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CONSULTATION PAPER

ON

JUDICIAL REVIEW PROCEDURE

(LRC CP 20 - 2003)

IRELAND

The Law Reform Commission

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The Working Group on Judicial Review

In November 2001, the Commission established an expert working group to assist and advise it on aspects of judicial review procedure to be addressed in the Commission's paper. The members of the Group met on five occasions to discuss aspects of the present law on judicial review procedure with a view to reform, to direct the research of the Commission's staff and to appraise the material which they provided.

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The Law Reform Commission wishes to record its appreciation for the indispensable contribution which the members of the Working Group made, on a voluntary basis, to this project.

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The Commission would also like to thank Mr Justice Ó Caoimh, who offered valuable advice and assistance in relation to this Consultation Paper. Full responsibility for this Consultation Paper, however, lies with the Commission.

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INTRODUCTION

1. It was noted by Denham J in *De Roiste v Minister for Defence* that “as the arena of public law decision making has expanded, so too has the volume of judicial review”.¹ With the rise in the numbers of applications for judicial review yet to reach its peak,² the Commission is of the view that the time is ripe for an examination of what are considered to be some of the most pertinent areas affecting practice in the area of judicial review. In undertaking this task, we hope to build on the foundations laid in the Commission’s 1979 Working Paper on Judicial Review,³ which went on to form the basis of Order 84 of the Rules of the Superior Courts 1986.⁴ The focus of this paper is also largely directed to procedural matters, although it must be noted that, especially given the recent innovation in statutory schemes, this is a wide canvas, and our examination has been expanded to embrace areas of concern suggested by practitioners and other interested parties.

2. The main impetus for this paper may be identified as the recent debate in this jurisdiction in relation to whether the leave stage in judicial review proceedings ought to be abolished.⁵ This is linked

¹ [2001] 1 IR 190, 204.

² Statistics obtained from the Courts Service show that the number of applications for judicial review has been rising steadily for the past four years: from a total of 990 applications for the years 1998 and 1999, there were 808 applications made in 2000, with the numbers rising to 888 in 2001. As of 7 August 2002, the High Court had received 501 applications for judicial review, indicating the that total number for 2002 should at least equal those of 2001, if not exceed them.

³ Law Reform Commission *Judicial Review of Administrative Action: The Problem of Remedies* (Working Paper No 8 1979).

⁴ It should be noted that throughout this paper, all references to the Rules will be to the Rules of the Superior Courts 1986 as amended.

⁵ Simons “Judicial Review under the Planning Legislation – The Case for the Abolition of the Leave Stage” (2000) 8 IPELJ 55.

to the continuing rise in the number of applications for judicial review, and a need for procedures in this area to be streamlined as much as possible. Although the Commission ultimately found that there is, as yet, insufficient support or justification for the abolition of the leave stage, this paper does contain various other recommendations intended to alleviate some of the complaints in the area of judicial review, with particular consideration given to the increase in the use of case management in addressing some of these issues.

3. It should be noted that in preparing this paper, the Commission relied on the invaluable input and experience of distinguished practitioners. The Commission met with its Working Group on Judicial Review Procedure on a number of occasions in order to obtain the benefit of the opinions of the members, for which we are deeply grateful. However, the Commission takes full responsibility for the contents of this paper.

4. The division of the paper was a difficult task, in that there is an inevitable amount of overlap in certain matters arising in both conventional judicial review proceedings and applications brought pursuant to the specialised statutory schemes. In situations where the recommendations made involve reform of the present position, we have attempted to state the appropriate mechanism by which such reform should be implemented, whether by legislation, rules of court, or practice direction.⁶

5. Chapter One examines the various issues arising in relation to conventional judicial review, beginning with a detailed consideration of the arguments for and against the abolition of the leave stage, concluding ultimately in favour of its retention. Other issues considered in the context of conventional judicial review are the proper standard to be applied at the leave stage, the appropriateness of the phenomenon of conducting what has traditionally been an *ex parte* application instead as an application on notice to the respondent, recent developments on applications to set aside a grant of leave, and a consideration of the issue of time limits in conventional judicial review proceedings.

⁶ This issue is considered in further detail below at paragraphs 12-15.

6. Chapter Two goes on to consider a number of issues which also arise in Chapter One, but in the context of the generally stricter provisions of the various statutory schemes. We examine the question of the leave stage in statutory judicial review proceedings, and consider the higher test of “substantial grounds”, and also the requirement of conducting the leave stage on notice in statutory schemes, in addition to evaluating the stricter time limits which operate in statutory schemes and the provisions for extension of time. The final two parts of Chapter Two, which are relevant to both conventional and statutory schemes, consider the issues of amendments to the grant of leave, and the question of appeals against a refusal to grant leave. The concluding part traces the origins of Irish statutory schemes in judicial review to English legislative precedents dating from 1930 onwards, and considers the justification for the existence of such schemes and their effect on the conventional scheme.

7. The subject matter of Chapter Three is the issue of costs in judicial review proceedings, with Irish practice being considered in conjunction with the English law, which has clearly been of great influence in the development of principles in this area. The chapter begins with a consideration of costs at the leave stage, and moves on to consider costs at the full hearing. Next we examine the issue of awarding costs against respondent judges, as a result of the decision of the Supreme Court in *McIlwraith v Fawsitt*.⁷ A further issue arising from this case is the present difficulties of District Court Judges in particular, in attempting to have their position, often a simple statement of factual background, available in proceedings where judicial review of their decisions is sought. Although strictly peripheral to the narrow issue of costs, this issue is considered in conjunction with *McIlwraith*. The next parts of this chapter go on to briefly consider the current state of the law on pre-emptive costs, security for costs and undertakings as to damages.

8. As noted above, the issue of case management was considered to be crucial to any attempt to streamline, or otherwise modify, current practice in relation to the judicial review list. Present practice has been criticised in certain specific areas, particularly with regard to delay. Case management is both a philosophy and a practical

⁷ [1990] 1 IR 343.

exercise⁸ and Chapter Four seeks to consider the developing awareness of the importance of case management, both on a domestic level and also in comparative terms and examines a number of specific areas which seem particularly relevant to case management in judicial review. We consider the possibility of devising a system to facilitate early settlement, as well as the issue of establishing a specialised division of the High Court with responsibility for all administrative law matters. The Commission then considers an alternative system, namely the use of nominated judges to administer the list, and we make recommendations on such issues as the number of nominated judges necessary to administer the judicial review list and the optimum duration of appointment of such judges. More practical recommendations deal with such issues as the need for reading days for nominated judges on the judicial review list, the appropriateness of opening affidavits in court, the duration of *ex parte* applications for leave, the requirement of filing written legal submissions prior to the substantive hearing and the possibility of imposing strict time limits for the conclusion of the various stages prior to the substantive hearing. The concluding part of Chapter Four considers a number of miscellaneous matters, including the facility for converting judicial review proceedings to plenary hearing, the appropriateness of traversing in judicial review proceedings, the issue of discovery and the importance of resources in any attempt at implementing and operating a case management system.

9. Chapter Five arises from our examination of comparative material on judicial review throughout the Commonwealth and the fact that in many such jurisdictions, legislative reforms have been enacted to remove the final element of distinction between the various traditional orders sought in an application for judicial review. Such reforms generally provide for a single unified procedure wherein an application is made for “an order of judicial review”. Although the Commission provisionally recommends that such reform not be undertaken, we would welcome a debate on the possibility of creating a unified order of judicial review in this jurisdiction.

10. Chapter Six comprises a summary of the provisional recommendations contained in this paper.

⁸ Comment from Denham J in question to Lord Woolf at Case Management Conference; see Expert Group on a Courts Commission *Conference on Case Management* (Government Publications May 1997) Chapter 6.

11. Where appropriate, reference is made throughout this Consultation Paper to procedural regimes in other jurisdictions and a note is warranted at the outset by way of explanation of the approach taken to comparative material from England. Part 54 of the Civil Procedure Rules, replacing Order 53 of the Rules of the Supreme Court, came into force in October 2000. CPR Part 54 implemented many of the changes suggested by the *Review of the Crown Office List*.⁹ The Bowman Report is given detailed consideration in this Paper, in light of its comprehensive analysis of the previous regime in England as it operated under the Rules of Court, as well as its detailed recommendations for reform. However, it should be noted that the Commission's consideration of proposals for reform in this jurisdiction did not extend to the same scope as the radical changes undertaken in England in recent times, in conjunction with Lord Woolf's *Access to Justice* reforms.¹⁰ The research undertaken in this paper makes reference to the previous regime in England for the sake of comparative illustration and where appropriate, reference is made to the superceding provisions under the Civil Procedure Rules.

12. A further matter to be noted at the outset relates to the parameters of the scope of this paper. Given the range in this subject area, the reader will understand why, in this paper, we are not attempting to haul out into the deeper waters of substantive judicial review; why, for example, we are not surveying the basic policy question of whether it was correct for the Supreme Court, in *P & F Sharpe Ltd v Dublin City and County Manager*¹¹ and *O'Keeffe v An Bord Pleanála*¹² to reduce the scope of review for unreasonableness. Still less, are we considering the entire range of devices by which the executive organs of government are controlled - for instance, such matters as the anticipated Administrative Procedures Bill which has

⁹ (A Report to the Lord Chancellor March 2000). This report is also referred to as the Bowman Report. It should be noted that some recommendations from the Bowman Report had not been implemented at the time of the enactment of CPR Part 54, and further amendment was made in March 2002 (introducing the pre-action protocol).

¹⁰ Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales 1995.

¹¹ [1989] IR 701.

¹² [1993] 1 IR 39. These issues are considered in Hogan & Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 637-649.

been incubating in the organisation and management arm of the Department of Finance for some years; or appeals from tribunals to courts and the statutory provisions settling the width of such appeals.

13. Finally, it should be noted that in those matters upon which we have seen fit to recommend reform of the current law, we have endeavoured to identify the preferred mechanism by which such reform should be achieved. Hogan and Morgan have stated that while “the sources of administrative law are various and heterogeneous ... five principal domestic sources can be identified: the Constitution, common law, primary legislation, delegated legislation and administrative circulars”.¹³ In recommending reform, the Commission agreed that there were three avenues available to carry out these recommendations: primary legislation, delegated legislation (i.e. Rules of Court) and administrative rules (in the form of practice directions).

14. Article 15.2.1 of the Constitution vests the Oireachtas with exclusive power of legislation, providing that “The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.”¹⁴ As such, primary legislation might be viewed as the preferred mechanism for reform and indeed is the only possible avenue in such areas as the proposed reform of the various statutory schemes of judicial review.¹⁵ Another possible mechanism for reform is by Rules of Court (as amended by statutory instrument and therefore coming within the rubric of delegated legislation). The power of the Superior Court Rules Committee to make rules of court governing “pleading, practice and procedure generally” is contained in s. 36 of the *Courts of Justice Act 1924*, as applied by ss. 14(2) and 48 of the *Courts (Supplemental Provisions) Act 1961*.¹⁶ Since the promulgation of the

¹³ Hogan & Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 19.

¹⁴ See generally Hogan & Morgan *ibid* at 9-51; and Hogan & Whyte Kelly: *The Irish Constitution* (3rd ed Butterworths 1994) at 104-123.

¹⁵ See further Chapter 2.

¹⁶ See Hogan & Morgan *op cit* fn 13 at 22-41. The authors refer to the large body of case law turning on the *vires* of certain rules made by the Rules Committees, including *Woolf v Ó Griobhta* [1953] IR 267; *State (Lynch) v Ballagh* [1986] IR 203; *State (O’Flaherty) v Ó Floinn* [1954] IR 295; *Thompson v Curry* [1970] IR 61; *Rainey v Delap* [1988] IR 470; *Holloway v*

new Rules of the Superior Courts in 1986, there have been numerous amendments by way of statutory instrument. Delany and McGrath note that “the number and importance of some of these changes creates its own problems, and the time may be opportune for a set of consolidating Rules”.¹⁷ Whilst the Commission agrees that the time is indeed ripe for such consolidation, it is accepted that pending such action by the Rules Committee, it may be necessary to introduce the proposed changes to the present Rules by way of statutory instrument.

15. The third, and final, possibility by which we suggest certain reforms might be introduced is by way of practice directions, issued by the President of the High Court. Practice directions have been described as part of the “family” of administrative rules which, as Hogan and Morgan note, include a large number of instruments which are neither primary nor sub-ordinate legislation, including circulars (of diverse types), codes of practice, notes of guidance, “instructions” and administrative guidelines.¹⁸ The legal status of practice directions was considered in *Donohue v Dillon*¹⁹ by Lynch J, who held that because a practice direction did not have statutory force, it could not be used as an aid to the construction of the Rules of the Superior Courts 1986. Hogan and Morgan suggest that in effect, Lynch J appeared to say that these administrative notices “cannot change the law or alter it”.²⁰ The Commission is aware that compliance with practice directions is crucial to their impact and where change has been recommended by way of practice direction, effort has been made to identify the appropriate measures for penalising non-compliance.²¹

Belenos Publications [1988] IR 470; *Fitzpatrick v Independent Newspapers* [1988] IR 132.

¹⁷ Delany & McGrath *Civil Procedure in the Superior Courts* (Round Hall Sweet & Maxwell 2001) Preface.

¹⁸ Hogan & Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 42.

¹⁹ [1988] ILRM 654.

²⁰ Hogan & Morgan *op cit* fn 18 at 51. The latter is a quote from Lord Denning MR in *Colman (JJ) Ltd v Commissioners of Customs & Excise* [1968] 1 WLR 1286.

²¹ Often through the imposition of immediate costs orders; see Chapters 3 and 4.

16. This Consultation Paper is intended to form the basis for discussion and accordingly the recommendations contained herein are provisional only. The Commission will make its final recommendations on this topic following further consideration of the issues and consultation with interested parties. Submissions on the provisional recommendations included in this Consultation Paper are welcome. In order that the Commission's final report may be made available as soon as possible, those who wish to do so are requested to make their submissions in writing to the Commission by **30 April 2003**.

Introduction

1.01 The rules governing conventional judicial review proceedings in this jurisdiction are to be found in Order 84, rules 18-27 of the Rules of the Superior Courts. Our analysis of conventional judicial review in this chapter may be broadly divided into four parts, beginning in Part A with a consideration of the various issues arising in relation to the leave stage, including an examination of the purpose of this stage, the appropriate test to be applied and the question of whether the application for leave should be conducted *ex parte* or *inter partes*. Part B will examine the issue of time limits, as they operate at both the leave stage and the substantive hearing, whilst Parts C and D will focus on an analysis of the concept of sufficient interest and the case law on alternative remedies and their adequacy as against judicial review proceedings. These latter two parts will include a consideration of whether such matters should be determined conclusively at the leave stage, thus preventing a respondent from re-opening and challenging such issues at the substantive hearing. It should be noted that the issues of amending the statement of grounds and appealing against a refusal to grant leave are considered at Parts E and F of Chapter 2, as they apply equally to conventional and statutory schemes of judicial review.

I. The Leave Stage

(a) Introduction

1.02 Order 84 rule 20(1) of the Rules of the Superior Courts 1986 provides that no application for judicial review shall be made unless the leave of the court has been obtained. A useful summary of the matters to be established in a *prima facie* manner in the affidavit and submissions before an applicant will be granted leave is set out by

Finlay CJ in *G v Director of Public Prosecutions*¹ although he stressed that these conditions were not intended to be exhaustive:

- (a) That the applicant has sufficient interest in the matter to which the application relates to comply with rule 20(4).
- (b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground in the form of relief sought by way of judicial review.
- (c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.
- (d) That the application has been made promptly and in any event within the three months or six months time limit provided for in Order 84 rule 21(1), or that the court is satisfied that there is a good reason for extending the time limit.
- (e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure.

(i) *Purpose of the leave stage*

1.03 The purpose of this leave stage is effectively to provide a mechanism for weeding out claims which are frivolous, vexatious or of no arguable substance at an early and generally *ex parte* stage² of the proceedings. In *G v Director of Public Prosecutions*³ Denham J spoke about the aim of the leave stage as being “to effect a screening process of litigation against public authorities and officers” and “to prevent an abuse of the process, trivial or unstateable cases

¹ [1994] 1 IR 374, 377-378.

² See further below.

³ [1994] 1 IR 374, 382. See also the *dicta* of Lord Diplock in *R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617, 642-643 that: “Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.” See also the *dicta* of Lord Donaldson MR in *R v Secretary of State for the Home Department, ex parte Cheblak* [1991] 1 WLR 890, 898 to the effect that: “The requirement that leave be obtained before a substantive application can be made for relief by way of judicial review is designed to operate as a filter to exclude cases which are unarguable.”

proceeding and thus impeding public authorities unnecessarily”. A similar point was made by Kelly J in *O’Leary v Minister for Transport, Energy and Communications*⁴ where he stated that “the judicial review procedure is designed so as to ensure that cases which are frivolous, vexatious or of no substance cannot be begun, hence the necessity for judicial screening at the stage when leave is sought”.

(ii) *Arguments for retaining the leave stage*

1.04 As noted above, the primary purpose of the leave stage is to provide a filter to weed out frivolous claims and as the vast majority of leave applications in conventional judicial review are heard *ex parte* it means that public authorities need not be involved at all in proceedings which the High Court considers are unwarranted or unstateable at this preliminary stage.⁵ As was noted by the Law Commission of England and Wales:⁶ “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.” A statistical analysis carried out as part of

⁴ [2000] 1 ILRM 391, 397.

⁵ The Commission compiled a statistical analysis from the judicial review list in relation to both conventional and statutory schemes. However, the most recent data available dealt with the period 1998-1999, and is thus already somewhat dated, particularly in relation to the statutory schemes, given that neither the *Illegal Immigrants (Trafficking) Act 2000* nor the *Planning and Development Act 2000* were in force at that date. Nevertheless, the statistics provide an informative snapshot of the state of affairs at that date. There were a total of 990 applications for leave to apply for judicial review in the 1998/1999 period, of which leave was granted in 603, representing a percentage of 61%. In relation to conventional judicial review only, the percentage of cases in which leave was granted is 64%, whilst the higher standard in statutory schemes resulted in leave being granted in only 36% of cases in that period. In terms of the filtering function as regards narrowing of grounds, of the total number of 603 cases in which leave was granted, permission was given on all grounds in almost 91% of cases, with the grounds being narrowed in only 9% of cases. However, anecdotal evidence from practitioners suggests that this is no longer the case, with the phenomenon of leave being granted on only some grounds becoming increasingly familiar, particularly in the area of immigration/asylum.

⁶ Law Commission for England and Wales *Administrative Law: Judicial Review and Statutory Appeals* (No 226 1994) at paragraph 5.1.

the recent *Review of the Crown Office List*⁷ revealed that the permission filter in England and Wales led to a significant saving in court time⁸ which would otherwise have been taken up hearing unmeritorious claims. It has also been observed that the leave stage provides a useful mechanism for achieving more efficient case management.⁹

(iii) *Arguments against the leave stage*

1.05 It has been suggested that this filtering stage may encourage speculative applications for judicial review.¹⁰ A more persuasive argument is that potentially viable applications are being prematurely rejected at this stage.¹¹ It has also been suggested that the threshold at the leave stage is presently set so low that it serves no practical purpose and that many applications which overcome this hurdle are ultimately unsuccessful at the substantive hearing. However, one of the most compelling reasons for dispensing with a leave stage is that whatever test is adopted by the courts as a filtering mechanism, inconsistency in its application by different judges will lead to arbitrary and unfair results.

⁷ A Report to the Lord Chancellor March 2000, see Appendix F. Based on statistics for the year ended 30 June 1999 there were 3,345 applications for permission. Allowing for successful renewal application, leave was refused in 1,563. Even on the basis that not all these cases would have proceeded to a substantive hearing, it was assumed that 1,250 to 1,500 substantive hearings had been avoided by the permission filter.

⁸ In the region of 1,000 court days. It should be noted however that the accuracy of this statistic and the methodology employed by the Review Team in reaching this conclusion have been called into question: Cornford & Sunkin "The Bowman Report, access and the recent reforms of the judicial review procedure" [2001] PL 11.

⁹ Frequently directions in respect of grounds, abridging or extending time or seeking expedition, and other matters in respect of filing affidavits and notices are made at this initial hearing. See Law Commission *Administrative Law: Judicial Review and Statutory Appeals* (No 226 1994) at paragraph 5.6.

¹⁰ *Review of the Crown Office List* (2000) at paragraph 7.10.

¹¹ Sunkin, Bridges and Meszaros *Judicial Review in Perspective* (Public Law Project 1993) at 102.

(iv) *Approaches in other jurisdictions*

1.06 In Scotland, judicial review procedure is set out in Chapter 58 of the Rules of the Court of Session 1994. There is no requirement that leave be sought in judicial review proceedings in Scotland and a decision whether to grant a first order which effectively initiates proceedings is a matter for the discretion of the Lord Ordinary. While there is an “occasional limited filtering” by the court at the first order stage, the vast majority of applications proceed to first hearing.¹² It was suggested, albeit nearly a decade ago, that the small number of judicial review applications in Scotland has meant that the issue of leave has not been perceived to be an issue in that jurisdiction.¹³ More recently it has been noted that “there is no evidence to suggest that the Court of Session is being overwhelmed by a mass of hopeless cases”¹⁴ and that the high rate of relief granted suggests that the cases which are being taken are not of such a nature that they should have been filtered out.

1.07 In England and Wales the requirement of a form of leave application or “permission stage” has traditionally been favoured. The Law Commission recommended its retention in 1976¹⁵ and this approach was also favoured by the majority of those consulted in the Commission’s later report on *Administrative Law: Judicial Review and Statutory Appeals*.¹⁶

(v) *Retention of the leave stage in conventional judicial review*

1.08 The vast majority of the Working Group favoured retention of a leave stage in conventional judicial review proceedings in this jurisdiction. However, a number of factors must be borne in mind if this procedure is to achieve its perceived aim. First, this stage must

¹² See O’Neill *Judicial Review in Scotland: A Practitioner’s Guide* (Butterworths 1999) at 190.

¹³ See Law Commission *Administrative Law: Judicial Review and Statutory Appeals* (No 226 1994) at paragraph 5.5.

¹⁴ Mullen Pick and Prosser *Judicial Review in Scotland* (Wiley 1996) at 47.

¹⁵ Law Commission *Report on Remedies in Administrative Law* (No 73 1976) at paragraphs 37-39.

¹⁶ Law Commission *Administrative Law: Judicial Review and Statutory Appeals* (No 226 1994) at paragraph 5.3. The permission stage in judicial review proceedings in England is now governed by CPR Part 54.4.

provide an *effective* filtering process; in other words, the threshold must be set at a level which weeds out unmeritorious and unarguable claims while at the same time not ruling out genuine claims before a sufficient opportunity is given to put them forward. Secondly, whatever test is employed at the leave stage must be consistently applied if the spectre of arbitrary decision making is to be avoided. Anecdotal evidence would suggest that while the present “arguable case” test which will be considered below is being fairly and consistently applied in the majority of applications, this is not invariably the practice. In addition, leaving aside the actual level at which the threshold for granting leave is set, consistency in the amount of detail which will be required at this stage must also be achieved. As Lord Diplock commented in *R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd*¹⁷ “the whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage”. It is important if judicial review is to achieve its aim of providing a speedy and cost efficient means of challenging decisions made by public bodies that leave applications come on for hearing and are disposed of in a fair and expeditious manner.

(vi) *Recommendation*

1.09 *It is therefore the view of the Commission that where the leave stage is operated in such a manner that it performs an effective filtering function and where the test at this stage is consistently applied, then the argument for retention of the leave stage is stronger than that which advocates its abolition. The Commission recommends the retention of the leave stage in conventional judicial review proceedings.*

(b) *The test which should be applied at the leave stage*

(i) *The present position*

1.10 The burden of proof which lies on an applicant seeking to obtain liberty to apply for judicial review under Order 84 was described as “light” by Denham J in her judgment in *G v Director of*

¹⁷ [1982] AC 617, 643-644.

*Public Prosecutions*¹⁸ stating that “the applicant is required to establish that he has made out a stateable case, an arguable case in law”. So, as Finlay CJ stated in *O’Reilly v Cassidy*¹⁹ the court is concerned that it should not permit the bringing of the proceedings if there is not an arguable case, although he stressed that it is not appropriate or proper for it to express any view on whether the grounds put forward are strong or weak, nor is it concerned with trying to ascertain what the eventual result will be.

1.11 The test applied by the courts in England and Wales has also traditionally been “an arguable case”.²⁰ As Lord Donaldson MR commented in *R v Secretary of State for the Home Department, ex parte Cheblak*:²¹ “If an arguable point emerges, leave is granted and extended argument ensues upon the hearing of the substantive application. If not, it is refused.” The issue of the nature of the examination which should be carried out at this stage in the proceedings has been considered by the courts in that jurisdiction on a number of occasions. In *R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd*²² Lord Diplock stated that “if on a quick perusal of the material then available, the court thinks it might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.” However, subsequently in *R v Legal Aid Board, ex parte Hughes*²³ Lord Donaldson MR commented that “things have moved on since then”²⁴ and stated as follows:

¹⁸ [1994] 1 IR 374, 381. See also the *dicta* of Finlay CJ at 378 to the effect that the applicant must satisfy the court in a *prima facie* manner that an arguable case in law can be made that he is entitled to the relief which he seeks.

¹⁹ [1995] 1 ILRM 306, 309.

²⁰ *R v Secretary of State for the Home Department, ex parte Angur Begum* [1990] COD 107.

²¹ [1991] 1 WLR 890, 901.

²² [1982] AC 617, 644.

²³ (1992) 24 HLR 698, 702-203.

²⁴ Likewise, Clayton and Tomlinson in *Judicial Review Procedure* (Wiley 1997) at 122 note that “current practice has changed not least because of the lengthening Crown Office Lists.”

“In such a case leave is or should be granted only if *prima facie* there is already an arguable case for granting the relief claimed. This is not necessarily to be determined on a ‘quick perusal of the papers’ although clearly any in-depth examination is inappropriate. Furthermore, a ‘*prima facie* arguable’ case is not established merely by the disclosure of ‘what might on further consideration turn out to be an arguable case.’ Equally, it is only when *prima facie* there is clearly no arguable case that leave should be refused *ex parte*.”

1.12 In its *Report on Administrative Law: Judicial Review and Statutory Appeals*²⁵ the Law Commission recommended that an application for leave should not be granted unless it disclosed a serious issue to be determined. Subsequently Lord Woolf in his *Access to Justice Report*²⁶ recommended a test of a “realistic prospect of success”, although it should be noted that in a recent *Review of the Crown Office List*²⁷ it was recommended that the requirement should remain that the equivalent of leave²⁸ should be granted if the claim discloses an “arguable case”. The reasoning behind this recommendation is that the so-called permission stage is intended to filter out hopeless claims and that it would not be appropriate to raise the threshold as earlier reports had suggested.

1.13 A further issue is whether the test to be applied at the leave stage should be expressly set out in the Rules of the Superior Courts or whether the present system whereby it is governed by case law suffices. In its *Report on Administrative Law: Judicial Review and Statutory Appeals*²⁹ the Law Commission recommended that the test should be stated in the Rules, a conclusion which was also reached in the *Review of the Crown Office List*,³⁰ although as noted above, the thresholds proposed were different. On one view it might be suggested that for the sake of consistency, it would be appropriate for

²⁵ (No 226 1994) at paragraph 5.15.

²⁶ Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales 1995.

²⁷ (A Report to the Lord Chancellor March 2000) at paragraph 7.14.

²⁸ Referred to as the permission stage.

²⁹ *Op cit* fn 25 at paragraph 5.15.

³⁰ *Op cit* fn 27 at paragraph 7.13.

a single test, such as that of “substantial grounds” to be applied in both conventional and specialised statutory schemes. However, a majority of the Working Group concluded that while such a higher standard might be appropriate in the context of the statutory schemes (having regard to the subject matters of the various schemes and dire consequences of delay to the public purse), such a higher standard would not be desirable in all applications for conventional judicial review. Requiring applicants to establish “substantial grounds” at the preliminary stage would not strike the correct balance between the need to protect public bodies and the rights of applicants to challenge the decisions of such bodies.

(ii) *Recommendation*

1.14 *The Commission recommends the retention of the “arguable case” test in conventional judicial review proceedings, although again it is stressed that it is essential that this test is applied consistently. Thus, while there is no certainty that explicitly stating the “arguable case” test in the Rules would lead to greater consistency in its application, this would avoid any residual uncertainty about the precise formula to be applied and would reinforce the desirability of its imposition. For this reason the Commission would also recommend that it should be set out in Order 84 rule 20(4).*

(c) ***Circumstances in which there may be an inter partes hearing at leave stage***

(i) *The present position*

1.15 While Order 84 rule 20(2) of the Rules of the Superior Courts provides that an application for leave shall be made *ex parte*, it may be decided not to determine the application without giving the respondent an opportunity to be heard and to conduct an *inter partes* hearing at this stage. According to Kelly J in *Gorman v Minister for the Environment*³¹ the procedure of adjourning an *ex parte* application to an *inter partes* hearing is one which is used “in a small number of cases” but it appears to be happening with increasing frequency. In *Gorman*, counsel on both sides had agreed initially that

³¹ High Court (Kelly J) 7 December 2000.

notwithstanding the fact that the hearing was *inter partes*, the test to be satisfied was that set out by the Supreme Court in *G v Director of Public Prosecutions*,³² namely that the applicant had made out an arguable case. Kelly J concluded that he must proceed to decide the case on the basis of that standard given the fact that counsel had proceeded to open the case in reliance on it, but he expressed the view that he was “by no means convinced that this low standard is appropriate on an *inter partes* hearing.”³³ He then stated that there was much to be said in favour of the standard put forward by Glidewell LJ in *Mass Energy Ltd v Birmingham City Council*³⁴ that the applicant’s case should be not merely arguable but “strong, that is to say, likely to succeed”. In the view of Kelly J this approach appeared to make for a more economic use of court time than the application of the substantially lower standard of an arguable case, although he stressed that the question must be decided in another case in which the issue could be fully debated.

1.16 Subsequently in *Halpin v Wicklow County Council*³⁵ in which the applicant sought leave to extend the grounds on which leave to bring judicial review proceedings had been granted, O’Sullivan J stated that in his view the standard laid down by the Supreme Court in *G v Director of Public Prosecutions* should apply, notwithstanding the observations of Kelly J in *Gorman*, although he went on to say that he agreed that he could not shut his mind to the case being made by the respondent which was a notice party to the application.³⁶

³² [1994] 1 IR 374.

³³ *Gorman v Minister for Environment* High Court (Kelly J) 7 December 2000 at 4. Note that subsequently in *Irish Haemophilia Society Ltd v Lindsay* High Court (Kelly J) 16 May 2001, Kelly J applied the onus of proof as set out in *G v Director of Public Prosecutions* to an *inter partes* leave application, although he reiterated that there might well be grounds for believing that a higher threshold was appropriate in cases of this nature.

³⁴ [1994] Env LR 298, 308. Applied by Keene J in *R v Cotswold District Council, ex parte Barrington Parish Council* (1998) 75 P & CR 515, 530.

³⁵ High Court (O’Sullivan J) 15 March 2001.

³⁶ It had been submitted that whilst there was a question as to the applicability of the standard laid down in *G v Director of Public Prosecutions*, the respondent did not go so far as to advance any alternative proposed standard of proof. However, the respondent did submit that the court should “take account of the evidence and submissions advanced on behalf of the respondents on the hearing of this motion”: *Halpin v Wicklow County Council* High Court (O’Sullivan J) 15 March 2001 at 5.

Similarly, in *Gilligan v Governor of Portlaoise Prison*³⁷ McKechnie J having commented that “in many respects a state of uncertainty exists which evidently is unsatisfactory” proceeded to apply the threshold of arguability but suggested that he would in the evaluation process “take into account those parts of the respondent’s evidence which [he could] confidently accept as being accurate and also the submissions made thereon.”³⁸

1.17 This issue has also been considered in the context of applications brought pursuant to s. 5(2) of the *Illegal Immigrants (Trafficking) Act 2000* which are required to be on notice to the Minister for Justice and any other person specified by order of the High Court. In *P v Minister for Justice, Equality and Law Reform*³⁹ in considering an application for judicial review brought pursuant to s. 5 of the Act of 2000, which provides that leave shall not be granted unless there are “substantial grounds” for contending that the decision ought to be quashed, Smyth J stated that he was not satisfied that imposing the ordinary standard of establishing a stateable case was suitable at an *inter partes* hearing and that it was appropriate to apply the views expressed by Kelly J in *Gorman* to cases decided pursuant to the legislation. In dismissing the applicants’ appeal, Hardiman J speaking for the Supreme Court, focused on the “substantial grounds” standard imposed in order to obtain leave pursuant to s. 5. He said that for the purpose of the case before him, he had not found it necessary to consider whether any more onerous standard was required by that phrase and he decided not to express any view on the findings made by the trial judge in relation to this question. Therefore considerable doubt remains about whether the views expressed by Kelly J in *Gorman* will gain approval in the context of “ordinary” leave applications heard *inter partes* which are not governed by legislative schemes imposing a requirement to establish “substantial grounds”.

1.18 A number of criticisms of the present position can be made. If the same arguable case test is to be applied, it can legitimately be asked whether any purpose is served by involving the respondent at the leave stage. It is likely that neither side will wish to allow points to go uncontested lest they are taken to have conceded them at the

³⁷ High Court (McKechnie J) 12 April 2001.

³⁸ *Ibid* at 9.

³⁹ [2002] 1 ILRM 16.

substantive hearing. This may lead to an unduly protracted hearing at the leave stage and considerable repetition of arguments when the case progresses. Even if a higher standard is adopted, as put forward by Glidewell LJ in *Mass Energy Ltd v Birmingham City Council*,⁴⁰ namely “strong, that is to say, likely to succeed”, it would still be questionable whether an *inter partes* hearing at the leave stage serves any useful purpose. While it may sometimes lead to a narrowing of the issues and occasionally lead to a case failing to proceed further, the view of the Commission is that if such procedure was to be adopted on a frequent basis, it would tend to add further costs and lead to longer hearings.

(ii) *The English approach*

1.19 In England, RSC Order 53 rule 3(2) formerly provided: “An application for leave must be made *ex parte* to a Judge by filing in the Crown Office – (a) a notice in Form No 86A ... and (b) an affidavit verifying the facts relied on.”⁴¹ However, as happened in this jurisdiction, it appeared that with the increasing numbers of sophisticated applications for leave to apply for judicial review coming before the courts, the practice of serving the respondent with notice of the application for leave became increasingly common. Although there was no express provision in the Rules of the Supreme Court governing the circumstances in which an *ex parte* application for leave could be adjourned in order to facilitate attendance by the respondent, general authority for this practice was deemed to be inherent in the *dicta* of Lord Diplock in *IRC v National Federation of Self-Employed and Small Businesses Ltd*.⁴² This authority was further strengthened by what was said by the Court of Appeal in *R v Secretary of State for the Home Department, ex parte Begum*.⁴³

⁴⁰ [1994] Env LR 298, 308. Applied by Keene J in *R v Cotswold District Council, ex parte Barrington Parish Council* (1998) 75 P & CR 515, 530.

⁴¹ Now governed by CPR Part 54. CPR PD 54 suggests, at paragraph 8.4, that generally the court will, in the first instance, consider the question of permission without a hearing

⁴² [1982] AC 617, 642F.

⁴³ [1990] COD 107. Lord Donaldson MR identified three distinct options available to the judge at the leave stage in this regard: where the facts were such as to clearly warrant further investigation at an *inter partes* hearing, then leave should be granted; and where the facts clearly disclose that there is no arguable case, then the application for leave should be refused. But Lord Donaldson MR also noted that there is on occasion a third, intermediate

1.20 Situations which were identified⁴⁴ as appropriate for such procedure to be followed include:

- (i) Where the applicant intended to seek interim relief, such as a stay or injunction, it was thought that best practice would be to serve the respondent with notice of the proceedings, to enable such respondent to “attend and assist the court by filling in any gaps in the information which may be available and thereby enable the matter to be dealt with properly at the first hearing and dispense with the need for a second hearing.”⁴⁵
- (ii) In a complicated case the Crown Office could, at the instigation of the court, invite the respondent to be represented at the leave stage so as to assist the court.⁴⁶ It was also suggested that such procedure could be appropriate where the applicant anticipated that the respondent would seek to have the leave set aside, if not given an opportunity to make representations at this stage.

class of case in which the judge is unable to determine whether or not there is in fact an arguable case on the materials before him. In such cases, it was held, the right course was to invite the putative respondent to attend and make representations, although Lord Donaldson MR cautioned that this hearing should in no way resemble the substantive hearing which would take place if the application for leave was successful.

⁴⁴ Gordon *Judicial Review: Law and Procedure* (Sweet & Maxwell 1996) at 7-023 – 7-025; Clayton & Tomlinson *Judicial Review Procedure* (Wiley 1997) at 121; Supperstone & Goudie *Judicial Review* (Butterworths 1997) at 16.4 – 16.5; Gordon *Judicial Review and Crown Office Practice* (Sweet & Maxwell 1999) at 3-600 – 3-606; Bridges Meszaros & Sunkin *Judicial Review in Perspective* (Public Law Project 1993) at 40.

⁴⁵ *R v Kensington and Chelsea Royal LBC, ex parte Hammell* [1989] QB 518, 539 *per* Parker LJ cited in Gordon *Judicial Review: Law and Procedure* (Sweet & Maxwell 1996) at 7-024.

⁴⁶ Gordon *Judicial Review: Law and Procedure* (Sweet & Maxwell 1996) at 138. See for example *Ex parte Oral* [1990] Imm AR 208, where the Court of Appeal indicated that where there may be doubts about the evidence, an *ex parte* application for leave should be adjourned to be dealt with *inter partes*.

- (iii) To enable the respondent to make representations about the directions an applicant seeks, such as abridging time for service of the respondent's affidavit, or seeking expedition.⁴⁷ Thus, in *R v Northamptonshire County Council, ex parte K*,⁴⁸ Hutchison J commented that the leave application should have been made orally on notice; the proposed respondents could then have appeared and made helpful submissions and, even if leave had been refused, a number of other matters (such as service of third parties) would have been raised and dealt with.

1.21 Thus, while there was apparently some element of consensus in the English authorities as to the potential benefits to be derived from flexibility in relation to this procedure, there also existed a recognition of the potential inappropriateness of allowing a respondent to make representations at the leave stage. While it would appear to have been accepted that this procedure was designed and intended to save both time and costs, nevertheless in practice it could result in two hearings and increased costs. Concerns were raised regarding problems arising as a result, including the potential for conceptual inconsistency as to the court's function if it does hear full arguments at the leave stage. There was also the criticism that the isolation of law from merits is rarely a satisfactory method of dealing with issues such as delay or *locus standi*.⁴⁹

1.22 Despite such concerns, the *Review of the Crown Office List*⁵⁰ contained a recommendation that the leave stage should always be on notice to the respondent. In response to concerns that allowing the leave stage to be conducted *inter partes* could effectively lead to an unnecessary duplication of the substantive hearing and could thus

⁴⁷ Clayton & Tomlinson *Judicial Review Procedure* (Wiley 1997) at 121. The authors also suggest that an *ex parte* application might be adjourned to allow the respondent to appear where it is possible that such procedure might facilitate a compromise or settlement; eg the respondent may be more inclined to settle upon hearing the court's views at the leave stage.

⁴⁸ The Times 27 July 1993.

⁴⁹ As suggested by Gordon *Judicial Review: Law and Procedure* (Sweet & Maxwell 1996) at 138.

⁵⁰ (A Report to the Lord Chancellor March 2000) at paragraphs 7.1 – 7.15.

represent an uneconomical use of both time and resources, the Review Team of the Crown Office suggested that where the leave stage is on notice to the respondent, such respondent should not subsequently be entitled to apply to have the grant of leave set aside save in exceptional circumstances.⁵¹

1.23 The final point to be considered at this stage is the question of the appropriate standard to be applied in deciding applications for leave conducted *inter partes*. While Kelly J in *Gorman v Minister for the Environment*⁵² placed great emphasis on the question of whether a higher standard was necessary in leave applications on notice, relying on the *dicta* of Glidewell LJ in *Mass Energy Ltd v Birmingham City Council*⁵³ in support of this approach, it would appear from an examination of English materials on the point that this “higher standard” is not the usual and accepted approach of the courts. Indeed *Mass Energy Ltd v Birmingham City Council* appears to be the exception rather than the rule. Thus, in *R v Secretary of State for the Home Department, ex parte Begum*,⁵⁴ the Court of Appeal sanctioned the growing practice of allowing the court to adjourn the leave application to facilitate the attendance by the respondent, with a view to the respondent making submissions on whether the applicant has established an *arguable case* only. This is also the approach adopted by Kerr J in relation to *inter partes* applications for leave to apply for judicial review in Northern Ireland.⁵⁵ Despite the apparently growing trend of applications for leave being held on notice,⁵⁶ it would thus

⁵¹ Note however that in making this recommendation, the Review Team made no reference to the case of *R v Secretary of State for the Home Department, ex parte Vafi* [1996] Imm Ar 169, where Harrison J accepted that there could be circumstances in which it would be appropriate for the court to exercise its jurisdiction to set aside leave, even where the initial application for leave had been conducted *inter partes*. This issue is considered further below, at 1.34 - 1.35.

⁵² High Court (Kelly J) 7 December 2000.

⁵³ [1994] Env LR 298.

⁵⁴ [1990] Imm AR 1.

⁵⁵ See paper presented by Mr Justice Kerr “Commercial Actions: An example of Case Management in Northern Ireland” presented to the Expert Group on a Courts Commission *Conference on Case Management* November 1996 (Government Publications 1997).

⁵⁶ See Bridges Meszaros & Sunkin *Judicial Review in Perspective* (Cavendish 1995) Chapter 2: Changing Patterns in Use of Judicial Review.

appear that the English courts have chosen not to import a higher standard than the established requirement of the arguable case.

(iii) *Recommendation*

1.24 In light of the approach of the courts in both Ireland and England and having regard to the various views expressed by members of the Working Group, it was agreed that an outright prohibition on the practice of conducting the leave stage on notice to the respondent and any interested parties would not be desirable. It was generally agreed that there were certain limited circumstances in which an *inter partes* hearing at the leave stage could be of benefit.

1.25 *It is therefore recommended that the discretion residing in the High Court to conduct inter partes applications for leave to apply for judicial review should remain, but that the discretion of the court to conduct the leave stage on notice should be exercised "only in exceptional cases". The Commission also recommends that the test to be applied at this hearing should be that the applicant has an arguable case rather than a more onerous standard.*

(d) *Application to set aside order granting leave*

(i) *The present position*

1.26 It is clear that the High Court has jurisdiction to set aside an order granting leave to bring judicial review proceedings made on an *ex parte* basis,⁵⁷ although it has been suggested that this jurisdiction should "only be exercised sparingly and in a very plain case".⁵⁸ In

⁵⁷ See Order 52 rule 4 of the Rules of the Superior Courts 1986 which provides:

"In any case the Court, if satisfied that the delay caused by proceeding by motion on notice under this Order would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to the costs or otherwise and subject to such undertaking, if any, as the Court may think just; and any party affected by such order may move to set it aside".

This has also been recognised as an inherent jurisdiction by McCracken J in *Voluntary Purchasing v Insurco Ltd* [1995] 2 ILRM 147, subsequently endorsed by Kelly J in *Adams v Director of Public Prosecutions* High Court 12 April 2000.

⁵⁸ *Adam v Minister for Justice* [2001] 2 ILRM 452, 469 *per* McGuinness J.

*Adam v Minister for Justice*⁵⁹ the applicants had been granted leave by Kinlen J to bring judicial review proceedings in respect of the respondents' decision to make deportation orders against them and the respondents sought to have the order granting leave discharged. O'Donovan J acknowledged that while Kinlen J had filtered and evaluated the applicants' applications for leave to apply for judicial review, nevertheless he had heard only one party to the proceedings and certainly had not had the full facts before him. O'Donovan J stated that following McCracken J in *Voluntary Purchasing Expert Groups Inc v Insurco Ltd*⁶⁰ he thought it would be quite unjust if an order could be made against a party in his absence and without notice to it which could not be reviewed on the application of the party affected. O'Donovan J concluded that the applications of the applicants in respect of whom deportation orders had been made or threatened were without substance and that the order of the court in so far as it affected those applicants ought to be discharged.⁶¹ The Supreme Court agreed that the order made by the High Court should be upheld although McGuinness J accepted the submission of counsel for the applicant, with which counsel for the respondent agreed, that this jurisdiction should only be exercised very sparingly and in a very plain case. In this regard, McGuinness J referred to the comments of Bingham LJ in *R v Secretary of State for the Home Department, ex parte Chinoy*⁶² to the effect that it would be an unfortunate development if the granting of leave were to be followed by applications to set aside the grant of leave which would then be followed, if leave were not set aside, by a full hearing. McGuinness J continued as follows:

“One could envisage the growth of a new list of applications to discharge leave to be added to the already lengthy list of applications for leave. Each application would probably require considerable argument – perhaps with further affidavits and/or discovery. Where leave was discharged, an appeal would lie to this Court. If the appeal succeeded, the matter would return to

⁵⁹ [2001] 2 ILRM 452.

⁶⁰ [1995] 2 ILRM 145, 147.

⁶¹ See also the decisions of Morris P in *Iordache v Minister for Justice* High Court 30 January 2001 and *Byrne v Wicklow County Council* High Court 7 February 2001.

⁶² [1991] COD 381.

the High Court for full hearing followed, in all probability, by a further appeal to this Court. Such a procedure would result in a wasteful expenditure of court time and an unnecessary expenditure in legal costs; it could be hardly said to serve the interests of justice. The exercise of the court's inherent jurisdiction to discharge orders giving leave should, therefore, be used only in exceptional cases."⁶³

1.27 Hardiman J reached the same conclusion that the High Court had jurisdiction to set aside an order giving leave to seek judicial review. He expressed the view that any order made *ex parte* must be regarded as an order of a provisional nature only and that the fact that a party may be affected by it without notice and without having had the opportunity of being heard may, depending on the facts of the case, constitute a grave injustice to him. In his view "once it is accepted that the jurisdiction invoked here by the respondents exists, it is difficult to justify any hard and fast restrictions on it".⁶⁴ He concluded that the grant of leave, especially when coupled with a stay, was quite sufficient to constitute the respondents as parties affected by an order and that they must in a suitable case be entitled to attack the grant of leave.

1.28 Any potential tension between the judgments of McGuinness and Hardiman JJ in *Adam* would now appear to have been resolved by the decision of the Supreme Court in *Gordon v Director of Public Prosecutions*.⁶⁵ Fennelly J, giving the judgment of the court, noted that while both McGuinness and Hardiman JJ agreed that there was an inherent jurisdiction to set aside a grant of leave, only McGuinness J had dealt with the standard to be employed in the exercise of that jurisdiction. Fennelly J quoted with approval the passage from *Chinoy* which McGuinness J also referred to in *Adam* and went on to quote with approval a passage from McGuinness J's judgment. Fennelly J then stated that the applicant for the order to set aside carries a heavier burden than the original applicant for leave. On an application for leave, the standard to be met is that of an arguable case; on an application to have leave set aside, the standard is to demonstrate that leave should never have been granted, "a negative

⁶³ [2001] 2 ILRM 452, 469.

⁶⁴ *Ibid* at 475.

⁶⁵ [2003] 1 ILRM 81.

proposition”.⁶⁶ Fennelly J accepted that the purpose of the leave stage is to provide a filtering function, but also recognised the inevitability of the fact that the judge at the leave stage may not always be correct, hence the need to allow applications to set aside, where clearly unmeritorious applications have slipped through the net. Fennelly J further stated that a grant of leave may be set aside on the grounds of lack of good faith.⁶⁷ On the facts of the case before him, Fennelly J concluded that it had not been shown that the applicant’s case was unarguable; in so holding, he specifically warned that it was not appropriate to examine the merits of such arguments in any detail.⁶⁸ The Court consequently set aside the order of Kearns J who had previously granted an order setting aside the grant of leave.

1.29 The final point to note is that there is a clear interaction between three distinct factors at the leave stage in judicial review proceedings. These are: the issue of the leave hearing being held on notice, the requirement that an applicant establish arguable (or, in the case of statutory schemes, substantial) grounds and finally the possibility of the respondent making an application to have the grant of leave set aside. In framing recommendations in each of these areas, the Commission is aware of the need to strike the correct balance in light of the overall interaction between these matters, so as to achieve a result that is equitable to all the parties and consistent with the rationale underpinning judicial review proceedings.

(ii) *The English approach*

1.30 The jurisdiction of the English courts to set aside an order granting leave, where such application was heard *ex parte*, was previously found in RSC Order 32 rule 6 which provided that “[t]he

⁶⁶ *Op cit* fn 65 at 85.

⁶⁷ This may constitute an implicit endorsement of such English authorities as *R v Jockey Club Licensing Committee, ex parte Wright* Queen’s Bench Division (Potts J) 7 February 1991 where Potts J stated that an applicant seeking leave to apply for judicial review must act *uberrimae fides* and there must be no false statements or suppression of material facts.

⁶⁸ It would appear that this concern arose from the belief that the court must exercise particular care not to influence the result of the substantive hearing of the application, if it is to take place; *Gordon v Director of Public Prosecutions* [2003] 1 ILRM 81, 84.

court may set aside an order made *ex parte*".⁶⁹ It was undisputed that there should be no delay in making such applications – if it was not made before the substantive hearing, there was no point in making the application at all, since it saved no costs and was to no one's advantage.⁷⁰ The Law Commission in its report *Administrative Law: Judicial Review and Statutory Appeals*⁷¹ recommended that it be stated in the Rules that any application by a respondent to set aside an order that an application for judicial review may proceed should be made not later than 28 days beginning with the day on which the respondent is served with notice of the application.

1.31 The circumstances in which an application to set aside a grant of leave should be made had been the subject of some debate in England, although there gradually appeared to be some degree of consensus on the point. Accepting that a fundamental principle underlying the court's consideration of applications to set aside leave was that such jurisdiction should be exercised sparingly,⁷² there would appear to have been no less than seven distinct circumstances in English law in which it the court might set aside a grant of leave:⁷³

- (i) Where there had been serious material non-disclosure.⁷⁴

⁶⁹ The jurisdiction to set aside is generally agreed to lie within the inherent jurisdiction of the court derived from this provision; see De Smith Woolf & Jowell *Judicial Review of Administrative Action* (5th ed Stevens 1995) at 667 fn 78; *R v Customs and Excise Commissioners, ex parte Eurotunnel plc* [1995] COD 291, and *R v Secretary of State for the Home Department, ex parte Begum* [1991] COD 381.

⁷⁰ Gordon *Judicial Review: Law and Procedure* (Sweet & Maxwell 1996) at 144.

⁷¹ (No 226 1994) at paragraph 9.4.

⁷² *R v Secretary of State for the Home Department, ex parte Begum* [1991] COD 381; *R v Secretary of State for the Home Department, ex parte Sholola* [1992] Imm AR 135; *R v Crown Prosecution Service, ex parte Hogg* Queen's Bench Division (Auld J) 15 October 1993; *R v Customs & Excise Commissioners, ex parte Eurotunnel plc* [1995] COD 291.

⁷³ As set out in Clayton & Tomlinson *Judicial Review Procedure* (Wiley 1997) at 144–148.

⁷⁴ *R v Jockey Club Licensing Committee, ex parte Wright* [1991] COD 306, *ibid* at fn. 69; *R v Bromsgrove District Council, ex parte Kennedy* [1992] COD 129 (Material put before the judge on an *ex parte* hearing must not mislead either deliberately or innocently, *per* Popplewell J); *R v Lloyd's of London, ex parte Briggs* [1993] COD 66 (Failure of counsel and solicitors to alert the court to the fact that three of the applicants had previously been parties to an unsuccessful private law action against the respondent

- (ii) Failure to demonstrate an “arguable case,” though it was stressed in a number of decisions that this was a jurisdiction to be exercised only in the most exceptional cases.⁷⁵
- (iii) Absence of jurisdiction to apply for judicial review.⁷⁶
- (iv) Where the applicant should have used an alternative remedy.⁷⁷
- (v) Where the proceedings could serve no further purpose.⁷⁸
- (vi) Where the applicant delayed unduly.⁷⁹
- (vii) Failure to make out a necessary precondition in relation to entitlement to seek review.⁸⁰

constituted material non-disclosure and misrepresentation, warranting the exercise of the exceptional jurisdiction to set aside leave).

⁷⁵ Lord Donaldson MR in *R v Secretary of State for the Home Department, ex parte Begum* [1991] COD 381, spoke of the need to establish some “knock out blow”, such as the fact that the original grant of leave was made *per incuriam*, or the existence of a quasi-jurisdictional bar to relief.

⁷⁶ *R v Cornwall County Council, ex parte Huntington* [1992] 3 All ER 566 (leave obtained *ex parte* set aside owing to failure of the applicants to alert the court to the existence of a statutory provision ousting the jurisdiction of the court); *R v Darlington Borough Council, ex parte Association of Darlington Taxi Owners* [1994] COD 424 (leave set aside where the applicants were unincorporated associations and the proceedings were therefore not properly constituted). Note, however, that in *R v Traffic Commissioner for the North Western Traffic Area, ex parte BRAKE* [1996] COD 248 Turner J, noting that there was a complex and occasionally conflicting line of case law in this area, declined to follow *R v Darlington Borough Council, ex parte Association of Darlington Taxi Owners*. Turner J thus refused to set aside leave which had been granted to an unincorporated association described by the court as a pressure group whose aim was the promotion of safety in the use of lorries on public roads.

⁷⁷ *R v Special Educational Needs Tribunal, ex parte Fairpo* [1996] COD 180 (Failure to proceed by way of statutory right of appeal); also *R v Secretary of State for the Home Department, ex parte Doorga* [1990] Imm AR 98.

⁷⁸ *R v General Medical Council, ex parte Popat* [1991] COD 245 (Respondent successful in seeking to have leave struck out where it had voluntarily decided to reconsider the decision under challenge).

⁷⁹ *R v Customs and Excise Commissioners, ex parte Eurotunnel plc* [1995] COD 291 confirmed that in exceptional circumstances, a respondent might seek to have leave set aside on ground of delay.

⁸⁰ *R v Social Security Commissioner, ex parte Pattni* [1993] Fam Law 213. A lay applicant obtained a grant of leave pursuant to statutory provisions allowing review on a point of law; however, the applicant failed to identify the point of law of which review was sought. The application to set aside

1.32 It had been suggested that in more recent times, there had been an increase in the number of applications to set aside the grant of leave, with a growing body of case law to deal with the issues raised.⁸¹ Sunkin and Le Sueur noted that this development could be seen as highlighting the tension in the process; thus, applicants saw applications to set aside as reinforcing barriers to access, while respondents saw the possibility of seeking an order setting aside leave as a necessary element of the procedural protection to which they were entitled.⁸² Any increase in such applications could have negative repercussions for efficient court administration and it was therefore suggested that the solution might be to limit the use of the process. In relation to unnecessary duplication and inefficient use of already limited resources, it should also be noted that the possibility of appealing a grant of leave was strongly discouraged by the Court of Appeal in *R v Governor of Pentonville Prison, ex parte Herbage (No. 2)*.⁸³

1.33 Such concerns would seem to have informed the recommendations of the *Review of the Crown Office List*.⁸⁴ The Review Team recommended that the leave stage should be conducted on notice and the respondent would therefore have the opportunity to

was refused by Pill J in the High Court, who held that having regard to the exceptional nature of the court's jurisdiction to set aside, it would not be appropriate to grant the relief sought by the respondent on the ground that the point of law was not readily discernible, as such a point of law might become apparent on a closer examination of the papers. Pill J went on to comment that such close examination was not appropriate in the context of an application to set aside, and consequently, refused the respondent's application. However, the Court of Appeal subsequently granted the application to have leave set aside on the ground that it was not appropriate for the judge at the leave stage to undertake a search for a point of law.

⁸¹ Sunkin & Le Sueur "Applications for Judicial Review: The Requirement of Leave" [1992] PL 102, 118.

⁸² *Ibid.*

⁸³ [1987] 1 All ER 324. The respondents in the instant case had sought to appeal the grant of leave in the context of an appeal against an order for discovery; referring to the possibility of seeking to have the grant of leave set aside pursuant to the inherent jurisdiction of the court, Purchas LJ strongly doubted the appropriateness of appealing the grant of leave in this manner.

⁸⁴ (A Report to the Lord Chancellor March 2000) at paragraph 7.37.

put his case before the court. It was accordingly considered that the respondent's entitlement to apply to set aside leave would be redundant and there would thus be no need to implement the Law Commission's recommendation on this matter. The conclusion reached was that a respondent should no longer be entitled to seek to have a grant of leave set aside save where such respondent was not on notice in the initial application for leave.⁸⁵

1.34 However, it should be noted that in making this recommendation, the Review Team made no reference to the decision of Harrison J in *R v Secretary of State for the Home Department, ex parte Vafi*.⁸⁶ In *Vafi*, noting that there was no statutory provision ousting the court's jurisdiction to hear an application to set aside where the leave hearing had been conducted *inter partes*, Harrison J suggested that the reason for this was that "there could be new circumstances arising after the grant of leave which may show that it is appropriate for leave to be set aside."⁸⁷ Harrison J clarified that he accepted without hesitation the proposition that such jurisdiction would arise only in exceptional circumstances and was satisfied that the present case constituted such an exceptional case by reason of the change in circumstances.⁸⁸ Harrison J concluded that "in the very particular circumstances of this case" it was appropriate to set aside the grant of leave.

1.35 Whilst the jurisdiction of the courts to set aside a grant of leave must always be regarded as an exceptional jurisdiction to be exercised only in the rarest circumstances, it is also the case that there may be isolated instances in which it would be appropriate for the court to retain its jurisdiction to set aside where there has been a change in facts or circumstances since the grant of leave. In such situations as *Vafi*, where a change in circumstance would render the

⁸⁵ CPR Part 54.13 now provides that "[n]either the defendant nor any other person served with the claim form may apply to set aside an order giving permission to proceed".

⁸⁶ [1996] Imm AR 169.

⁸⁷ *Ibid* at 172.

⁸⁸ Leave had been granted in relation to the refusal of the Home Secretary to allow the applicant to be examined by a doctor of her choice prior to her deportation. Three days after leave was granted, the applicant was examined by a doctor of her own choice and as Harrison J noted "in that sense the matter has now become academic".

substantive hearing nugatory, requiring the matter to go to substantive hearing before having the proceedings struck out would result in the parties incurring unnecessary additional costs. In the view of the Commission, this is essentially a matter of case management and the effective use of court time, subject always to the caveat that the discretion to set aside leave should be most sparingly used.

(iii) *Recommendation*

1.36 *The Commission accepts that the possibility of setting aside leave is a necessary procedural safeguard and its total abolition is therefore unwarranted. Further, in light of the recommendation on the limited circumstances in which applications for leave should be conducted inter partes, the Commission accepts that the potential for seeking to have a grant of leave set aside remains necessary.*

1.37 *The Commission is satisfied that the dicta of McGuinness J in Adam v Minister for Justice⁸⁹ as approved by Fennelly J in Gordon v Director of Public Prosecutions,⁹⁰ suggesting that “the exercise of the court’s inherent jurisdiction to discharge orders giving leave should, therefore, be used only in exceptional cases” is the sensible approach. Where the application for leave is conducted inter partes, the respondent should not be permitted to seek to have the grant of leave set aside unless there is a change in circumstances such as to render the substantive hearing nugatory. The Commission recommends that these tests be explicitly set out in the Rules of Court.*

II. Time Limits

(a) The present position

1.38 Order 84 rule 21(1) lays down requirements in relation to time limits in judicial review proceedings.⁹¹ Rule 21(1) provides that an application for leave to apply for judicial review shall be made

⁸⁹ [2001] 2 ILRM 452.

⁹⁰ [2003] 1 IR 81.

⁹¹ As Denham J commented in *De Roiste v Minister for Defence* [2001] 1 IR 190, 207 it sets out a scheme “which indicates a specific, short, time span within which to bring an application”.

“promptly, and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*, unless the court considers that there is good reason for extending the period within which the application shall be made”. While Order 84 rule 21 does not operate in the same way as a period of limitation, it does impose “a preliminary obligation to proceed with despatch”.⁹² Even where leave is granted on the basis that any delay is not such as to disentitle the applicant from seeking judicial review, the issue of delay may still debar an applicant from obtaining relief at the substantive hearing.⁹³

1.39 As noted above, rule 21(1) requires that an application for leave to apply for judicial review should be made “promptly”, a precondition described by Ackner LJ in *R v Stratford-on-Avon DC, ex parte Jackson*⁹⁴ in relation to the same wording in the then equivalent English provision⁹⁵ as the “essential requirement.”⁹⁶ A similar view was expressed by McCracken J in *De Roiste v Minister for Defence*⁹⁷ where he said 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* 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.⁹⁸

⁹² Per Fennelly J in *De Roiste v Minister for Defence* [2001] 1 IR 190, 216.

⁹³ *Solan v Director of Public Prosecutions* [1989] ILRM 491, 494 per Barr J; *O'Flynn v Mid-Western Health Board* [1991] 2 IR 223, 236 per Hederman J.

⁹⁴ [1985] 3 All ER 769.

⁹⁵ RSC Order 53 rule 4. Time limits in judicial review proceedings in England are now governed by CPR Part 54.5

⁹⁶ It was acknowledged by him in his decision in *R v Stratford-on-Avon DC, ex parte Jackson* [1985] 3 All ER 769, 772 that the fact that an application has been made within the time period laid down in the rules does not necessarily mean that it has been made ‘promptly’.

⁹⁷ High Court (McCracken J) 28 June 1999 at 2.

⁹⁸ [2001] 1 IR 190, 203.

1.40 While there have been few examples of cases in this jurisdiction in which judicial review has been refused on grounds of lack of promptness within the three or six month time periods specified in the rules, in limited circumstances this may happen.⁹⁹ However, the usual position would appear to be that if an applicant acts within the three or six month time periods, albeit only just within them, it is unlikely that a court will find that the application has not been made promptly provided no prejudice has been suffered by the respondent or third parties as a result of this delay.¹⁰⁰

1.41 A more significant aspect of rule 21(1) which should be examined is the power of the court to exercise its discretion to extend the three and six month time limits, provided that there is ‘good reason’ for doing so.¹⁰¹ As Denham J made clear in *De Roiste v Minister for Defence*¹⁰² the onus is on the applicant to show good reason why time should be extended. This power may be exercised in an applicant's favour, provided the delay can be satisfactorily explained and there is no evidence of prejudice being caused to the respondent¹⁰³ or to third parties as a result of it.¹⁰⁴

⁹⁹ *Director of Public Prosecutions v Macklin* [1989] ILRM 113; *Director of Public Prosecutions v Kelly* [1997] 1 IR 405. While it should be borne in mind that in both these cases judicial review was being sought by the Director of Public Prosecutions and not by an accused person, the decisions nevertheless show that a failure to act promptly even within the time periods laid down in the rules may be fatal to an application for judicial review.

¹⁰⁰ *Eg Eurocontainer Shipping plc v Minister for the Marine* High Court (Barr J) 11 December 1992; *McEniry v Flynn* High Court (McCracken J) 6 May 1998.

¹⁰¹ See eg *Director of Public Prosecutions v Hamill* [2000] 1 ILRM 150 (HC) and Supreme Court 11 May 2000.

¹⁰² [2001] 1 IR 203. See also the *dicta* of Barr J in *Solan v Director of Public Prosecutions* [1989] ILRM 491, 493 to the effect that where the application, as in the case before him, was 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”.

¹⁰³ *Director of Public Prosecutions v Hamill* [2000] 1 ILRM 150, 159. See also Supreme Court 11 May 2000.

¹⁰⁴ See the *dicta* of McCarthy J in *Flynn v Mid-Western Health Board* [1991] 2 IR 223, 239 to the effect that “[i]n principle it is right to relieve against delay in challenging an administrative decision where the delay has not prejudiced third parties”.

1.42 A useful explanation of what will constitute ‘good reason’ for this purpose is provided by Costello J in his judgment in *O’Donnell v Dun Laoghaire Corporation*.¹⁰⁵ He stated as follows:

“The phrase ‘good reasons’ is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under Order 84, rule 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay.”¹⁰⁶

1.43 In her judgment in *De Roiste v Minister for Defence* Denham J stated that in analysing the facts of a case to determine whether there is good reason to extend time, the following factors may be taken into account, although she stressed that this list was not exclusive.

- (i) the nature of the order or actions the subject of the application;
- (ii) the conduct of the applicant;
- (iii) the conduct of the respondents;
- (iv) the effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed;
- (v) any effect which may have taken place on third parties by the order to be reviewed;
- (vi) public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished.¹⁰⁷

¹⁰⁵ [1991] ILRM 301. Although the case concerned plenary proceedings brought to challenge the validity of water charges imposed by the corporation, Costello J decided to apply by analogy the rules and principles contained in Order 84 rule 21.

¹⁰⁶ [1991] ILRM 301, 315. This passage was quoted by Fennelly J in *De Roiste* who said that the view that delay in making an application for judicial review requires both explanation and justification is fully consistent with the provisions of Order 84 rule 21.

¹⁰⁷ [2001] 1 IR 190, 208.

1.44 As Barr J commented in *Solan v Director of Public Prosecutions*¹⁰⁸ ‘[i]n the absence of evidence explaining delay, there is no basis on which the court can exercise its discretion to grant an extension of time for making the applications’. So in *Flynn v Mid-Western Health Board*¹⁰⁹ the Supreme Court refused to grant judicial review quashing a decision establishing a committee to investigate complaints against the applicant doctors eight months after it was made, in circumstances where no explanation was offered for this delay. However, where the delay can be satisfactorily explained and there is no evidence that the respondent has been prejudiced by it, it may be overlooked.¹¹⁰

1.45 One issue which is slightly controversial is the extent to which the courts should have regard to the underlying merits of the application for judicial review in deciding whether to extend time. In *Eastern Health Board v Farrell*¹¹¹ the applicant sought judicial review in relation to an inquest originally convened sixteen months previously and the respondent contended that the application had not been made promptly and that there was no justification for extending time. While Geoghegan J agreed that the application had not been made promptly, he expressed the view that the issues in the case were far too important to allow the judicial review application to be determined on a time point alone unless some serious prejudice was going to be caused. He concluded that no serious injury would follow and stated that in all the circumstances he thought that he should deal with the application on its merits.

1.46 Conversely, lack of a good case on the merits has arguably influenced a decision to refuse to extend time in a trilogy of cases,

¹⁰⁸ [1989] ILRM 491, 493. It should be noted that in this decision, as in *Connors v Delap* [1989] ILRM 93 and *White v Hussey* [1989] ILRM 109, the court appeared to place importance on the fact that there was no evidence that the criminal convictions in each case were not properly made on the merits in refusing to extend to the time for bringing applications for judicial review. This approach can be open to criticism given that the purpose of judicial review proceedings is to examine the legality of a decision rather than its merits.

¹⁰⁹ [1991] 2 IR 223.

¹¹⁰ *Murphy v Minister for Social Welfare* [1987] IR 295.

¹¹¹ [2000] 1 ILRM 446.

viz., *Connors v Delap*,¹¹² *White v Hussey*¹¹³ and *Solan v Director of Public Prosecutions*.¹¹⁴ In each of these cases the court, in refusing to extend the time for bringing applications for judicial review, appeared to place importance on the fact that there was no evidence that the criminal convictions in the cases were not properly made on the merits. This went beyond stating that the *grounds* on which judicial review was sought were not likely to succeed and suggested that the application should not be allowed because the applicants did not have a case on the merits and can be criticised as confusing the issues of substantive grounds and the jurisdiction to extend time.

1.47 It should be noted that in *GK v Minister for Justice, Equality and Law Reform*¹¹⁵ in the context of the statutory formula of “good and sufficient reason for extending the period” contained in s. 5 of the *Illegal Immigrants (Trafficking) Act 2000*, the Supreme Court concluded that the court should have regard to the merits of the substantive case and not simply the merits of the application to extend time. Hardiman J then stated that in other circumstances where the court is called upon to extend the period of time limited for the taking of any step, the merits of the substantive case are considered relevant and he referred to the position in relation to extensions of time to appeal to the Supreme Court from the High Court.¹¹⁶ He continued by saying that the statute does not provide that time may be extended if there are “good and sufficient reason for the failure to make the application within the period of fourteen days”, a provision which would have placed focus exclusively on the reason for the delay and not on the underlying merits and that the phrase actually used did not appear to him to limit the factors to be considered in any way.

1.48 It remains to be seen whether similar reasoning will now be applied to the “good reason” formula which applies in conventional judicial review, although the case law to date shows no sign of this. While the formulae used are different¹¹⁷ it is far from satisfactory to

¹¹² [1989] ILRM 93.

¹¹³ [1989] ILRM 109.

¹¹⁴ [1989] ILRM 491.

¹¹⁵ [2002] 1 ILRM 401.

¹¹⁶ See *Eire Continental Trading Co Ltd v Clonmel Foods Ltd* [1955] IR 170; *Dalton v Minister for Finance* [1989] IR 269.

¹¹⁷ In that the test in conventional judicial review proceedings is that time may be extended where the court considers that there is “good reason”, while the

have such divergent approaches being applied in relation to conventional and statutory judicial review.

1.49 A final issue which has provoked comment is whether the courts should extend time merely because there is no evidence of prejudice being caused to the respondent or to third parties as a result of the delay.¹¹⁸ While in *Flynn v Mid-Western Health Board*¹¹⁹ the Supreme Court refused to extend time in the circumstances, McCarthy J stated that in principle “it is right to relieve against delay in challenging an administrative decision where the delay has not prejudiced third parties”. There is certainly increasing anecdotal evidence of the courts placing emphasis on the issue of lack of prejudice in exercising its discretion. This question was considered although it clearly did not form the sole basis for the conclusion reached by the court in the recent decision in *Dekra Eireann Teo v Minister for the Environment and Local Government*.¹²⁰ This case concerned an application to extend time under Order 84A rule 4 of the Rules of the Superior Courts 1986¹²¹ which provides that an application for the review of a decision to award a public contract shall be made “at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending such period.” The applicant was seeking judicial review of the respondent’s decision to award a contract to the notice party but sought damages rather than seeking to have the contract set aside. O’Neill J accepted that the onus is on the party seeking an extension

test in the statutory schemes is phrased in the negative, such that time shall not be extended save where there is good and sufficient reason for doing so. (The issue of extension of time in statutory schemes is considered below, in Chapter 2). The effect, if any, of the difference in phrasing remains to be clarified by the courts.

¹¹⁸ However, it should be borne in mind that as stated above, Denham J made it clear in *De Roiste v Minister for Defence* [2001] 1 IR 203 that the onus is on the applicant to show good reason why time should be extended and the approach adopted by Costello J in *O’Donnell v Dun Laoghaire Corporation* [1991] ILRM 301 requires a plaintiff to establish reasons which both explain the delay and afford a justifiable excuse for it.

¹¹⁹ [1991] 2 IR 223.

¹²⁰ High Court (O’Neill J) 2 November 2001. Judgment has been reserved by the Supreme Court on the appeal.

¹²¹ Inserted by the Rules of the Superior Courts (No 2) 1996 (SI No 377 of 1996)

of time to demonstrate on an objective basis that there is an explanation for the delay and a justifiable reason for it. Referring to the *dicta* of McCarthy J in *Flynn* set out above, he then said that applying that principle must result in tilting the balance in favour of an extension of time where to do so would not prejudice either the respondent or third parties. O'Neill J concluded that the applicant's conduct in seeking to enter into discussions with the respondent in order to obtain answers to its queries was reasonable and justifiable and he was satisfied that neither the respondent nor the third party would suffer significant prejudice where it was not sought to have the contract set aside. He held that neither the respondent nor the notice party would suffer any significant prejudice which could be fairly attributable to delay on the applicant's part and that to strike out the proceedings might cause grave injustice to the applicant, in whose favour the balance therefore lay.

(b) Recommendation

1.50 *The Commission suggests that while it is useful to consider the issue of prejudice as one of a number of factors to be weighed up,¹²² it is important to stress that it is well established that the onus lies on the applicant to establish good reason to extend time and in order to ensure consistency the courts must not lose sight of this in determining applications of this nature.*

1.51 *Clearly if one of the underlying purposes of judicial review is to be met, namely to achieve certainty in relation to decisions made by public bodies without undue delay, realistic time limits must be set down. While some flexibility to extend time is probably desirable to meet the needs of justice of individual cases, it is necessary to try to achieve consistency in the manner in which any extension of time will be granted.*

1.52 *Experience has shown that the existing provisions have worked reasonably well in practice and we recommend that the courts continue to apply the guidelines set out above in relation to what will constitute 'good reason' to extend time, namely that the applicant must demonstrate that there are reasons which both explain the delay and afford a justifiable excuse for it.*

¹²² See *Keymed (Medical) and Industrial Equipment Ltd v Forest Health Care NHS Trust* High Court (Queen's Bench Division Langley J) 17 November 1997.

III. Sufficient interest

1.53 In order to obtain leave to issue judicial review proceedings, the applicant must establish that he has a “sufficient interest” in the matter to which the application relates.¹²³ Even before the introduction of the 1986 Rules of the Superior Courts, it was accepted that the test of interest should be broadly speaking the same, both in relation to private law remedies and those which operated in the realm of public law.¹²⁴ As Hogan and Morgan have observed,¹²⁵ the policy underpinning the new rules was to achieve uniformity and given that Order 84 rule 20(4) applied to all remedies, they concluded that “this must mean that the *locus standi* requirements do not vary from remedy to remedy”. In *State (Lynch) v Cooney*¹²⁶ Walsh J commented that such rules as did exist regarding what constituted “sufficient interest” were judge made rules and as such could be altered by the judiciary; more importantly, he said “they must be flexible so as to be individually applicable to the particular facts of any given case”.

1.54 One question which has provoked discussion both in this jurisdiction and in England is the extent to which the issue of standing should be determined at the leave stage or whether it should largely be left for consideration at the hearing of the substantive application.¹²⁷ Collins and O’Reilly¹²⁸ have commented that the issue

¹²³ Order 84 rule 20(4). However, note that s. 50(4)(b) of the *Planning and Development Act 2000* imposes a requirement that an applicant establish that he has a “substantial interest” before leave to bring judicial review proceedings will be granted in respect of certain types of planning decisions. S. 50(4)(d) goes on to provide that a “substantial interest” in this context is not limited to an interest in land or other financial interest. For a discussion of this requirement see Simons “The Implications of the New Act for Judicial Review Proceedings” in *The Planning and Development Act 2000: Implications for Practitioners* (2001) at 4-6; and Simons “Special Judicial Review Procedure under the Planning and Development Act 2000” Vol. 2 No 1 at 134-143.

¹²⁴ *State (Lynch) v Cooney* [1982] IR 337, 369.

¹²⁵ *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 741.

¹²⁶ [1982] IR 337, 369.

¹²⁷ Note that the question of *locus standi* should be raised by the respondent or notice party in the statement of opposition if it is intended to challenge the

of whether an applicant has a sufficient interest to maintain an application for judicial review is “by and large too complex and controversial to be resolved at the hearing of the application for leave” and this tends to reflect judicial thinking on the matter. In *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd*¹²⁹ Lord Diplock stated that “the discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the leave application”. This statement was quoted with approval by Denham J in *G v Director of Public Prosecutions*,¹³⁰ who commented that on the actual application for judicial review, the applicant has “an altogether heavier burden of proof to discharge”. Linked to this is the point made by Walsh J in *State (Lynch) v Cooney*¹³¹ that the question of whether a person has a sufficient interest must depend on the circumstances of each particular case. In his view, while the question of sufficient interest is a mixed one of fact and law, greater importance should be attached to the facts and it is clear that a detailed examination of the facts of the case may only take place at the hearing of the substantive application for judicial review. Tending in the same direction is the not unrelated point that usually, the respondent will not have been heard at the leave stage. Thus, it might be stated that whilst the issue can be established against the applicant at the leave stage, with the court consequently refusing to grant leave, it cannot be conclusively decided in his favour, rendering the issues unassailable at the substantive hearing.

1.55 These principles were drawn together by Keane J in his judgment in *Lancefort Ltd v An Bord Pleanála*¹³² in considering whether *locus standi* should be determined as a threshold issue on an application for leave or whether, assuming that leave is granted, it

applicant’s standing; see *O’Connor v Dublin Corporation* High Court (O’Neill J) 3 October 2000 at 45.

¹²⁸ *Civil Proceedings and the State in Ireland: A Practitioner’s Guide* (Round Hall 1990) at 88.

¹²⁹ [1982] AC 617, 643-644.

¹³⁰ [1994] 1 IR 374, 382.

¹³¹ [1982] IR 337, 369. See also *Lancefort Ltd v An Bord Pleanála* [1999] 2 IR 270, 310-311 *per* Keane J.

¹³² [1999] 2 IR 270, 310-311.

should be determined at the substantive hearing. In the view of Keane J the approach adopted by Walsh J in *State (Lynch) v Cooney* was consistent with the view that standing should be determined as a threshold issue on an application for leave only where it was obvious that the applicant did not have a sufficient interest. However, Keane J went on to clarify that while this was true in the case of conventional judicial review proceedings, the situation was quite different in the context of the statutory schemes, because:

“in such cases the application must be made on notice to the authority concerned and the applicant must at that stage show that there are substantial grounds for contending that the decision in question was invalid. As a general rule, there should be sufficient evidence before the court at that stage to enable the judge to determine the question of standing: to require the court in every case to reserve the question until the hearing of the substantive application would be inconsistent with the general statutory scheme”¹³³.

Recommendation

1.56 *The Commission is satisfied that it is generally not appropriate for the courts to reach a conclusive decision on such matters as the sufficiency of interest of an applicant at the leave stage. We endorse the principles set out in such cases as G v Director of Public Prosecutions and Lancefort v An Bord Pleanála, namely that for the court to decide such issues at the leave stage would be inconsistent with the purpose of that stage. However, we are also mindful of the need to avoid duplication of arguments between the leave stage and substantive hearing, which can contribute to significant delays. We therefore suggest that the High Court exercise caution at the leave stage so as to prevent such duplication, in light of the fact that such issues will be fully argued and determined at the substantive hearing.*

¹³³ *Lancefort Ltd v An Bord Pleanála* [1999] 2 IR 270, 311.

IV. Alternative remedies

1.57 The public law remedies¹³⁴ are all discretionary in nature and although a plaintiff may succeed in proving his case, he may nevertheless be refused relief on discretionary grounds. So in addition to establishing a ground for judicial review the applicant must satisfy the court that “it would be just and proper in all the circumstances” to grant the relief sought.¹³⁵ This discretion is exercised in accordance with well established principles which have generated significant case law in recent times. One of the factors informing the exercise of this discretion is the existence of an alternative remedy and the adequacy thereof.

1.58 It has been suggested that it is often not so much the failure of the applicant to pursue an alternative remedy which will prejudice the court’s decision, but rather his motive for doing so.¹³⁶ Where an appeal can deal only with the merits of a case and not with its legality or jurisdictional aspects, judicial review will be the appropriate means of redress open to a person and the existence of a right of appeal should not *per se* be a ground for refusing relief. Conversely, where judicial review would appear to be a “singularly inappropriate” remedy as compared to an appeal, leave to seek review should be refused.¹³⁷ An analysis of the case law in this area over the last two decades reveals a remarkable divergence in attitudes towards the question of exhaustion of alternative remedies and while it would appear that there is now a middle ground approach emerging in more recent times, a consideration of these differences in judicial opinion is still necessary.¹³⁸ Much of the case law relates to planning matters and it should be noted at the outset that s. 50(3) of the *Planning and Development Act 2000* now provides that the High Court is empowered to stay judicial review proceedings pending the making of

¹³⁴ The remedies of declaration and injunction are also discretionary in nature.

¹³⁵ *Per Henchy J in State (Cussen) v Brennan* [1981] IR 181, 195.

¹³⁶ *Delany & McGrath Civil Procedure in the Superior Courts* (Round Hall Sweet & Maxwell 2001) at 590.

¹³⁷ *Buckley v Kirby* [2000] 3 IR 431.

¹³⁸ See generally Steen “Judicial Review, Discretion and Alternative Remedies” (2000) 2 *Hibernian Law Journal* 294.

a decision by An Bord Pleanála in relation to a parallel statutory appeal.¹³⁹

1.59 Probably the high watermark of the strict approach to this issue is to be found in the judgment of Henchy J in *State (Abenglen Properties Ltd) v Dublin Corporation*¹⁴⁰ in which the applicant, which sought to challenge the imposition of restrictive conditions attached to a grant of planning permission by way of judicial review also had the option of pursuing an appeal to An Bord Pleanála. Henchy J stated that the Planning Acts envisaged “a self-contained administrative code, with resort to the courts only in exceptional circumstances”¹⁴¹ and concluded that even if the court was satisfied that there were grounds for review, he would on the exercise of his discretion have refused to grant *certiorari* on the ground that the applicant should have pursued the appellate procedure open to it under the Acts.

1.60 O’Higgins CJ adopted a more flexible approach, which is generally regarded as achieving a better balance between the various considerations.¹⁴² He stated as follows:

“The question immediately arises of the existence of a right of appeal or an alternative remedy as to the effect on the exercise of the court’s discretion. It is well established that the existence of such 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 circumstance 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. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to

¹³⁹ Thus, s. 50(3) of the 2000 Act provides that the High Court may order a stay where it considers that the matter is within the jurisdiction of An Bord Pleanála. It remains to be seen how the courts will interpret the phrase “matter ... within the jurisdiction”, although it has been suggested that there are two viable interpretations: see Simons “Special Judicial Review Procedure under the Planning and Development Act 2000” (2002) 2(1) *Judicial Studies Institute Journal* 125, 147-153.

¹⁴⁰ [1984] IR 381.

¹⁴¹ [1984] IR 381, 404.

¹⁴² See Delany & McGrath *op cit* fn 133 at 591.

avail of such, should be immaterial. Again, 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 of 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, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with error in the application of the code in question. In such cases, while retaining always the power to quash, the court should be slow to do so, unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate.”¹⁴³

1.61 The approach of Henchy J in *Abenglen* was followed in a number of subsequent decisions,¹⁴⁴ including *Memorex World Trade Corporation v Employment Appeals Tribunal*¹⁴⁵ in which Carroll J declined to grant an order of *certiorari* quashing the decision of the respondent on the grounds that the appeal procedure was open to the applicant, namely an appeal to the Circuit Court was adequate. However, this reasoning has been criticised on the basis that it deprives the applicant of the opportunity to have his case considered properly at first instance and ignores the fact that there may be a difficulty with the legality of the decision making process which should be rectified.¹⁴⁶

1.62 An alternative approach, which can be contrasted with that adopted by Henchy J in *Abenglen* is that put forward by Finlay CJ in *P & F Sharpe v Dublin City and County Manager*.¹⁴⁷ This case also concerned a challenge to the validity of a decision made in a planning context, in this case by the respondent county manager, although it should be noted that, in addition to the judicial review proceedings, an appeal to An Bord Pleanála had also been lodged. Finlay CJ pointed out that:

¹⁴³ *State (Abenglen Properties Ltd) v Dublin Corporation* [1984] IR 381, 393.

¹⁴⁴ *Nova Colour Graphic Supplies v Employment Appeals Tribunal* [1987] IR 426 and *O'Connor v Kerry County Council* [1988] ILRM 660.

¹⁴⁵ [1990] 2 IR 184.

¹⁴⁶ Delany & McGrath *op cit* fn 133 at 591.

¹⁴⁷ [1989] IR 701, 721. This approach was applied by Barr J in *Tennyson v Dun Laoghaire Corporation* [1991] 2 IR 527.

“The powers of An Bord Pleanála on the making of an appeal to it would be entirely confined to the consideration of the matters before it on the basis of the proper planning and development of the area and it would have no jurisdiction to consider the question of the validity, from a legal point of view, of the purported decision of the county manager.”¹⁴⁸

1.63 He held that it would not be just for the applicant to be deprived of its right to have the decision quashed for want of validity and concluded that proceedings by way of judicial review had been properly brought in the circumstances. Similarly, in *Mythen v Employment Appeals Tribunal*¹⁴⁹ Barrington J granted an order of *certiorari* in relation to a refusal by the respondent to entertain the applicant’s claim on the grounds that it had erred as to its jurisdiction. He stated that he did not think the applicant should be denied relief in the form of judicial review because he could have appealed to the Circuit Court and that he was entitled to have the facts investigated by a court of first instance. The rationale behind this approach is that a person is entitled to a proper decision at an initial stage in proceedings without the expense and delay often involved in an appeal and it certainly better reflects the true purpose of judicial review.

1.64 The most recent pronouncements in this area seem to fall somewhere in between the two approaches outlined above and tend to reflect the attitude adopted by O’Higgins CJ in *Abenglen*. In *McGoldrick v An Bord Pleanála*.¹⁵⁰ Barron J stated as follows:

“The real question to be determined where an appeal lies is the relative merits of an appeal as against the granting of 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

¹⁴⁸ [1989] IR 701, 721.

¹⁴⁹ [1990] 1 IR 98.

¹⁵⁰ [1997] 1 IR 497. The applicant had appealed a decision of the respondent on a reference to it under s. 5 of the *Local Government (Planning & Development) Act 1963* and also sought to challenge the validity of the respondent’s determination of that reference by way of judicial review.

and 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.”¹⁵¹

1.65 Barron J concluded that the applicant was entitled to have the particular issues of fact, on which his application had been refused, determined before the respondent and he granted judicial review. This approach has recently been approved *obiter* by Geoghegan J in the Supreme Court decision of *Buckley v Kirby*¹⁵² where he considered the appropriate course of action for the court to take where an applicant has brought an appeal which is pending and has moved for judicial review in circumstances where either remedy would be equally appropriate. Geoghegan J stated that he would adopt the view of Barron J in *McGoldrick* and that the High Court on an application for leave is not bound to refuse it merely because an appeal is pending. In the more recent decision of *Gordon v Director of Public Prosecutions*¹⁵³ Fennelly J quoted with approval from the judgment of O’Higgins CJ in *Abenglen* and concluded that the existence of an alternative remedy such as a right of appeal will be relevant to the question of whether the court will grant *certiorari* although he accepted that there may be cases where such an alternative remedy will not preclude the granting of relief by way of judicial review.

1.66 In *Duff v Mangan*¹⁵⁴ Denham J expressed the view that *certiorari* is a discretionary remedy which will be granted “cautiously where there is an adequate alternative remedy which has been inadequately prosecuted”,¹⁵⁵ although she decided in the circumstances that the court’s jurisdiction should be exercised in the appellant’s favour. One point in her judgment which should be treated with caution is her statement that “*certiorari* will not lie regarding a matter which is pending before an appellate court”.¹⁵⁶ In the case before her the appellant’s appeal to the Circuit Court had been concluded and thus it was, she said, not an absolute bar to judicial review but rather a factor for consideration by the court. It is

¹⁵¹ *Ibid* at 509.

¹⁵² [2001] 2 ILRM 395.

¹⁵³ [2003] 1 ILRM 81.

¹⁵⁴ [1994] 1 ILRM 91.

¹⁵⁵ *Ibid* at 101. See also *Arnold v Windle* Supreme Court 4 March 1999 at 5.

¹⁵⁶ *Ibid* at 96.

difficult to reconcile this approach with that of Finlay CJ in *P & F Sharpe* and Barr J in *Tennyson v Dun Laoghaire Corporation*¹⁵⁷ where the court placed no significance on the fact that appeals to An Bord Pleanála were also pending.

1.67 The correct view is probably that expressed by O’Sullivan J in *Nevin v Crowley*¹⁵⁸ to the effect that the principle that *certiorari* will not lie where a matter is pending before an appellate court is not an absolute rule. He stated “what I have to consider is whether justice can be done by refusing the appellant relief and allowing him to prosecute his appeal or whether it is more appropriate in the interests of justice to quash the impugned decision”. In the circumstances O’Sullivan J decided to grant *certiorari* to quash the decision made by the District Court, a finding upheld on appeal by the Supreme Court.¹⁵⁹ A further relevant factor may be an applicant’s motive in deciding whether to pursue an appeal or proceed by way of judicial review. In *Bridgeman v Limerick Corporation*¹⁶⁰ Finnegan J commented that in the case before him “there was not ... a deliberate choice not to avail of the remedy of appeal” and he concluded that if he had found for the applicant on substantive grounds, it would have been appropriate for him to exercise his discretion in the latter’s favour.

1.68 One further general consideration which may be relevant is the nature of the error or illegality which an applicant seeks to correct. In *Sweeney v Brophy*¹⁶¹ Hederman J suggested that *certiorari* was not the appropriate remedy for a “routine mishap” which might occur in the course of a trial and that an appeal would be the correct remedy in such circumstances. However, this approach is open to criticism on the grounds that it overlooks the distinction between appeal and review and should be viewed with some caution. At the other end of

¹⁵⁷ [1991] 2 IR 527.

¹⁵⁸ [1999] 1 ILRM 376, 381.

¹⁵⁹ Supreme Court 17 February 2000.

¹⁶⁰ High Court (Finnegan J) 2 June 2000.

¹⁶¹ [1993] 2 IR 202, 211. See also *Moore v Martin* High Court (Finnegan J) 29 May 2000 where Finnegan J held that in circumstances where the error in question did not appear on the face of the record, there had been no breach of the requirements of natural justice and the applicant had an appeal pending before the Circuit Court, it was not appropriate that an order of *certiorari* should be made. See also *Maher v O’Donnell* [1995] 3 IR 530, 539-540.

the spectrum, there is some authority for the proposition that if the error made amounts to a breach of the principles of constitutional justice, the availability of an alternative remedy should not be a consideration.¹⁶² This was suggested by O’Higgins CJ in *State (Abenglen Properties Ltd) v Dublin Corporation*¹⁶³ where he stated that if the decision impugned is made without jurisdiction or in breach of constitutional justice then, normally the existence of a right of appeal or a failure to avail of it should be immaterial. The tenor of the judgment of O’Sullivan J in *Nevin v Crowley*¹⁶⁴ also supports this view and he stated that in his opinion “it would be an inadequate response from the High Court, faced with [a] failure of natural and constitutional justice ... simply to allow the appeal to proceed as if nothing untoward had happened”. This approach was also favoured by Murray J in the Supreme Court in *Nevin v Crowley*¹⁶⁵ where he quoted with approval the statement of O’Higgins CJ in *Abenglen* and said that where a trial has been conducted in a manner which is in breach of a fundamental principle of constitutional justice “the mere existence of a right of appeal cannot be an obstacle to the granting of an order of *certiorari*”.¹⁶⁶

1.69 Finally it is important not to overlook the fact that any hard line approach to the exhaustion of alternative remedies requirement will have the effect of blurring the distinction between an appeal on

¹⁶² Described by Hogan & Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 738 as “a strong, though not unanimous, line of authority” derived from such authorities as *Leary v National Union of Vehicle Builders* [1971] Ch 34; *Ingle v O’Brien* (1975) 109 ILTR 6; *Moran v Attorney General* [1976] IR 400; *Irish Family Planning Association v Ryan* [1979] IR 295; *State (Grahame) v Racing Board* High Court (O’Hanlon J) 22 November 1983. Conflicting with this line of authority are such decisions as *Memorex World Trade Corporation v Employment Appeals Tribunal* [1990] 2 IR 184 and *State (Collins) v Ruane* [1984] IR 151. See also the recent *dicta* of Denham J in *Stefan v Minister for Justice* [2002] 2 ILRM 134 where she considered in detail the various authorities on alternative remedies, commenting that “a fair appeal does not cure an unfair hearing”, implicitly endorsing the statement by Kelly J at first instance that “an insufficiency of fair procedures at first instance is not cured by a sufficiency on appeal”. (At 148).

¹⁶³ [1984] IR 381.

¹⁶⁴ [1999] 1 ILRM 376.

¹⁶⁵ Supreme Court 17 February 2000.

¹⁶⁶ *Ibid* at 7.

the merits and a review of the legality of a decision. In view of the fact that judicial review is the appropriate mechanism for controlling the legality of decisions made by administrative bodies and lower courts, it may be important to allow review to take place even where an alternative appeal procedure is open in order to ensure that confidence in the decision-making process is maintained. Hogan and Morgan suggest that such approach could offer the necessary potential for reconciliation between the divergent *dicta* of *Abenglen* and *P & F Sharpe*, commenting that “it may be that some consistency can be built upon a reasonable principle by considering, in the context of a given case and the alleged blemish, exactly how comprehensive and appropriate is the right of appeal which was provided”.¹⁶⁷

Recommendation

1.70 *The area of alternative remedies is a complex one, a fact reflected by the original confusion and divergence of dicta on the matter. From the case law, there would appear to be three lines of authority: the dicta of Henchy J in Abenglen might be seen as representing the high watermark of the law in this area, whilst the approach of Finlay CJ in P & F Sharpe might be seen as the opposite extreme. The Commission is of the opinion that the decision of O’Higgins CJ in Abenglen represents a fair middle ground in this area and we endorse the more recent trend of the courts in following the approach of O’Higgins CJ.*

¹⁶⁷ Hogan & Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 739.

CHAPTER 2 STATUTORY SCHEMES IN JUDICIAL REVIEW

Introduction

2.01 In this chapter, the focus will turn to specialised statutory schemes of judicial review, an area which has expanded considerably in recent times.¹ A preliminary question which should be addressed at this stage is the justification behind the elevation of certain matters of public law to the higher standard imposed by the various statutory schemes. On one view, the justification is squarely based on the particular character of the areas the subject of these schemes. Alternatively, it might be said that this is a question of policy upon which no comment should be made in this regard. However, it might also be suggested that there should be a heavy onus on the Oireachtas in deciding to raise certain areas to this elevated statutory standard, because of the potential distortion and fragmentation which may well be caused to the general scheme as a result.

¹ With the enactment and coming into force of the *Illegal Immigrants (Trafficking) Act 2000* and the *Planning and Development Act 2000*. The *Illegal Immigrants (Trafficking) Act 2000* came into force on 20 November 2000, whilst the *Planning and Development Act 2000* was fully commenced by 11 March 2002. It seems that such expansion is set to continue, with recent reports suggesting that the Office of the Director of Telecommunications Regulation is seeking the introduction of legislation elevating challenges to decisions of the Office of the Director to a statutory scheme of judicial review: “Telecoms regulator seeks further powers” *The Irish Times* 13 July 2002. See also the Report of the Office of the Director of Telecommunications Regulation *ODTR Response to Department of the Taoiseach Consultation “Towards Better Regulation”* (Document 0265 11 July 2002).

I. Requirement of Leave Stage

(a) *The present position*

2.02 While the test for obtaining leave to apply for conventional judicial review is that of establishing an “arguable case”, the Oireachtas has imposed the higher requirement in relation to certain areas,² that leave to bring judicial review proceedings should not be granted unless the High Court is satisfied that there are “substantial grounds” for contending that the impugned decision is invalid or ought to be quashed. Considering first whether the argument for retaining the leave stage (which is required to be on notice) is as strong in relation to statutory judicial review, the majority of the Working Group felt that there remained cogent reasons for the retention of the leave stage in statutory judicial. Some strong concern was expressed at the potential for “double hearings,” whereby the application for leave can last for two to three (or more) days, followed by a substantive hearing of much the same length. Nevertheless it was the general view of the Working Group that such concerns were subservient to the useful purpose served by the leave stage, in terms of filtering unmeritorious applications and also to the policy requirement of the protection of public bodies when subjected to certain types of challenge.

(b) *Recommendation*

2.03 *The Commission therefore recommends the retention of the leave stage in specialised (statutory) judicial review procedure.*

² Among the most commonly invoked provisions are s. 82(3B)(a)(ii) of the *Local Government (Planning and Development) Act 1963*, as amended, s. 50(4)(b) of the *Planning and Development Act 2000*, s. 43(5)(b)(ii) of the *Waste (Management) Act 1996* and s. 5(2)(b) of the *Illegal Immigrants Act 2000*. See also s. 55A(2)(b) of the *Roads Act 1993* (as amended by the *Roads (Amendment) Act 1998*), s. 12(2)(b) of the *Transport (Dublin Light Rail) Act 1996*, s. 13(3)(b) of the *Irish Takeover Panel Act 1997* and s. 73(2)(b) of the *Fisheries (Amendment) Act 1997*, s. 85(8) *Environmental Protection Agency Act 1992* and s. 78 *Housing Act 1966*.

II. Test of Substantial Grounds

(a) *The present position*

2.04 It would appear that the intention behind the introduction of the test of “substantial grounds” was to impose a stricter test for the grant of leave to apply for judicial review.³ The meaning of the test of “substantial grounds” has been interpreted in a number of decisions. One of the most frequently cited definitions of “substantial grounds” is that set out by Carroll J in *McNamara v An Bord Pleanála*:⁴

“What I have to consider is whether any of the grounds advanced by the appellant are substantial grounds for contending that the board’s decision was invalid. In order for a ground to be substantial, it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned with trying to ascertain what the eventual result would be. I believe that I should go no further than satisfy myself that the grounds are “substantial.” A ground that does not stand a chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial.”

2.05 More recently, the Supreme Court commenting on this test in *In re Article 26 and ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999*⁵ stated that the interpretation put forward by Carroll J was appropriate. The court concluded that the imposition of a requirement of “substantial grounds” in an application for leave to apply for judicial review was one which fell within the discretion of the legislature and was not so onerous, either in itself or in

³ *Jackson Way Properties Ltd v Minister for the Environment* High Court (Geoghegan J) 2 July 1999 (“stricter criteria”); *Kenny v An Bord Pleanála* High Court (McKechnie J) 15 December 2000 (“different and higher threshold”); *de Faoite v An Bord Pleanála* High Court (Laffoy J) 2 May 2000 (“higher threshold”).

⁴ [1995] 2 ILRM 125, 130. Also *Scott v An Bord Pleanála* [1995] 1 ILRM 424, 428, where Egan J stated: “[t]he words “substantial grounds” require that the grounds must be reasonable.”

⁵ [2000] IR 360, 395. This test was recently applied in *Zgnat’ev v Minister for Justice* High Court (Finnegan J) 29 March 2001.

conjunction with a fourteen day limitation period,⁶ as to infringe the constitutional right of access to the courts or the right to fair procedures.

2.06 Although a majority of the Working Group favoured the retention of the higher standard of “substantial grounds”, there were strong criticisms voiced about the usefulness of this standard bearing in mind the additional requirement under the statutory schemes that the application for leave be conducted on notice. It has been suggested that applying this higher standard at the *inter partes* leave application results in the leave stage in statutory judicial review duplicating the substantive hearing and that it must be asked whether there is any real distinction between the two hearings. In particular, it has been suggested that save with the possible exception of the impact of the discovery process, there may be very little difference in terms of the evidence before the court at the leave stage and the full hearing. Therefore it might be questioned whether any useful purpose is served by imposing the requirement of a leave stage in such cases.

2.07 This issue is closely allied to the problem of “double hearings”,⁷ which has been suggested results in inefficient use of court time. There are a number of reported cases in which the application for leave under statutory schemes resulted in a lengthy application for leave followed by a full hearing of the substantive application for judicial review.⁸ It has been suggested that the difficulties caused by the imposition of this higher standard are clear from such cases as *Kenny v An Bord Pleanála (No 1)*⁹ where

⁶ Imposed by s. 5(2) of the *Illegal Immigrants (Trafficking) Act 2000*.

⁷ See above at paragraph 2.02.

⁸ Examples of such cases include *McNamara v An Bord Pleanála* [1995] 2 ILRM 125; *Boland v An Bord Pleanála* [1996] 3 IR 435; *Keane v An Bord Pleanála* [1997] 1 ILRM 508; *Lancefort v An Bord Pleanála* [1999] 2 IR 270; *Seery v An Bord Pleanála* High Court (Finnegan J) 2 June 2000; *Stack v Kerry County Council* High Court (O’Neill J) 11 July 2000; *Village Residents Association Ltd v An Bord Pleanála* [2000] 1 IR 65; *Ashbourne Holdings Ltd v An Bord Pleanála* High Court (McCracken J) 23 March 2000. It should be noted that these cases constitute a representative sample only, as in some cases, the application for leave to apply for judicial review would have taken in excess of one day but the High Court judge may not have delivered a reserved judgment, and accordingly is not as easy to track.

⁹ [2001] 1 IR 565.

McKechnie J referred to the interpretation placed on the phrase “substantial grounds” in such decisions as *McNamara*, and noted:

“it seems to me that whilst obviously I should not attempt to resolve conflicts of fact or express any concluded view on complex questions of law or indeed anticipate the long term result, nonetheless within existing limitations, I should, I feel make some evaluation of the factual matrix and should, where with certainty I can, form some view of the appropriate statutory provisions and the relevant and material case law ... simply because matters of fact and law may be traversed again, if leave is granted, should not in any way take from, reduce or lessen the appropriate threshold”.¹⁰

2.08 As noted above, a majority of the Working Group 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. The Commission provisionally supports the view of the majority of the Working Group that the retention of the higher standard of “substantial grounds” is desirable. This is so particularly in the light of the recommendation¹¹ that the mandatory requirement in statutory judicial review proceedings that the leave stage be held on notice should be amended, so that the question of whether the application for leave is on notice to the respondent is a matter for the discretion of the High Court. Submissions are nevertheless invited on the extent of the difficulties caused by the phenomenon of “double hearings” and in relation to the recommendation of the retention of the higher standard in applications for leave under the statutory schemes, in order to determine the extent of difficulties caused by this issue.

(b) Recommendation

2.09 *The Commission is satisfied that the higher standard of “substantial grounds” is justifiable in the context of specialised*

¹⁰ [2001] 1 IR 565, 572-573.

¹¹ See below at paragraph 2.12.

statutory schemes in light of the subject matter of challenges undertaken pursuant to these schemes and it is therefore recommended that there be no alteration to this test. However, concern was expressed at the potential for discrepancies in the application of this test and the Commission accepts that it is essential that there be consistency in the interpretation and application of the test of “substantial grounds.”

III. Conducting the Leave Stage On Notice in Statutory Schemes

(a) The present position

2.10 It should also be noted that certain types of judicial review applications governed by statute are required to be on notice to other parties. For instance, applications brought pursuant to s. 5(2) of the *Illegal Immigrants (Trafficking) Act 2000* are required to be brought on notice to the Minister for Justice and any other person specified by order of the High Court.¹² In *P. v Minister for Justice, Equality and Law Reform*¹³ in considering an application for judicial review brought pursuant to s. 5 of the 2000 Act, which provides that leave shall not be granted unless there are “substantial grounds” for contending that the decision ought to be quashed, Smyth J stated that he was “not satisfied that such a low standard is appropriate on an *inter partes* hearing”.¹⁴ In so holding, Smyth J referred to the views expressed by Kelly J in *Gorman v Minister for Environment*¹⁵ as

¹² See also s. 82(3B)(a)(ii) of the *Local Government (Planning and Development) Act 1963* (inserted by s. 19 of the *Local Government (Planning and Development) Act 1992*), s. 50(4)(b) of the *Planning and Development Act 2000* which requires applications for leave to be made on notice to An Bord Pleanála and each other party to the appeal or reference (see *McCarthy v An Bord Pleanála* [2000] 1 IR 42 and *Murray v An Bord Pleanála* [2000] 1 IR 58). In addition, see the provisions of s. 43(5)(b)(ii) of the *Waste Management Act 1996*, s. 55A(2)(b) of the *Roads Act 1993* as amended, s. 12(2)(b) of the *Transport (Dublin Light Rail) Act 1996*, s. 13(3)(b) of the *Irish Takeover Panel Act 1997* and s. 73 (2)(b) of the *Fisheries (Amendment) Act 1997*. There are only two specialised statutory schemes of judicial review in which such applications are not required to be on notice: s. 85(8) of the *Environmental Protection Agency Act 1992*, and s. 78 of the *Housing Act 1966*.

¹³ [2002] 1 ILRM 16.

¹⁴ [2002] 1 ILRM 16, 21.

¹⁵ High Court (Kelly J) 7 December 2000.

relevant to cases decided pursuant to the legislation. In dismissing the applicants' appeal, Hardiman J speaking for the Supreme Court focused on the "substantial grounds" standard imposed in order to obtain leave pursuant to s. 5. He said that for the purpose of the case before him, he had not found it necessary to consider whether any more onerous standard was required by that phrase and he decided not to express any view on the findings made by the trial judge in relation to this question.

2.11 It is thus clear that there remains some doubt as to the approach of the court in relation to the conduct of the leave stage on notice. Although the Working Group accepted that putting the respondent (and occasionally other interested parties) on notice at the leave stage could be beneficial in certain circumstances,¹⁶ there was also a consensus that this procedure should not be mandatory. In certain circumstances, there is little benefit to be derived from conducting the leave stage on notice and the procedure may often serve to prolong the hearing of the application for leave, increasing costs and effectively amounting to a duplication of the substantive hearing. This is undesirable in the context of already limited resources.

(b) Recommendation

2.12 *The Commission recommends that conducting the application for leave on notice under the various statutory schemes should be a discretionary matter only and that such discretion should be exercised only in exceptional cases. Legislative amendment will be required to give effect to this proposal.*

IV. Time Limits

(a) The present position

2.13 One of the most notable aspects of specialised statutory schemes is the imposition of specific time limits for the institution of proceedings for judicial review pursuant to the applicable statutory

¹⁶ Where for example the application for leave was also accompanied by a tandem application for a stay.

provision.¹⁷ The most frequently invoked of these provisions relate to decisions in planning matters and immigration. S. 82(3B)(a)(i) of the *Local Government (Planning and Development) Act 1963* laid down a two month time limit for bringing an application for judicial review of a decision of a planning authority or of An Bord Pleanála commencing on the date on which the decision is given. This provision is now modified by s. 50(4) of the *Planning and Development Act 2000* which applies to a decision of a planning authority on an application for permission or to proceed with a proposed local authority development or to a decision of An Bord Pleanála in a range of areas. S. 50(4)(a) lays down an eight week time period, commencing on the date of the decision in the case of an application for permission. An important innovation is contained in s. 50(4)(a)(iii) of the *Planning and Development Act 2000* which empowers the High Court to extend the eight week period prescribed for the bringing of judicial review proceedings, although it provides that the High Court shall not do so “unless it considers that there is good and sufficient reason for doing so.”

2.14 Provision has also been made in s. 5(2)(a) of the *Illegal Immigrants (Trafficking) Act 2000* for a time limit which should not be extended unless there is “good and sufficient” reason for doing so, although the period specified is only 14 days as opposed to eight weeks. As noted above, the constitutionality of this provision was upheld by the Supreme Court in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999*.¹⁸

2.15 The question of time limits imposed by statute in the context of judicial review was considered by Costello J in *Brady v Donegal County Council*.¹⁹ Costello J began by recognising that the intention of the Oireachtas in imposing such time limits by statute was to

¹⁷ See eg s. 85(8) of the *Environmental Protection Agency Act 1992* (two months); s. 55A(2)(b) of the *Roads Act 1993* as amended (two months); s. 43(5)(b) of the *Waste Management Act 1996* (two months); s. 12(2)(a) of the *Transport (Dublin Light Rail) Act 1996* (two months); s. 13(3)(a) of the *Irish Takeover Panel Act 1997* (seven days); s. 73(2)(a) of the *Fisheries (Amendment) Act 1997* (three months) and s. 5(2)(a) of the *Illegal Immigrants (Trafficking) Act 2000* (14 days).

¹⁸ [2000] 2 IR 360, 388-391.

¹⁹ [1989] ILRM 282. The particular time limits in question were those imposed by s. 82(3A) of the *Local Government (Planning and Development) Act 1963*.

balance competing interests, for example the requirements of the common good as against the interests of holders of constitutionally entrenched rights. He went on to state:

“The public interest in (a) the establishment at an early date of certainty in the development decisions of planning authorities and (b) the avoidance of unnecessary costs and wasteful appeals procedures is obviously a very real one and could well justify the imposition of stringent time limits for the institution of court proceedings.”²⁰

2.16 However, Costello J stressed the importance of the fact that any such time limits should not amount to an unreasonable and unjustifiable restriction on the exercise of a plaintiff’s constitutional rights. On appeal, the Supreme Court referred the matter back to the High Court, as the issue of the unconstitutionality of the statute was dependant on the establishment of specific facts on which Costello J had made no finding. *Brady* therefore remains an authority at the High Court level only.

2.17 The constitutionality of the time limits imposed by s. 82(3A) and (3B) of the *Local Government (Planning & Development) Act 1963* (as amended) was considered more recently in *White v Dublin Corporation*.²¹ Having conducted an extensive review of relevant case law, including such decisions as *Brady v Donegal County Council*,²² *Cahill v Sutton*,²³ and *Tuohy v Courtney*,²⁴ Ó Caoimh J concluded that the applicants’ ignorance of their rights during the short limitation period imposed by s. 82(3A) and (3B) was caused by the first respondent’s own wrong doing and the fact that the law still imposed an absolute time bar without facility for extension would consequently require very compelling reasons in order to justify it. The test as formulated by Ó Caoimh J in this instance was:

“Whether the decision of the Oireachtas to legislate in the manner in question without the saving clause contended for on

²⁰ [1989] ILRM 282, 289.

²¹ High Court (Ó Caoimh J) 21 June 2002.

²² [1989] ILRM 282.

²³ [1980] IR 269.

²⁴ [1994] 3 IR 1.

the part of the applicants was irrational such as to require this Court to strike down the impugned provision, where the failure of the applicants to bring the proceedings in question was one where the essential blame lies with the planning authority”.²⁵

2.18 Ó Caoimh J described the issue in this case as being one of whether the balance in the impugned provision was so contrary to reason and fairness as to constitute an unjust attack on an individual’s constitutional rights, an issue to be determined from an objective stance. Ó Caoimh J concluded that he was satisfied in the instant case that the limitation period concerned, in the absence of any saver, was so restrictive as to render access to the courts impossible for persons in the position of the applicants. As such, it must be considered unreasonable and therefore unconstitutional. While he accepted that the imposition of limitation periods will inevitably engender some element of hardship, the extent and nature of such hardship in the instant case was so undue and unreasonable having regard to the objectives of the legislation as to make it constitutionally flawed. Ó Caoimh J concluded that the decision of the Oireachtas in enacting the impugned provision was a decision which could not be supported by just and reasonable policy decisions.²⁶

2.19 Another recent consideration of time limits in statutory schemes, specifically those imposed in relation to immigration matters, is to be found in what the Supreme Court said in *In re Article 26 and ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999*.²⁷

2.20 Counsel assigned by the court to argue against the constitutionality of ss. 5 and 10 in the *Illegal Immigrants (Trafficking)*

²⁵ High Court (Ó Caoimh J) 21 June 2002 at 45.

²⁶ It should be noted that the significance of this decision is somewhat diluted in that the time limits prescribed in the *Planning and Development Act 2000* permit extension of time. However, the 2000 Act is not of universal application to all planning matters and there are also other statutory schemes in operation which contain absolute time limits, such as s. 78 of the *Housing Act 1966*, s. 85(8) of the *Environmental Agency Protection Act 1992*, s. 43(5) of the *Waste Management Act 1996* and s. 73 of the *Fisheries (Amendment) Act 1997*.

²⁷ [2000] 2 IR 360.

Bill reference, raised the argument that the 14 day time limit²⁸ was so unrealistic that a very large number, perhaps even a majority of applications would have to be brought outside the prescribed time limit, thus requiring an application for extension of time. Although the Court held that this was not a valid basis for assessing the efficacy or validity of the provision,²⁹ it would appear that counsel's concerns in this regard were justified. Anecdotal evidence suggests that there are a large number of applications for extension of time pursuant to s. 5(2)(a) of the *Illegal Immigrants (Trafficking) Act 2000* coming before the High Court and inevitably many of those applications result in appeals to the Supreme Court.³⁰

2.21 The decision of Costello J in *Brady* was also considered by the Supreme Court in the *Illegal Immigrants (Trafficking) Bill* reference. The court concluded that the requirement to proceed by way of judicial review within a limited period served the legitimate public policy objective of seeking to bring about, at an early stage, legal certainty as regards administrative decisions; and also that the 14 day limit for instituting judicial review proceedings, when considered in conjunction with the discretion of the High Court to extend the time period for good and sufficient reason was sufficiently wide to avoid injustice.³¹ Thus, it was concluded that:

“The Court is satisfied that the discretion of the High Court to extend the fourteen day period is sufficiently wide to enable persons who, having regard to all the circumstances of the case...have shown reasonable diligence, to have sufficient access to the Courts for the purpose of seeking judicial review in accordance with their constitutional rights. The Court does not therefore consider the limitation period to be unreasonable

²⁸ Prescribed by s. 5(2)(a) of the *Illegal Immigrants (Trafficking) Act 2000*.

²⁹ As Keane CJ stated at 390: “[w]hether a large number or even a majority of persons seeing leave to apply for judicial review will find it necessary also to apply for an extension of time is a matter for speculation. In any event, such a mathematical approach is not a basis on which to assess the validity or efficacy of such a provision.”

³⁰ As is clear from the decision of the Supreme Court in *B v Governor of the Training Unit, Glengarrif Parade Dublin and Minister for Justice, Equality and Law Reform* [2002] 2 ILRM 161 considered below.

³¹ [2000] 2 IR 360, 390-391.

as such and its repugnancy to the Constitution has not been established.”³²

2.22 Another question arising under the *Illegal Immigrants (Trafficking) Act 2000* concerns the criteria to which the courts should have regard when assessing whether there is “good and sufficient reason” to extend time.³³ The Supreme Court in *GK v Minister for Justice*³⁴ recently considered this issue. It was held that, in relation to a decision governed by the provisions of s. 5 of the *Illegal Immigrants (Trafficking) Act 2000* in deciding 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. It may be argued that this test is unduly restrictive, and also in contravention of a well established line of authority on the principles applicable to extension of time in conventional judicial review proceedings.³⁵

2.23 In the context of such short time limits, concerns have also been raised by a recent decision of the Supreme Court, *B v Governor of the Training Unit, Glengarrif Parade Dublin and Minister for Justice, Equality and Law Reform*.³⁶ The Court began by acknowledging that the policy underlying the *Illegal Immigrants (Trafficking) Act 2000* was the “speedy resolution of disputes under the aliens and refugee legislation”.³⁷ However, it went on to apply the well-established principle that exceptions to or regulation of the Supreme Court’s appellate jurisdiction must be clear and unambiguous to close the door to appeals to that court without the leave of the High Court against the refusal to extend time for the bringing of an application for judicial review in relation to a decision

³² [2000] 2 IR 360, 394.

³³ The power to extend time on the basis of such “good and sufficient reason” is laid down in s. 5(2)(a) of the *Illegal Immigrants (Trafficking) Act 2000*.

³⁴ [2002] 1 ILRM 401.

³⁵ *De Roiste v Minister for Defence* [2001] 1 IR 190; *O’Donnell v Dun Laoghaire Corporation* [1991] ILRM 301; *Connors v Delap* [1989] ILRM 93; *White v Hussey* [1989] ILRM 109; *Solan v Director of Public Prosecutions* [1989] ILRM 491. For a discussion of the relevant principles, see Chapter 1 at 1.38-1.52.

³⁶ [2002] 2 ILRM 161.

³⁷ *Ibid* at 175.

governed by the provisions of the *Illegal Immigrants (Trafficking) Act 2000*. Thus, the decision in *B* establishes that a refusal of an extension of time may be appealed to the Supreme Court, a decision that is arguably contrary to the policy of the Act.³⁸ That policy was described by that Court in the *Illegal Immigrants (Trafficking) Bill* decision as follows:

“[the] well established public policy objective that administrative decisions, particularly those taken pursuant to detailed procedures laid down by law, should be capable of being applied or implemented with certainty at as early a date as possible and that any issue as to their validity should accordingly be determined as soon as possible... Furthermore, it may be inferred from the Bill and the surrounding circumstances that the early establishment of the certainty of the decisions in question is necessary in the interests of the proper management and treatment of persons seeking asylum or refugee status in this country. The early implementation of decisions duly and properly taken would facilitate the better and proper administration of the system governing seekers of asylum for both those who are ultimately successful and ultimately unsuccessful.”³⁹

2.24 However, the fact remains that the decision in *B* will almost inevitably result in the Supreme Court’s time being taken up in hearing appeals against a refusal to extend the time for seeking judicial review in cases of this nature.

2.25 The Working Group agreed that there are a number of matters of concern in the context of time limits in statutory schemes of judicial review, particularly in relation to the *Illegal Immigrants (Trafficking) Act 2000*. These include concerns of limited resources being over-stretched by the need for large numbers of applications for extension of time in the context of such restrictive time constraints, further exacerbated by the apparently unfettered right of appeal to the Supreme Court from refusals of the High Court to extend time.

³⁸ Although Geoghegan J was careful to state in the course of his judgment that the existence of an automatic right of appeal against refusal of extension of time is not “necessarily against the policy of the Act”: [2002] 2 ILRM 161, 179.

³⁹ [2000] 2 IR 360, 392.

Concern has also been expressed that decisions allowing extension of time in the context of the *Illegal Immigrants (Trafficking) Act 2000* may be used to open the door to extensions under other schemes, such as the planning legislation, where extensions are less justifiable on policy grounds. As against this, however, it should be noted that with the *Illegal Immigrants (Trafficking) Act 2000* in operation only a relatively short time, any evaluation of its operation would as yet be premature. It has also been suggested that the number of applicants who meet the 14 day time limit currently stands at approximately 80%; this figure clearly answers some of the concerns that the time limits were too onerous for applicants to meet.

2.26 The Commission considered the possibility of recommending that the time limit in s. 5(2)(a) of the 2000 Act be extended to a period of either one or two months. The perceived benefit of recommending a two month time limit in immigration matters would be to achieve uniformity with other statutory time limits, such as that imposed by the *Planning and Development Act 2000*. Ultimately, however, it was concluded that a two month time limit would not strike the correct balance between the various competing considerations, and could operate to frustrate the clear policy objectives underlying the *Illegal Immigrants (Trafficking) Act 2000*.⁴⁰

2.27 The Commission accepts that the present 14 day time limit in immigration matters may cause some difficulties for practitioners. However, when the matter was discussed with the Working Group, anecdotal evidence suggested that a large majority of applications met the 14 day time limit.⁴¹ On this basis, it was accepted by the Commission that there is no justification for extending the time limits presently set out in the *Illegal Immigrants (Trafficking) Act 2000*.

⁴⁰ This conclusion is further substantiated by recent reports of forthcoming changes in immigration control measures, such as the proposal to require asylum-seekers to make claims for refugee status at the point of entry to the State; see Haughey “Tighter Controls on Would-be Refugees Signalled” *Irish Times* 11 December 2002.

⁴¹ It should be noted that comprehensive statistics were not available to substantiate this estimate. The Commission hopes to obtain a full statistical analysis from all relevant agencies for use in the final report on Judicial Review Procedure.

(b) Recommendation

2.28 *The Commission is satisfied that the 14 day time limit prescribed by s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000 achieves the necessary balance between the rights of applicants and the policy concerns of the Legislature. The Commission therefore recommends no change to the present regime of time limits in judicial review of immigration matters.*

V. Amendments to the Grant of Leave

(a) The present position

2.29 Order 84 rule 23(1) of the Rules of the Superior Courts 1986 provides that subject to rule 23(2) no grounds shall be relied on or any relief sought at the hearing except grounds and relief set out in the statement in support of the application for judicial review. Rule 23(2) then goes on to provide that on the hearing of the motion or summons, the court may allow the applicant or 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.

2.30 As Kelly J commented in *O’Leary v Minister for Transport*⁴² the test for an application to amend the grounds for seeking judicial review is “much more stringent” than that applicable to amending pleadings generally pursuant to Order 28 rule 1.⁴³ The circumstances in which the High Court would allow a grounding statement to be amended in conventional judicial review proceedings were considered by Costello P in *McCormack v Garda Síochána Complaints Board*⁴⁴ in which the applicant sought an order amending the statement grounding his application for judicial review by adding additional grounds of relief. Costello P decided to allow the amendment sought in the circumstances but laid down the following general principle:

⁴² [2000] 1 ILRM 391, 398.

⁴³ Kelly J held that notwithstanding the delivery of a statement of claim the proceedings before him retained the character of judicial review proceedings. However, on appeal the Supreme Court held that the application to amend fell to be considered pursuant to Order 28 rule 1 and granted the relief sought by the applicant (see [2001] 1 ILRM 132).

⁴⁴ [1997] 2 IR 489.

“It seems to me that only in exceptional circumstances would liberty to amend a grounding statement be made because the court’s jurisdiction to entertain the application is based on and limited by the order granting leave. But when facts come to light which could not be known at the time leave was obtained and when the amendment would not prejudice the respondents, then it seems a proper exercise of the court’s power of amendment to permit the amendment rather than require that the new ‘grounds’ be litigated in fresh proceedings.”⁴⁵

2.31 Similarly it was accepted in *Twomey v Minister for Tourism and Transport*⁴⁶ that due to the “very special circumstances” of the case, the applicant should be permitted to amend his motion before the Supreme Court pursuant to rule 23(2) by specifying an additional ground of relief.

2.32 While some doubt remains about whether the exceptional circumstances test set out in *McCormack* is too strict,⁴⁷ a further question which arises in the context of an application to amend a statement of grounds is what, if any, time constraints should apply. The courts do not appear to tolerate unacceptable delay in bringing an application to amend a statement of grounds and there is some *dicta* to suggest that similar time constraints to those which apply in respect of an application seeking leave may be imposed. In *Toner v Ireland*⁴⁸ Kinlen J made it clear that amendments under rule 23(2) should not be allowed unless the applicant can justify the delay in seeking to introduce new material. He referred to the decision of the Supreme Court in *Molloy v Governor of Limerick Prison*⁴⁹ and stressed that “it was held that a statement of grounds could be amended subject to the

⁴⁵ [1997] 2 IR 489, 503-504. See also *O’Leary v Minister for Transport* [2000] 1 ILRM 391; *Dooner v Garda Síochána Complaints Board* High Court (Finnegan J) 2 June 2000.

⁴⁶ Supreme Court 12 February 1993.

⁴⁷ The test set out by Costello P in *McCormack* has been criticised by Hogan and Morgan in *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 705 on the basis that it seems to be too strict and they correctly point out that the Rules themselves “expressly envisage that the grounding statement can be amended”.

⁴⁸ High Court (Kinlen J) 11 February 2000.

⁴⁹ Supreme Court 12 July 1991.

applicant discharging the same onus as an applicant for leave under Order 84 – ie the time limit of six months referred to above applies unless the applicant can justify a departure from it.”

2.33 Subsequently in *Aquatechnologie Ltd v National Standards Authority of Ireland*⁵⁰ Murray J held, in deciding to grant the application for leave to amend the statement of grounds, that the proposed amendments did not extend the ambit of the proceedings in a significant manner and that the delay was excusable. The respondents had opposed the application submitting that the plaintiff had failed to bring his action promptly, was out of time and had failed to explain or excuse the delay. Murray J stated that if the appellant knew or ought to have known of the alleged decision which prompted it to seek to amend its grounds on service of an affidavit,⁵¹ it was out of time for the making of its application by a short period.

2.34 However, he stated that having regard to all the circumstances of the case, the delay was excusable and the Supreme Court granted the application for leave to amend the statement of grounds.

2.35 While it would seem that Murray J was not advocating that the requirements as to time limits laid down in Order 84 rule 21 should be strictly adhered to by analogy in bringing an application to amend a statement of grounds,⁵² it could equally be argued that he was in favour of applying similar requirements to those contained in rule 21 which provide that an extension may be granted for “good reason”.

⁵⁰ Supreme Court 10 July 2000.

⁵¹ This referred to a decision by the Minister for the Environment to deem certain materials imported by the applicant as not constituting “proper materials” for the purposes of the Building Control Regulations 1991, which had repercussions on the potential for obtaining a grant (in respect of houses built with those materials) pursuant to the *Housing (Miscellaneous Provisions) Act 1979*. The respondents alleged that the applicants should have been aware of the decision to deem the materials as falling outside the scope of “proper materials”, from an affidavit filed on behalf of the respondent on 31 August 1998 and 14 December 1998. The application for leave to amend was made by motion dated 15 March 1999.

⁵² That is to say that the time limit of three months in respect of prohibition, *mandamus*, *quo warranto*, declaration and injunction, and six months in respect of *certiorari*. Murray J was referring to the possibility that in deciding an application for leave to amend a statement of grounds, the Court might have regard to the time limits of three or six months as stipulated in Order 84 rule 21.

Because of this element of flexibility built into the provisions of rule 21 it is difficult to make comparisons between the case law in relation to conventional judicial review and the decisions concerning the statutory schemes which apart from a few exceptions⁵³ do not allow for extension of time.

2.36 A recent consideration of the circumstances in which such applications will be allowed and the issue of time limits in this context, is to be found in the decision of Keane CJ in *Ó Síodhacháin v Ireland*.⁵⁴ The applicant had been refused leave to amend his statement of grounds by the High Court and appealed against this refusal. Noting that the respondent had conceded that the proposed amendments did not cause “the slightest degree of prejudice to the respondents and they [did] not represent any significant or serious enlargement or change of the applicant’s case”, Keane CJ suggested that this seemed “an entirely appropriate case in which the High Court should have amended the grounds.”⁵⁵ Indeed, the only reason the Court could ascertain for the refusal of the High Court to grant leave to amend was a delay in bringing the application. While Keane CJ noted that there were undoubtedly time limits in relation to judicial review and that it was most important that they be observed, he concluded that “the actual chronology of events ... [did] not suggest that there was any great delay”.⁵⁶ In the view of the Chief Justice, 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, in my view, should be granted, and should have been granted in the High Court.”⁵⁷

2.37 In a number of decisions the courts have considered whether grounds of review could be amended in applications brought pursuant

⁵³ See s. 50(4) of the *Planning and Development Act 2000* and s. 5(2) of the *Illegal Immigrants (Trafficking) Act 2000*.

⁵⁴ Supreme Court (*ex tempore*) 12 February 2002.

⁵⁵ *Ibid* at 4.

⁵⁶ *Ibid*. The actual chronology was as follows: the order granting leave to apply for judicial review had been granted on 24 October 2000 and the notice of motion was issued on 11 November 2000. There were a number of adjournments to allow the respondent to reply and the notice of opposition was filed on 16 February 2001. The application for leave to amend was made on 3 April 2000, a few weeks later.

⁵⁷ *Ibid* at 4.

to s. 82(3B) of the *Local Government (Planning and Development) Act 1963* which laid down a two month time limit for bringing judicial review applications.⁵⁸ The question of whether an applicant can expand the grounds of challenge beyond this statutory time limit was subsequently answered in the negative by Murphy J in *Keane v An Bord Pleanála*.⁵⁹ In this case he stated that while the time limit was an extraordinarily brief one within which to bring proceedings, “to permit an amendment at a later stage, however well founded the new ground might appear to be, [seemed] to be impermissible”. Similarly in *McNamara v An Bord Pleanála*⁶⁰ Barr J rejected the submission put forward on behalf of the applicant that additional grounds of challenge not previously notified might be introduced after the statutory time limit had expired. Instead he interpreted the legislation to mean that “not only must [the applicant] initiate proceedings and specify the relief claimed within the two month time limit, but when so doing, he must also specify the grounds on which the relief is sought”.⁶¹

2.38 A further example of this approach is the decision in *Ní Eilí v Environmental Protection Authority*.⁶² Leave to amend the grounds on which an application for judicial review was sought outside the statutory time limit⁶³ and was refused, albeit in circumstances where the amendment sought amounted to “an additional and entirely new case”. Kelly J concluded that the applicant could not expand her challenge by seeking new reliefs on new grounds outside the statutory time limit. In his view “[t]o allow such a thing to occur would run

⁵⁸ As Finlay CJ stated in *KSK Enterprises Ltd v An Bord Pleanála* [1994] 2 IR 128, 135: “The general scheme of the subsection ... is very firmly and strictly to confine the possibility of judicial review in challenging or impugning a planning decision”.

⁵⁹ High Court 23 May 1995.

⁶⁰ [1996] 2 ILRM 339.

⁶¹ *Ibid* at 351. However, Barr J accepted that the applicant was not precluded from introducing evidence after the expiration of the two month time limit to support or amplify the grounds he was relying on, provided these were specified in the original documentation which had been served on all relevant parties within time.

⁶² [1997] 2 ILRM 458.

⁶³ Two months pursuant to s. 85(8) of the *Environmental Protection Agency Act 1992*.

counter to the statute, negative its intent, and in effect permit of no time bar at all in respect of the additional reliefs sought".⁶⁴

2.39 Given that s. 50(4)(a)(iii) of the *Planning and Development Act 2000* empowers the High Court to extend the eight week period prescribed for the bringing of judicial review proceedings in relation to specified types of planning decisions where there are good and sufficient reasons for doing so, there is now arguably greater scope for flexibility if the time limit is to be applied by analogy to applications to amend a statement of grounds.⁶⁵ However, it must be asked whether it is preferable to retain a strict approach in this area.

2.40 A number of conflicting points must be weighed up. The arguments which support strict adherence to time limits for the bringing of judicial review proceedings under the statutory schemes apply with equal force to applications to amend a statement of grounds. However, a case may be made that a very strict attitude to amendment may potentially cause injustice, eg where issues arise on discovery or that it may lead to a tendency on the part of counsel to plead a case with prolixity. In a general sense, the view expressed by Kelly J in *Ni Éilí*⁶⁶ that no amendment should be permitted where it amounts to an entirely new case is a compelling one and arguably should apply irrespective of the type of proceedings and the expedition with which the application to amend is made. However, it would appear to be accepted, certainly in conventional judicial review proceedings, that where material on which the amendment sought is based was not available or could not have been discovered with reasonable diligence at the time, amendments should be allowed

⁶⁴ [1997] 2 ILRM 458, 466.

⁶⁵ It should be noted that the rationale put forward for refusing amendments outside the two month time limit under the planning legislation does not apply to the *Environmental Protection Agency Act 1992*. The 1992 Act simply requires that proceedings be instituted within two months: there is no requirement to move by way of judicial review and accordingly, it would be sufficient compliance to issue a plenary summons within the two months. It would not be necessary even to serve the plenary summons within the two months, still less to serve a statement of claim. Accordingly, it would appear that it is not the case that simply because an applicant under the *Environmental Protection Agency Act 1992* has voluntarily chosen to proceed by way of judicial review, he must be required to plead his full case within the two months without any possibility of amendment.

⁶⁶ [1997] 2 ILRM 458.

provided there is no unacceptable delay in making the application. The question is whether a similar approach should be adopted in relation to applications made under the statutory schemes even where the time limit for bringing the initial application has expired.⁶⁷ While it is accepted that the need for finality and certainty is even greater in such cases, the potential for injustice remains if objectively justifiable amendments are refused and it is suggested that in exceptional circumstances they should be allowed, provided they meet the test of being based on material which was not available or could not have been discovered with reasonable diligence at the time.

(b) Recommendation

2.41 *It is therefore recommended that amendments should be permitted to the grant of leave, in both conventional judicial review proceedings and specialised statutory schemes, where the material on which it is based was not or could not have been discovered with reasonable diligence at the time, provided that there is no unacceptable delay in making the application.*

VI. Appeal Against Refusal to Grant Leave

(a) The present position

2.42 The issue of appeals against a refusal to grant leave applies equally to proceedings under conventional judicial review and specialised statutory schemes and having considered the various issues arising at the leave stage in both conventional and statutory schemes above, it is now appropriate to consider this issue. Where leave to apply for judicial review is refused by the High Court, an applicant may appeal on an *ex parte* basis within four days from the date of such refusal or within such enlarged time as the Supreme Court might allow.⁶⁸ It would appear that the Supreme Court will be

⁶⁷ It should be borne in mind that the most frequently invoked statutory schemes, namely those in the areas of planning law and immigration, now provide for an extension of time for good and sufficient reason and the case law set out above must be read in light of this.

⁶⁸ Order 58 rule 13 of the Rules of the Superior Courts 1986. Note that Order 84 rule 23(2) provides that the court may allow the applicant to amend his statement of grounds at the hearing of the motion or summons, so even if leave is refused in respect of certain grounds, application may subsequently be made to add to them.

reluctant to rule out an applicant's claim at this *ex parte* stage if he has an arguable case. In *O'Neill v Iarnrod Eireann*⁶⁹ the Supreme Court allowed an appeal against the decision of the High Court refusing leave to apply for judicial review on the basis that "it would not appear to be correct to cut out the applicant from his opportunity to pursue a relief by way of judicial review and at least to argue at the hearing of such application his right to proceed in this manner",⁷⁰ although the members of the Supreme Court clearly had misgivings about whether judicial review properly lay in this case, given the ostensibly contractual nature of the relationship between the parties. Nevertheless, the purely supervisory role of judicial review must be also borne in mind and as Murphy J has recently commented in *Devlin v Minister for Arts, Culture and the Gaeltacht*⁷¹ "it would be regrettable if this procedure, which achieved so much good, was to be invoked unnecessarily or in such a way as to delay or defeat the proper exercise of administrative powers."⁷²

2.43 One issue of concern is the fact that in certain specified circumstances no appeal shall lie to the Supreme Court in respect of a determination of the High Court on an application for leave save with the leave of the High Court. Difficulties arise by reason of the fact that leave to appeal will only be granted where the High Court itself certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that such appeal be taken. This type of provision is to be found in the various statutory schemes of judicial review; for example, s. 50(4)(f) of the *Planning and Development Act 2000* provides:

"...no appeal shall lie from the decision of the High Court to the Supreme ...except with the leave of the High Court, which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public

⁶⁹ [1991] ILRM 129. See also *Arnold v Windle* Supreme Court 4 March 1999.

⁷⁰ *Ibid* at 131 *per* Finlay CJ.

⁷¹ [1999] 1 IR 47, 58.

⁷² Note that Bradley has commented in *Judicial Review* (Round Hall Sweet & Maxwell 2000) at 222 that "[t]o date there is no evidence of either an express or implicit judicial policy to manage the judicial review case-load by adopting a restrictive approach at the leave stage."

importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.”⁷³

2.44 In *Irish Asphalt Ltd v An Bord Pleanála*⁷⁴ it was held that the High Court alone has power to issue such a certificate and that accordingly the Supreme Court has no jurisdiction to hear an appeal from a refusal to grant such certificate. The Supreme Court held that s. 82(3B)(b)(i) of the *Local Government (Planning and Development) Act 1963* (as amended by s. 19(3) of the *Local Government (Planning and Development) Act 1992*)⁷⁵ represented an exception to the Supreme Court’s appellate jurisdiction within the meaning of Article 34.4.3° of the Constitution. It was further held that the subsection, having excepted those cases from the appellate jurisdiction, goes on to create “an exception to this exception”.⁷⁶ the High Court may allow an appeal if the case involves a point of law of exceptional public importance and it is in the public interest that an appeal should be taken to the Supreme Court.

2.45 It was confirmed in *Irish Hardware Ltd v An Bord Pleanála*⁷⁷ that the effect of s. 82(3B)(b)(i) of the 1963 Act as amended, was to

⁷³ Other provisions restricting the right of appeal from the High Court on refusal to grant leave include s. 82(3B)(b)(i) of the *Local Government (Planning and Development) Act 1963*, s. 5(3)(a) of the *Illegal Immigrants (Trafficking) Act 2000* (which deals with applications for judicial review in respect of orders made regarding non-nationals pursuant to, *inter alia*, the *Refugee Act 1996* and the *Immigration Act 1999*). See also s. 55A(4)(a) of the *Roads Act 1993*, s. 43(5)(c)(i) of the *Waste Management Act 1996*, s. 12(4)(a) of the *Transport (Dublin Light Rail) Act 1996*, s. 13(6) of the *Irish Takeover Panel Act 1997* and s. 73(3) of the *Fisheries (Amendment) Act 1997*.

⁷⁴ [1996] 2 IR 179.

⁷⁵ This provision provides:

“The determination of the High Court of an application for leave to apply for judicial review as aforesaid or of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case save with the leave of the High Court which leave shall only be granted 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.”

⁷⁶ *Ibid* at 185 *per* Barrington J.

⁷⁷ [2001] 2 ILRM 291.

empower the High Court to grant leave to appeal by way of a certificate, which certificate can only be granted by the High Court. Rejecting the invitation to overrule the decision in *Irish Asphalt*, Keane CJ speaking for the court, concluded in relation to s. 82(3B)(b)(i) of the *Local Government (Planning and Development) Act 1963* (as amended by s. 19(3) of the *Local Government (Planning and Development) Act 1992*):

“The words 'shall *only* be granted where the *High Court* certifies ...' make it clear beyond doubt that the Oireachtas envisaged that it was the High Court, and that court alone, which was to grant leave for an appeal and then only where it issued a certificate in the terms of the section.”⁷⁸

2.46 This situation has given rise to a number of concerns. It has been suggested that the Supreme Court’s interpretation of the “exception to the exception” principle is artificial and also that any exclusion of appellate jurisdiction should only be effected by express language, not by reference to an implied objective.⁷⁹ Further difficulties become evident when this principle is considered in conjunction with the onerous test which an applicant must comply with to the satisfaction of the High Court in order to obtain a certificate, namely: the cumulative requirements of establishing 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.

2.47 A majority of the Working Group was of the opinion that the onus to be met by the applicant is too high under the present regime and that it should be possible to achieve a more balanced approach, although it was also recognised that any such approach must be carefully regulated, as the possibility of an open door policy in such matters would be particularly susceptible to abuse. It was suggested that many of the difficulties in the area were caused by the Supreme Court’s application of the practice of the Court of Criminal Appeal by

⁷⁸ [2001] 1 ILRM 291, 298.

⁷⁹ Although in *Irish Asphalt Ltd v An Bord Pleanála* [1997] 1 ILRM 81, 83, Barrington J accepted the application of the *dicta* of the Court in *People (Attorney General) v Conmey* [1975] IR 341 and *Hanafin v Minister for the Environment* [1996] 2 IR 321, that exceptions to the appellate jurisdiction of the Supreme Court by legislation should be effected by “clear and unambiguous” law.

analogy,⁸⁰ that where leave is granted on one ground, the applicant is allowed to later at the hearing of the appeal argue all grounds. There was consensus that this fact might lead to a reluctance on the part of the High Court to grant certificates and that in the context of the extremely high test of establishing a point of exceptional public importance, the onus on the applicant was too burdensome. Accordingly, the view was taken that some measure of compromise should be effected.

2.48 A further matter to be considered in this context is the test applied by the courts in determining whether an applicant seeking leave to appeal against a refusal has established that the case raises questions of exceptional public importance and that it is in the public interest that an appeal be taken to the Supreme Court. An earlier authority considering the clearly lower test of “point of law of public importance” is that of *Fallon v An Bord Pleanála*.⁸¹ Finlay CJ held that the standard to be applied was whether, if it were a point of law arising of the same character and type in a criminal case, a certificate would be granted pursuant to s. 29 of the *Courts of Justice Act 1924* so as to lead to an appeal from the Court of Criminal Appeal to the Supreme Court.⁸²

2.49 A number of more recent decisions have considered the appropriate test in the context of the more onerous requirement that an applicant demonstrate that the point of law concerned is one of “exceptional public importance” and that it is in the public interest that the appeal be heard by the Supreme Court. In *Ashbourne Holdings v An Bord Pleanála*,⁸³ the applicant sought to appeal a decision of the High Court to the Supreme Court pursuant to s. 82(3B)(b)(i) of the *Local Government (Planning and Development) Act 1963*.⁸⁴ In this context, the court was referred to the decision of

⁸⁰ See s. 29 of the *Courts of Justice Act 1924*.

⁸¹ [1992] 2 IR 380. Note that the consideration of a point of law of public importance arose in this context not pursuant to a statutory provision setting out the standards in an application for leave to appeal, but rather in relation to an application for security for costs.

⁸² [1992] 2 IR 380, 384.

⁸³ High Court (Kearns J) 19 June 2001.

⁸⁴ S. 82(3B)(b)(i) of the *Local Government (Planning and Development) Act 1963* (as amended) provides that:

McKechnie J in *Kenny v An Bord Pleanála*.⁸⁵ Kearns J described the judgment of McKechnie J in *Kenny* as having a most helpful résumé and review of the applicable criteria when considering such provision, noting also that McKechnie J's review of the case law indicated a considerable degree of uncertainty and subjectivity in decisions whether or not to grant certificates.⁸⁶ However, it would appear to be accepted throughout these authorities that whilst the question of certification will largely depend on the particular issues raised by the individual case, as McKechnie J noted in *Kenny*, "importance alone is not sufficient".⁸⁷ Thus, whilst there is no definitive statement of the criteria necessary in order to obtain a certificate of appeal in these circumstances, it appears to be well established that the point of law at issue must be one that "transcends well beyond the individual facts of the case, important as they are".⁸⁸

2.50 The requirement of s. 5(3)(a) of the *Illegal Immigrants (Trafficking) Bill 2000* that applicants in immigration matters obtain the leave of the High Court to appeal a refusal to grant leave has raised serious concerns in recent times. Although the Commission accepts the validity of the argument that the appeal undermines the policy objectives in statutory schemes, it would appear that the potential for arbitrariness and injustice under the present system is unacceptable. Indeed, this potential is further exacerbated by the present practice in some immigration matters, whereby a motion is issued, returnable for two to three weeks. A date for hearing will then be fixed, estimated at present to be within a period of six weeks. A problem which arises at present, it that it is not clear whether this

"...no appeal shall lie from the decision of the High Court to the Supreme Court... save with the leave of the High Court which leave shall only be granted 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."

⁸⁵ [2001] 1 IR 704.

⁸⁶ Cases considered by McKechnie J included *Fallon v An Bord Pleanála* [1992] 2 IR 380, *Irish Press v Ingersoll* [1995] 1 ILRM 117, *Lancefort v An Bord Pleanála* [1998] 2 IR 511, *People (Attorney General) v Giles* [1974] IR 422. A similar review of the authorities and applicable principles is to be found in *Neville v An Bord Pleanála* High Court (Ó Caoimh J) 12 October 2001.

⁸⁷ [2001] 1 IR 704, 711.

⁸⁸ *Per* Finlay CJ in *Irish Press v Ingersoll* [1995] 1 ILRM 117, 120.

hearing comprises the leave stage or the substantive hearing. This can cause grave difficulties for applicants who are unsuccessful at this stage and subsequently seek to obtain a certificate in order to appeal to the Supreme Court and the question arises of whether the certification relates to a refusal to grant leave or a refusal of substantive relief. On the other hand, it is clear that this practice has the advantage of avoiding the lengthy delays presently arising in other areas of judicial review. On balance, however, the Commission is of the view that it is not appropriate for the leave stage and substantive hearing to be effectively amalgamated in such a manner, as this practice would appear to circumvent the framework set out in s. 5 of the *Illegal Immigrants (Trafficking) Act 2000*.

2.51 Having regard to the policy considerations underlying this area, the Commission considered a number of suggested alternatives designed to alleviate somewhat the concerns in this regard. The position in England is somewhat complex, involving a “renewal” of the application for leave rather than an outright appeal.⁸⁹ Amongst the options considered as appropriate for this jurisdiction was a system of appealing the refusal to grant a certificate by way of a chambers application to a single judge of the Supreme Court. However, it was considered that such a proposal might be inconsistent with the constitutional requirement that justice be administered in public, as *per* Article 34. Similar difficulties might be caused by, for example, a proposal that the issue be dealt with on the papers.

⁸⁹ See Gordon *Judicial Review: Law and Procedure* (Sweet & Maxwell 1996) at 7-018; Fordham *Judicial Review Handbook* (2nd ed Wiley 1994) at 239-240; Supperstone & Goudie *Judicial Review* (Butterworths 1997) at 16.4; de Smith, Woolf & Jowell *Judicial Review of Administrative Action* (Sweet & Maxwell 1995). Reform of this area was recommended by the *Review of the Crown Office List* (A Report to the Lord Chancellor March 2000) at 76-77, with the Review Team recommending that where the leave stage is conducted on the papers and leave is refused, the applicant should have ten days following the receipt of the court order to renew the application at an oral hearing. Where the application for leave is refused at an oral hearing, it was recommended that the application should be entitled to appeal, with leave, to the Court of Appeal (Civil Division), with the appeal to be made within 7 days of receipt of the order determining the permission application. This matter is now dealt with in CPR Part 54.12, which provides that an applicant may not appeal against a refusal of permission, but may request that the decision be reconsidered at a rehearing. Such request for rehearing must be filed within seven days of service of the reasons for the court’s refusal: rule 54.12(3) and (4). See *Blackstone’s Civil Practice 2002* (Oxford University Press 2002) at 869.

2.52 In light of these competing considerations, the Commission considered that the most appropriate avenue of reform would be a system whereby a single judge of the Supreme Court would hear applications from a refusal of the High Court to grant a certificate of appeal. Such a system would provide a necessary safeguard against arbitrariness and injustice, whilst at the same time taking account of the need to guard against a process susceptible to abuse by unsuccessful applicants for judicial review.

(b) Recommendation

2.53 It is recommended that the requirement of obtaining a certificate of appeal from the High Court should be retained, but subject to modification in that the specific grounds of appeal should also be certified by the High Court when granting the certificate. It is the opinion of the Commission that this should remedy any reluctance on the part of the High Court in granting such certificates, while also moderating the necessarily heavy onus resting on an applicant in such cases. It is also recommended that 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 guard against injustice or arbitrariness.

VII. English Approach

2.54 It would appear that the legislative precedent for the elevation of certain matters to a higher standard of judicial review by way of specialised statutory schemes is to be found in enactments of the English parliament since the 1930s. However, it should be noted that the Irish statutory schemes differ from their English antecedents in a number of significant ways.

2.55 The rationale behind the introduction of specialised statutory schemes in judicial review in England has been explained as the fact that “many facets of administrative decision-making require greater certainty and immunity from delayed challenge than are conventionally afforded by the supervisory remedy of judicial

review”.⁹⁰ The earliest legislative intervention in this area was the enactment of s. 11 of the *Housing Act 1930* and there are now a large number of such schemes in force under English law.⁹¹ Conventional judicial review proceedings were formerly dealt with in RSC Order 53,⁹² whilst judicial review under statutory schemes was dealt with separately under Order 94, which remains unchanged and unaffected by the introduction of CPR Part 54. The various legislative provisions are known as “statutory review clauses” and statutory review has been described as both “a distinctive remedy both in terms of procedure and conceptual basis”.⁹³

2.56 Gordon describes the operation of the standard statutory review clause in English law as a preclusive clause restricting challenge of decisions to certain classes of person,⁹⁴ within a strict time limit which cannot be extended.⁹⁵ The absence of any facility to extend time in these provisions may be seen as consistent with the rationale behind the provisions in question, namely the speedy

⁹⁰ Gordon *Judicial Review: Law and Procedure* (Sweet & Maxwell 1996) at 121.

⁹¹ The history leading up to the enactment of s. 11 of the *Housing Act 1930* is illustrative of the rationale behind these legislative schemes. After a series of challenges to “slum clearance” orders, delaying the process for significant periods, and causing considerable additional expense to be incurred, it was decided to introduce legislation to aid the completion of this process. The clause was presented by the government during its passage through parliament as: “a most important and valuable provision. It is the greatest safeguard you can afford to the individual and at the same time provides a mechanism by which questions of right can be determined at the earliest possible moment.” (HL Deb, cols 461-463 (15 July 1930). See also HL Deb., cols 582-583 (21 July 1930) cited in de Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5th ed Sweet & Maxwell 1995) at paragraph 14-071.

⁹² Now CPR Part 54.

⁹³ Gordon *Crown Office Proceedings* (Sweet & Maxwell 1997) at G1-002.

⁹⁴ This is the statutory restriction on *locus standi*, usually framed as “any person aggrieved”.

⁹⁵ Usually 6 weeks or 42 days, as in s. 14 of the *Petroleum Act 1987*, s. 49 of the *Airports Act 1986*, s. 155 of the *Water Industry Act 1991*, s. 18 of the *Telecommunications Act 1984* and ss. 62-63 of the *Planning (Listed Buildings and Conservation Areas) Act 1990*. Note, however, that certain statutes provide for a longer time period, as with s. 107 of the *Medicines Act 1968*, which provides for a period of three months, and Schedule 2 of the *Agriculture Act 1967*, which stipulates a six month time limit.

resolution of matters of particular public importance. This rationale would also explain another noteworthy feature of the English statutory review provisions: with only one exception,⁹⁶ judicial review proceedings instituted pursuant to one of the legislative provisions are not subject to the requirement to obtain the leave of court. Indeed, it has been suggested that the various features outlined above operate to achieve the rationale for which they were introduced: in 1997, Gordon estimated that practice at that date enabled motions to be normally disposed of within three months.⁹⁷

2.57 One feature of statutory review in England and Wales which has not been adopted in Irish law concerns the grounds of review available. The common statutory expression given to this matter is to provide that the validity of an order, decision, etc, may be questioned only on either of two alternative grounds, namely:

- (i) that it is not within the powers conferred by the statute;
- or
- (ii) that any of the requirements of the statute have not been complied with.⁹⁸

2.58 It appears to be generally accepted that despite the stricter time limits imposed by the various statutory schemes, the type of review available in statutory review proceedings is the same as in conventional judicial review. As Gordon notes, “the case law... has clarified that all the heads of challenge under the modern judicial review procedure are also available to an applicant for statutory review”.⁹⁹ However, Gordon also notes that many statutes contain

⁹⁶ Carnwath QC in *Enforcing Planning Control* (Report for the Secretary of State for the Environment 1989) at paragraph 6, recommended that in certain statutory schemes in planning law, a leave stage should be required. Note that s. 289(6) of the *Town and Country Planning Act 1990*, in relation to appeals on point of law and case stated against enforcement notices, now requires leave to be obtained.

⁹⁷ Gordon *Crown Office Proceedings* (Sweet & Maxwell 1997) at G2-012.

⁹⁸ See de Smith Woolf & Jowell *Judicial Review of Administrative Action* (5th ed Sweet & Maxwell 1995) at 683; Gordon *Crown Office Proceedings* (Sweet & Maxwell 1997) at G1-003, G1-014-018.

⁹⁹ Gordon *ibid* at 124. Gordon refers to a number of decisions setting out statements of principle in this regard, at fn. 13, including *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1326, *per* Lord Denning MR; *Webb v Minister of Housing and Local Government* [1965] 1 WLR 755. Specific examples include *Peak Park Joint Planning Board v Secretary of State for the Environment* [1979] JPL 618

the additional requirement for ground (ii), as above, that the interests of the applicant have been “substantially prejudiced” by the statutory requirement not being complied with.

VIII. Conclusion

2.59 It would appear from the foregoing that although it is likely that the Irish legislation establishing specialised statutory schemes of judicial review derives its basis from the English legislative precedents considered above, there has emerged, particularly in more recent times, a marked divergence in the character of areas to which such provisions are applied and also in the terms of such provisions. Indeed, it might be suggested that the creators and drafters of the Irish schemes seem to have lost sight of the rationale behind the need for such specialised schemes. The English provisions on statutory review represent a coherent legislative attempt to address a perceived need for more streamlined procedures in the challenge by way of judicial review of certain matters of particular public importance.¹⁰⁰ This rationale is effected by the stricter, unimpeachable time limits imposed, the absence of the requirement to obtain leave and the higher standards imposed in relation to *locus standi*, grounds of review and various other matters. The Irish provisions, on the other hand, might be seen as borrowing piecemeal from the various English schemes in a relatively haphazard manner. The argument might be made that there is a need for the legislature to contemplate more

(illegality); *Westminster City Council v Same* [1984] JPL 27 (irrationality); *Fairmount Investments v Same* [1976] 1 WLR 1255 (procedural impropriety); *Colleen Properties Ltd v Minister of Housing and Local Government* [1971] 1 WLR 433 (no evidence).

¹⁰⁰ Thus, Gordon *Crown Office Proceedings* (Sweet & Maxwell 1997) at G3, suggests that a present, statutory review clauses are contained in four categories of enactment, being those covering (i) Land Use and Planning (see e.g. Sched 3, at paragraph 6 *Water Resources Act 1991*, Part XII of the *Town and Country Planning Act 1990*, Sched 7, Part II of the *Civil Aviation Act 1982*); (ii) Highways (eg Schedule 2 of the *Highways Act 1980*, s. 3 of the *Cycle Tracks Act 1984*, Schedule 9 Part VI of the *Road Traffic Regulations Act 1984*); (iii) Compulsory Acquisition of Land (eg s. 155 of the *Water Industry Act 1991*, s. 154 of the *Water Resources Act 1991*, challenges to ss. 23, 24 and 25 of the *Acquisition of Land Act 1981*); (iv) Government Licensing (eg s. 14 of the *Petroleum Act 1987*, s. 49 of the *Airports Act 1986*, s. 18 of the *Telecommunications Act 1984*). For further detail see Gordon at G3-002-007.

carefully the rationale behind such schemes, the areas to which they should apply and the manner in which they should operate, before the law on this matter becomes fragmented and incoherent.

CHAPTER 3 COSTS

Introduction

3.01 Undoubtedly the question of costs – in its most realistic sense of who has to pay at the end of the day and how much – is a bigger factor in what cases are taken than any question of law. Indeed, the absence of sufficient resources to meet a potential order for costs can be more determinative of whether proceedings are instituted than the issue of the standard to be met in such proceedings.¹

3.02 While the question of the awarding of costs will not generally be determined at the leave stage of proceedings,² Order 84 rule 20(6) provides that where a court grants leave “it may impose such terms as to costs as it thinks fit”.³ Costs always remain in the discretion of the court and usually follow the event: Order 99 rule 1. It has been suggested that legal thought about costs has remained to a large extent stagnant since the judicature reforms of the 1870s and that the current

¹ This is of course with the exception of those areas where legal aid is available. It should be noted, however, that the phrase “legal aid” in this context is more a term of art and is more correctly described as “the Attorney General’s scheme”, defined by de Blacam as “a non-statutory arrangement providing for the payment of legal costs to persons who need legal representation but cannot afford it”: de Blacam *Judicial Review* (Butterworths 2001) at 325. The Attorney General’s scheme covers judicial review applications consisting of *certiorari*, *mandamus*, or prohibition.

² Although note that Laffoy J accepted *obiter* in *Village Residents Association Ltd v An Bord Pleanála* [2000] 4 IR 321 that the High Court does have jurisdiction to make a pre-emptive order for costs. See also *R v Lord Chancellor, ex parte Child Protection Action Group* [1998] 2 All ER 755 and Costello “Costs Principles and Environmental Judicial Review” (2000) 35 Ir Jur 121, 134-136.

³ As Collins & O’Reilly point out in *Civil Proceedings and the State in Ireland: A Practitioner’s Guide* (Round Hall 1990) at 92 this latter requirement is necessitated by the fact that Order 84 rule 20(7)(b) allows the court to grant interim injunctive relief.

rejuvenation in the area is, to a large degree, attributable to the growth of a new constituency of litigant without the means to comply with the governing rules in relation to costs and keen to challenge the legitimacy of those rules.⁴

I. Costs at the Leave Stage

(a) The present position

3.03 Prior to the substantive hearing, it is inevitable that costs will be incurred by the preliminary application for leave. While the question of costs is always subject to the discretion of the court, it is nevertheless possible to make a number of observations about general court practice in this regard. Whilst in general the court will reserve the issue of costs until the determination of the substantive hearing of the application for judicial review,⁵ it has the power at the leave stage to impose such terms as to costs as it thinks fit.⁶ Thus, it has been held that in certain circumstances it may be appropriate to award the costs of the initial *ex parte* application for leave to apply for judicial review to the applicant, particularly where the respondent does not contest the making of the order.⁷

3.04 It has been noted,⁸ that the question of costs at the leave stage assumes particular significance in relation to certain statutory schemes, most notably s. 50 of the *Planning & Development Act 2000*. This arises as a result of the requirements under certain

⁴ Costello “Costs Principles and Environmental Judicial Review” (2000) 35 Ir Jur 121.

⁵ Examples of cases where the costs of the leave stage were reserved until the substantive hearing are: *Hynes v An Bord Pleanála* High Court (McGuinness J) 30 July 1998 (High Court order granting leave and reserving costs); *Ní Éilí v Environmental Protection Agency* High Court (Lavan J) 20 February 1998; *O’Keeffe v An Bord Pleanála* [1993] 1 IR 39 (High Court order granting leave and reserving costs); cited in Costello *ibid* at 122.

⁶ Collins & O’Reilly *Civil Proceedings in the State in Ireland* (Round Hall 1990) at 110.

⁷ *O’Murchu v Clairitheoir na gCuideachtaí* High Court (O’Hanlon J) 20 June 1988 (Costs awarded to applicant who sought forms in Irish which were only provided after she had obtained leave to apply for an order of *mandamus* in relation to this matter).

⁸ Costello *op cit* fn 4 at 122.

statutory schemes that the application for leave be conducted *inter partes* and also the onus on the applicant to establish the higher standard of “substantial grounds”. There are a number of options available to the court in relation to costs in such cases. The court may simply follow general practice and reserve the question of costs of the leave stage to the full hearing, when costs usually but not always follow the event. Where an applicant has succeeded at the leave stage, but is ultimately unsuccessful at the substantive hearing, general practice would not normally allow the applicant any credit for this initial success, although unusual circumstances may result in an exception to the norm.

3.05 An alternative approach was taken in *Keane v An Bord Pleanála*.⁹ The applicant was successful at the application for leave, though ultimately unsuccessful at the full hearing of judicial review. At the costs hearing, the applicant was ordered to pay the costs in relation to those grounds on which it was unsuccessful at the leave stage but no order was made in relation to those grounds which it successfully argued at this stage. A different approach was adopted in relation to costs in the case of *McNamara v An Bord Pleanála*.¹⁰ The applicant sought leave to apply for judicial review on eight grounds, of which five were accepted by Carroll J. The applicant was ultimately unsuccessful at the full hearing. At the final costs hearing, Barr J awarded the costs of the substantive hearing to the respondent. However, he apportioned the costs of the leave stage, with the applicant being awarded costs in relation to the five grounds upon which he was successful but the respondent being awarded the costs in relation to the grounds which it successfully resisted and the two sets of costs were set off against each other.

(b) The English approach

3.06 The courts in England have a very broad jurisdiction in relation to costs, derived from s. 51(1) of the *Supreme Court Act 1981*,¹¹ which states that the costs of and incidental to any proceedings are in the discretion of the court, which has full powers to determine by whom and to what extent such costs are to be paid.

⁹ [1997] 1 IR 184.

¹⁰ [1996] 2 ILRM 339.

¹¹ Substituted by s. 4 of the *Courts and Legal Services Act 1990*, as amended by s. 31 of the *Access to Justice Act 1999*.

This broad jurisdiction was formerly structured by the Rules of the Supreme Court and in particular, by the provisions of RSC Order 62.¹² RSC Order 62 rule 3(3) provided that costs should follow the event except when it appears to the court that, in the circumstances of the case, some other order should be made as to the whole or any part of the costs. The effect of this rule was carried over into CPR Part 44.3(2), which provides:

“if the court decides to make an order about costs-

- (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
- (b) the court may make a different order”.

General practice in England in relation to costs at the leave stage would appear to be very similar to the present regime in Ireland: such costs are generally reserved to the substantive hearing. However, it has been accepted that the courts in England have jurisdiction to make an order in relation to costs at the leave stage: the leave stage constitutes a “proceeding” for the purposes of s. 51(1)(b) of the *Supreme Court Act 1981*.¹³

3.07 It would appear to be well established that if leave is refused after an *inter partes* hearing, there is jurisdiction to award the respondent’s costs.¹⁴ While there would appear to be little case law in relation to the jurisdiction of the courts to order costs against a respondent who has unsuccessfully opposed the leave stage, reference should be made to the decision of *R v Royal Borough of Kensington & Chelsea, ex parte Ghebregiogis*.¹⁵ In *Ghebregiogis* it was held that

¹² See Gordon *Judicial Review: Law and Procedure* (Sweet & Maxwell 1996) at 140, 167-168 and 170; Clayton & Tomlinson *Judicial Review Procedure* (Wiley 1997) at 123-124, 148 & 182-184; Goudie & Supperstone *Judicial Review* (Butterworth 1997) at paragraphs 16.7, 17.13-17.20; Gordon *Judicial Review and Crown Office Practice* (Sweet & Maxwell 1999) at 140, 167-168 and 170. The costs regime in England is now governed by CPR Parts 44-48.

¹³ Substituted by s. 4 of the *Courts and Legal Services Act 1990*, and amended by s. 31 of the *Access to Justice Act 1999*.

¹⁴ *R v Test Valley Borough Council, ex parte Goodman* [1992] COD 101; *R v IRC, ex parte Mead and Cook* [1993] 1 All ER 772; *R v Secretary of State for Wales, ex parte Rozhon* (1993) 91 LGR 667, CA; *R v Camden London Borough Council, ex parte Martin* [1997] 1 All ER 307.

¹⁵ [1994] COD 502.

in exceptional cases, it may be appropriate to order costs against a respondent for failing to concede a well founded case until after the application for judicial review is lodged; here, the applicant had sent the respondents an “admirably clear” letter before the action commenced. The question of awarding the costs of the leave stage was also considered by MacGowan LJ in *R v Ecclesiastical Committee of Both Houses of Parliament, ex parte The Church Society*.¹⁶ The respondent had successfully opposed the application for judicial review, but in the final costs hearing, although the Court awarded the costs of the full hearing to the respondent, it declined to make any such order in relation to the costs of the leave stage. MacGowan LJ commented as follows:

“It is sufficient to say that we doubt very much whether we have any power to grant the costs of that application. But, in any event, we do not think it an appropriate case to do so because the respondents were not under any obligation to attend. They chose to do so. They strongly resisted the question of jurisdiction and argued that no leave should be given, and on that point they lost. It seems to us, therefore, the costs should not include the application for leave or anything that happened before that, but should include everything that happened since that.”¹⁷

3.08 Having regard to the approach of the courts in both jurisdictions, the Commission is of the view that there should be more widespread use of the discretion of the courts in relation to the award of the costs of the leave stage. Although concerns have been expressed by some commentators in relation to the appropriateness of the approach in *McNamara v An Bord Pleanála*,¹⁸ the Commission believes this approach could be adopted on a more widespread basis with positive results. It is suggested that using costs as a potential punitive measure might encourage respondents to concede clearly

¹⁶ (1994) 6 Admin LR 670, considered in Fordham *Judicial Review Handbook* (Chancery Law Publishing 1994) at 230.

¹⁷ (1994) 6 Admin LR 670, 695E-F.

¹⁸ Costello “Costs Principles and Environmental Judicial Review” (2000) 35 Ir Jur 121, 122-124 raises the question of whether this decision is sound in principle, and ultimately fair to the respondent. He also notes that it is rare that an applicant would fail to raise a *prima facie* case in relation to even a minority of the grounds on which judicial review is sought. Costello ultimately prefers the decision in *Keane*.

arguable grounds, thus minimising the length of the leave hearing and alleviating the pressures otherwise generated in an already overburdened system. Such an approach might also have the advantage of providing some relief to applicants, who might otherwise be deterred from instituting proceedings on the basis of potentially large awards of costs being made against them.

(c) Recommendation

3.09 *The Commission recommends that in appropriate cases, the courts should make greater use of their discretion in relation to the issue of costs at the leave stage. Specifically, the Commission suggests that greater use should be made of the possibility of apportioning the costs of the leave stage to allow recovery of costs only in relation to those grounds successfully argued or challenged.*

II. Costs at the Full Hearing

(a) The present position

3.10 As above, any comment on the approach of courts to the question of costs at the conclusion of the full hearing must always be understood to be subject to the courts' discretion in this regard, pursuant to Order 84 rule 20(6) and Order 99 rule 1. In the context of costs at the full hearing, there are a number of issues arising which are worthy of consideration. While general practice would suggest that costs usually follow the event, there have been a number of exceptions carved out in relation to this principle. The most important of these exceptions is that arising where the unsuccessful applicant has raised a point of general public importance, in which case the court may decline to award costs to the successful respondent. In such cases, the court may either award all costs in the matter to the unsuccessful applicant,¹⁹ or may simply make no order as to costs.²⁰ In relation to the opposite scenario, whilst a successful

¹⁹ As was the case in *State (Litzouw) v Johnson* [1981] ILRM 273; *Byrne v Grey* [1988] IR 31; *DPP v Nolan* [1990] 2 IR 526.

²⁰ Thus leaving each party to bear their own costs; see, for example, the order made as to costs by the High Court in *McKenna v An Taoiseach* [1995] 2 IR 10, discussed in Hogan & Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 715.

applicant might expect to recover their costs, this is not necessarily always the case.²¹

3.11 Another exception to this general rule concerns the limited immunity conferred on the judiciary in relation to awards of costs. Thus, no order as to costs may be made against a respondent who is a member of the judiciary in judicial review proceedings, where the error was made *bona fide* and the application was unopposed. This was confirmed by the Supreme Court in *State (Prendergast) v Rochford*,²² although the potential for injustice as a result of this approach was referred to by Barr J in *McIlwraith v Fawsitt*.²³ It has been suggested that this privileged position afforded to members of the judiciary in relation to costs is no longer appropriate, drawing on older authorities given in a time when principles of Crown (State) immunity were at their peak.²⁴ In response to this traditional principle, the practice has emerged of joining either the DPP or Attorney General in certain circumstances, simply to ensure that in the event of the applicant succeeding in the proceedings, that there will be a party against whom an order for costs can be made. The appropriateness of this practice has been questioned; de Blacam suggests that there is no basis in principle to justify the result in such cases, which is an award of costs against the DPP or some other respondent merely because the culpable party enjoys an immunity.²⁵

3.12 Difficulties as a result of this situation can arise as follows: while the Director of Public Prosecutions is always a party to judicial reviews of prosecutions,²⁶ the Attorney General might not be a party to each and every case, and would have to be joined subsequently.

²¹ *Kelly v O'Sullivan* High Court (Gannon J) 11 July 1990, where no order was made as to costs.

²² Supreme Court 1 July 1952.

²³ [1990] 1 IR 343. (Circuit Court judge's order was quashed and Barr J made an order for costs against the Attorney General who was not in fact a party to the judicial review application. Order reversed on appeal to the Supreme Court).

²⁴ See Hogan & Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 717.

²⁵ De Blacam *Judicial Review* (Butterworths 2001) at 324-326.

²⁶ Although note that the DPP is not a party to *habeas corpus* applications. See further *McSorley v Governor of Mountjoy Prison* [1997] 2 IR 258.

However, where it is the case that the DPP might not wish to oppose a judicial review, in such cases there would be no *legitimus contradictor*. Thus, it would seem that in such cases, a central fund should be available to meet any costs which might then arise, rather than the office of the DPP being fixed with such costs.

(b) The English Approach

3.13 The approach of the courts in England to the issue of costs at the full hearing of judicial review proceedings is quite similar to current practice in Ireland. As noted above, a broad jurisdiction exists under English law in relation to the awarding of costs, pursuant to both s. 51(1) of the *Supreme Court Act 1981* as amended and CPR Parts 44 - 48. The general rule is that costs follow the event, but as in this jurisdiction, a number of exceptions to this principle have been established. Thus, while a successful party might generally expect to recover his costs in judicial review proceedings, this may not always be the case.²⁷

3.14 It is significant to note that English courts also recognise the public interest exception in considering final orders as to costs. This is evident from *New Zealand Maori Council v Attorney General of New Zealand*,²⁸ where Lord Woolf made no order as to costs on the appeal since:

“the applicants were not bringing the proceedings out of any motive of personal gain [but] ... in the interest of taonga which is an important part of the heritage of New Zealand.... [This was] an important area of the law which it was important that their Lordships examine”.

3.15 This principle was more recently affirmed in *R v Secretary of State for the Environment, ex parte Shelter*.²⁹ It should also be noted

²⁷ *R v IRC, ex parte Oman International UK* [1986] 1 WLR 568 (Woolf J declined to award costs to the successful applicant, because of the failure of the applicant to give the respondent notice of its intention to commence proceedings, since such notice might well have averted the need for the proceedings altogether.)

²⁸ [1994] 1 AC 466, 485G-H.

²⁹ [1997] COD 49. Other examples of no costs orders against unsuccessful applicants are *R v Swale Borough Council & Medway Ports Authority, ex parte Royal Society for the Protection of Birds* (1990) 2 Admin LR 790,

that the Law Commission in 1994 recommended that where a case is allowed to proceed to a substantive hearing on the basis of either a public interest challenge or for the purpose of seeking an advisory declaration, a successful party's costs may be awarded either against the other party or out of central funds at the judge's discretion.³⁰

3.16 The final issue arising for consideration under English law is that of awarding costs against members of the judiciary who are respondents in judicial review proceedings. Special rules have been developed relating to the question of imposing costs on justices when one of their decisions is subject to review. These rules were summarised in the decision in *R v Newcastle-under-Lyme Justices, ex parte Massey*.³¹ In accordance with general principles, it could be said that if the application succeeded, the justices should be liable in costs since their action had materially contributed to the error giving rise to the application.³² However, it was established in *R v Amersham Justices, ex parte Fanthorne*³³ that where the judge, having been served with notice of the proceedings, neither appears at the hearing nor resists the application, costs will not be awarded against them. However, the English courts have on occasion exercised the discretion in relation to costs by making an order for costs against a respondent justice, although such orders remain relatively rare.³⁴

816E, and *R v Metropolitan Police Commissioner, ex parte Blackburn (No 3)* [1973] 1 QB 241, 254F-G.

³⁰ Law Commission *Administrative Law: Judicial Review & Statutory Appeals* (No 226 1994) at 84 - 88.

³¹ [1994] 1 WLR 1684. For detailed discussion of the applicable principles, see Supperstone & Goudie *Judicial Review* (Butterworths 1997) at paragraph 17.19-17.20.

³² See *R v Liverpool Justices, ex parte Roberts* [1960] 1 WLR 585.

³³ (1964) 108 Sol Jo 841.

³⁴ It is generally agreed that such orders will be made only in relation to "flagrant incidents". See *R v York City Justices, ex parte Farmery* (1988) 153 JP 257, 258. See also *R v Liverpool Justices, ex parte Roberts* [1960] 1 WLR 585; *R v Amersham Justices, ex parte Fanthorne* (1964) 108 Sol Jo 841; *R v Llanidloes Licensing Justices, ex parte Davies* [1957] 2 All ER 610n, [1957] 1 WLR 809n; *R v Huntingdon Magistrates' Court, ex parte Percy* [1994] COD 323; *R v Aldershot Justices, ex parte Rushmoor BC* [1996] COD 21 (order of costs against respondent justices for refusing to state case notwithstanding grant of leave for judicial review); *R v Aldershot Justices, ex parte Rushmoor BC (No 2)* [1996] COD 280 (refusal to set aside costs order against respondent justices).

(c) Undesirability of respondent judges filing affidavits

3.17 The decision of the Supreme Court in *McIlwraith v Fawsitt*³⁵ leads onto another issue in relation to respondent judges; though unrelated to the issue of costs, it is an area to which the Commission was referred which requires consideration. This issue relates to the appropriateness (or otherwise) of respondent judges filing affidavits in cases where judicial review of their decisions is sought.

3.18 McCarthy J in *Feeney v Clifford*³⁶ deprecated the filing of an affidavit by respondent judges and went on to state:

“In proceedings *inter partes* it is, in my view, undesirable that a district justice should take an active role in proceedings by way of judicial review, where, as is the case here, all relevant material may be placed before the High Court by or on behalf of the prosecuting authority”.³⁷

3.19 It has been suggested that as a result of this *dictum*, district court judges³⁸ have been effectively precluded from representing their position in judicial review of their decisions, where the concerns of the other party as *legitimus contradictor*³⁹ may not necessarily coincide with those of the respondent judge. The position becomes even more difficult where there is no *legitimus contradictor*, such as in family law or civil law matters, in which the State is not involved at District or Circuit Court level. It has been suggested that as a result of this situation, district court judges find themselves in an embarrassing and somewhat isolated position.⁴⁰ Furthermore, on occasion the respondent judge may feel that the version of the facts

³⁵ [1990] 1 IR 343. See above, at paragraph 3.12.

³⁶ [1989] IR 668.

³⁷ [1989] IR 668, 677. Similar sentiments had previously been expressed by Henchy J in *State (Sharkey) v McArdle* Supreme Court 4 June 1981 cited by Barr J in *State (Freeman) v Connellan* [1986] IR 433, 441.

³⁸ Of course, other lower court judges – including Circuit Court judges or members of the Special Criminal Court – might be similarly affected.

³⁹ Usually the Attorney General or Director of Public Prosecutions.

⁴⁰ Judge Mary C Devins, Judge of the District Court, Paper on Judicial Review and Respondent District Judges, presented to the National Judicial Studies Institute Conference, 10 November 2001.

given in the applicant's affidavit does not accurately reflect what actually occurred or was said.⁴¹ On the other hand, there is the problem, perhaps underlying the observations of McCarthy J in *McIlwraith v Fawsitt*, that the recollection of the respondent judge may be mistaken, or subject to contradiction which can lead to further embarrassment and problems as to admissibility of evidence.

3.20 A recognition of the difficulties which can be caused as a result is to be found in the judgment of Murphy J in *DP v McDonnell*,⁴² where he stated:

"I fully appreciate [the respondent's] concern about the procedure by which decisions of judges of the District Court are reviewed in the superior courts. While all judges of the subordinate courts – including the High Court – must accept that their decisions may be reviewed, reversed and even criticised, the procedure of judicial review under which a judge is named as a respondent and may be liable for costs and is, for practical reasons, debarred from providing evidence to controvert that given by an applicant seems irrational, unjust and unfair."

3.21 Murphy J went on to express a desire that the law on this matter be revised, but accepted that in the instant case he was bound to follow the procedures as they existed.

3.22 A more recent consideration of these issues is to be found in the decision of the Supreme Court in *O'Connor v Carroll*.⁴³ The case concerned an appeal from the refusal of Kelly J relying on *McIlwraith v Fawsitt*, to make an order for costs against the respondent judge. Murphy J speaking for the Supreme Court, reiterated the belief that it was inappropriate for any judge to swear an affidavit in proceedings

⁴¹ See the comments of O'Flaherty J in *McSorley v Governor of Mountjoy Prison* [1997] 2 IR 258, 262-263 in which the Supreme Court found that where, as in the case before the court, a district court judge's conduct of proceedings had been questioned, the appropriate course for the High Court to have followed would have been to give leave to apply for judicial review in order to give the district court judge and the DPP an opportunity to make observations, rather than for the court to consider the issue by way of a habeas corpus application.

⁴² Supreme Court 13 May 1994.

⁴³ [1999] 2 IR 166.

such as these since – and this is the crucial point – that would leave him open to cross-examination in relation to the judicial process, which the Court considered as contrary to the public interest.⁴⁴ In the present case Murphy J was satisfied that there was no possibility of imputing *mala fides* to the actions of the trial judge in refusing to allow certain evidence and legal argument in the case before him. Murphy J concluded that while parties cannot be asked to tolerate “bias, prejudice, ill will or *mala fides* in any form on the part of the judiciary”,⁴⁵ he was satisfied that there was no evidence that such existed in the present case and he consequently dismissed the appeal.

3.23 In the light of the suggestion that the situation at present is unsatisfactory, in that there is no mechanism available to judges of the District and Circuit Courts to state their position in the context of judicial review proceedings against them and where there may be no other party in a position to contradict perceived incorrect averments, the Commission considered whether there was an appropriate means of resolving this problem. It has been suggested that “in some cases, a letter from the respondent judge outlining the sequence of events in the District Court has been accepted by and filed in the High Court”.⁴⁶ Indeed, this was the approach taken in *MF v Superintendent of Ballymun Garda Station*.⁴⁷ The drawback to such a remedy is that, at present, it operates with no formal authority and is consequently open to challenge by the applicant. Furthermore, the contents of the letter or memo must be made known to the applicant and there is the further problem that such a letter is not strictly admissible in evidence, being neither an affidavit or sworn testimony. Nor is the respondent’s account subject to cross-examination.

⁴⁴ Barron J concurred on this point, stating at 170:

“I would ... support Murphy J where he questions the propriety of joining a judge as a party to judicial review proceedings. While it should be open to him or her to ensure through the court clerk or registrar as the case may be that the basic facts are not distorted, there is no need for him or her to be a party, particularly where it is inappropriate that he or she should enter the arena by swearing an affidavit”.

⁴⁵ [1999] 2 IR 166, 168.

⁴⁶ Judge Mary C Devins, Judge of the District Court, Paper on Judicial Review and Respondent District Judges, presented to the National Judicial Studies Institute Conference, 10 November 2001 at 6.

⁴⁷ [1991] 1 IR 189, 191.

3.24 The Commission accepts that this matter presents complex questions and it is, in theory, possible that there might be a case in which respondent judges are unable to state their position even as regards the basic outline of factual matters. This is significant because, if the *legitimus contradictor* takes no issue with the applicant's affidavit as to the factual background, then such statements may be accepted by the reviewing court as uncontroverted fact. The Commission considered a recommendation which would afford respondent judges the facility of being permitted to file a letter setting out a basic factual outline of events, but concluded that it would present difficulties in relation to cross-examination; the benefits of such a facility would be far outweighed by the disadvantages. This can be an important point where there are different and inconsistent versions of events put forward by the respondent judge. Where possible, the court clerk may swear an affidavit setting out the version of events, although of course it is possible that they may not remember them in sufficient detail to do so. Even in those cases where such an affidavit is not available, the Commission believes that the disadvantages of allowing a respondent judge file any account of proceedings must take precedence in this context.

(d) Recommendation

3.25 *The Commission accepts that it is not appropriate for the DPP to be joined in judicial review proceedings solely for the purposes of being made liable for an award of costs. Having regard to the approach adopted in England, the Commission recommends the establishment of a central fund from which costs, appropriately taxed, can be awarded in judicial review proceedings involving respondent judges where the error was made bona fide and the application was unopposed.*

III. Pre-emptive Costs Orders

(a) The present position

3.26 An area of developing law at present is the existence of a jurisdiction of the courts to make pre-emptive orders as to costs. This involves an order, in advance of litigation, that regardless of the outcome, the applicant will not be required to pay the costs of the proceedings. Courts frequently make an order for costs at interlocutory stages of a case, as on motions for particulars, judgment, discovery and other such matters. The distinction between such orders for costs and an order for “pre-emptive costs”, is that the latter involves an order that irrespective of the outcome of the proceedings, the applicant will not be subject to an order for costs in respect of any part of the proceedings. The pre-emptive costs order will be sought at a preliminary stage and if the applicant succeeds in obtaining such order, it will apply regardless of the fact that intermediate stages may be dealt with by other judges than the final full hearing.

3.27 The notion of such jurisdiction was argued before the English courts in the 1990s and first recognised by Dyson J in *R v Lord Chancellor, ex parte Child Poverty Action Group*.⁴⁸ Dyson J accepted the notional existence of such exceptional jurisdiction and laid down three criteria to be established before the court would exercise its jurisdiction in this regard:

“I conclude...that the necessary conditions for the making of a pre-emptive costs order in public interest challenge cases are that the court is satisfied that the issues raised are truly ones of general public importance, and that it has a sufficient appreciation of the merits of the claim that it can conclude that it is in the public interest to make the order ... The court must also have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue. It will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that,

⁴⁸ [1998] 2 All ER 755. The jurisdiction of the English courts to make an pre-emptive costs order is now found in the general terms of CPR Part 54.10, which simply provides that “[w]here permission to proceed is given the court may also give directions.”

unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in doing so.”⁴⁹

3.28 The existence of a pre-emptive costs jurisdiction as a principle of Irish law was accepted, albeit *obiter*, by Laffoy J in *Village Residents v An Bord Pleanála (No. 2)*.⁵⁰ The jurisdictional basis for the making of such an order was identified as Order 99 rule 5, which provides that “Costs may be dealt with by the Court at any stage of the proceedings”. Laffoy J went on to agree that although this was to be regarded as an exceptional jurisdiction, she suggested that it was possible that its exercise might not be as restricted as it would be in England, in accordance with the criteria laid down by Dyson J in the *CPAG* case. Thus, Laffoy J stated:

“While I am satisfied that the Court has jurisdiction in an appropriate case to deal with costs at an interlocutory stage in a manner which ensures that a particular party will not be faced with an order for costs against him at the conclusion of the proceedings, it is difficult in the abstract to identify the type or types of cases in which the interests of justice would require the Court to deal with the costs issue in such a manner and it would be unwise to attempt to do so. As a broad proposition the principles enunciated by Dyson J - confining

⁴⁹ [1998] 2 All ER 755, 766 h-j.

⁵⁰ [2000] 4 IR 321. The facts may be succinctly stated as follows: the applicant was an incorporated association having no share capital, with the primary object of representing the views of the local community, particularly in relation to planning and development matters. The applicants instituted judicial review proceedings seeking an order of *certiorari* quashing a decision of An Bord Pleanála to grant planning permission in respect of a development in the city of Kilkenny. The respondent sought an undertaking as to security for costs from the applicant; no such undertaking was given. There were two applications at issue in the *Village Residents* case: an application by the respondent for security for costs pursuant to s. 390 of the *Companies Act 1963* and an application by the applicant seeking a pre-emptive costs order. However, it should be noted that on the facts of the *Village Residents* case, Laffoy J declined to make such an order on the basis that the challenge had not been brought by a public interest litigant in the strict sense, that any issues of public importance arising were not sufficient to justify the making of such an order, and finally that the court did not have a sufficient appreciation of the merits of the application at this interlocutory stage to conclude that it would be in the public interest to make a protective costs order.

the possibility of making such orders to cases involving public interest challenges, as Dyson J explained the concept of a public interest challenge, and requiring that the issues raised on the challenge be of general public importance and that at the stage at which it is asked to make the order the Court should have a sufficient appreciation of the merits of the claim to conclude that it is in the public interest to make the order - would seem to meet the fundamental rubric that the interests of justice should require that the order be made.”⁵¹

3.29 The jurisdiction to make an order for pre-emptive costs has been described as a “high-risk strategy”.⁵² There would appear to be a considerable element of risk in making such an order, in that the pre-emptive costs order is made in advance of the full hearing, a risk recognised by the *Review of the Crown Office List*.⁵³ There is thus a danger that such order might be made prematurely, in advance of a full exposition of the facts, where it might subsequently be clear that making such an order was inappropriate. However, it has also been contended that there would appear to be an alternative course available to the courts where there is some element of doubt as to the appropriateness of making a pre-emptive costs order. Pursuant to the inherent jurisdiction of the courts in relation to costs, it remains open to the court to indicate at an initial stage of proceedings the likely outcome in relation to costs. This approach would have the advantage of flexibility: the court would be free to vary its approach to the question of costs at the conclusion of the full hearing if it is felt that such approach is warranted having heard the full case, while providing the applicant with some comfort in that, excluding any adverse facts coming to light at the full hearing, such applicant will be entitled to recover their costs.

(b) Recommendation

3.30 *It is therefore recommended that the jurisdiction of the courts in relation to pre-emptive costs should be exercised only in exceptional circumstances and that where any doubt exists, the court*

⁵¹ [2000] 4 IR 321, 330.

⁵² Costello “Costs Principles and Environmental Judicial Review” (2000) 35 Ir Jur 121, 136.

⁵³ (A Report to the Lord Chancellor March 2000) at 92.

should instead simply indicate the approach to be taken in relation to costs at the conclusion of the judicial review proceedings.

IV. Security for Costs

(a) The present position

3.31 Another issue arising is the jurisdiction of the courts to require an applicant to provide security for costs in certain circumstances. In the context of judicial review proceedings, the question of security for costs frequently arises in relation to limited liability companies. S. 390 of the *Companies Act 1963* provides that where a limited liability company is plaintiff in any action or other legal proceedings, any court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the successful defendant, require sufficient security to be given for those costs and may stay all proceedings until such security is given.⁵⁴ It has been held by Morris J in the High Court that judicial review proceedings constitute “other legal proceedings” for the purpose of s. 390.⁵⁵ The Supreme Court in *Lancefort Ltd v An Bord Pleanála (No. 2)*⁵⁶ confirmed that limited liability companies can have *locus standi* to take judicial review proceedings, although in certain cases such companies may be required to provide security for costs as a *quid pro quo* for such *locus standi*.

3.32 This point was made more clearly by Laffoy J in *Village Residents Association Ltd v An Bord Pleanála (No. 2)*.⁵⁷ In response to an argument that the provision of security for costs might be viewed as a *quid pro quo* for affording *locus standi*, Laffoy J stated:

“In my view, when the court is invited on a challenge to standing to infer that objectors to planning decisions have clothed themselves with limited liability for the less than pure

⁵⁴ In the event that security is not provided within the time fixed, or some other reasonable time, the proceedings may be dismissed: *Lough Neagh Explorations Ltd v Morrice* [1999] 4 IR 515.

⁵⁵ *Lancefort Ltd v An Bord Pleanála* [1998] 2 IR 511.

⁵⁶ [1999] 2 IR 270.

⁵⁷ [2000] 4 IR 321.

motive of conferring immunity against costs on themselves and the challenge is successfully resisted, on a subsequent attempt to resist an application for security for costs by the company, the *bona fides* of the members of the company requires cautious consideration.”⁵⁸

3.33 Laffoy J in *Village Residents (No. 2)*⁵⁹ also considered the application of the public importance exception in the area of security for costs, noting:

“It is not in dispute that where, as here, it is conceded by the plaintiff or applicant that it would in all probability not be able to discharge an order for costs made against it at the conclusion of the proceedings, there remains a discretion in the Court which may be exercised in special circumstances but the onus is on the party attempting to resist the order for security to establish that the special circumstances exist”.⁶⁰

3.34 Laffoy J went on to outline matters capable of constituting such “special circumstances” including:

- (a) where the applicant’s case involves an issue of genuine public importance;⁶¹
- (b) lack of *bona fides* on the part of the respondent;⁶²
- (c) the issue of delay.⁶³

3.35 Two further matters had been argued as capable of constituting such “special circumstances” but rejected by Laffoy J.

⁵⁸ [2000] 4 IR 321, 332-333.

⁵⁹ *Ibid.*

⁶⁰ *Ibid* at 331.

⁶¹ As considered in *Fallon v An Bord Pleanála* [1992] 2 IR 380, discussed above at paragraph 2.48.

⁶² Although on the facts of the case in *Village Residents (No 2)*, Laffoy J was satisfied that it would not be appropriate to draw any such inference in relation to the respondent’s conduct from the affidavits filed in the matter.

⁶³ The test formulated in relation to the issue of delay in this context was set out by Morris J in *Beauross Ltd v Kennedy* High Court 18 October 1995 as whether “the party seeking security has delayed to such an extent as to commit the other party to an amount and a level of costs which it would never have become committed to had it known that it was to be required to provide security for costs and thereby altered its position, to its detriment”.

On the question of whether the fact that the applicant had established the existence of “substantial grounds” could constitute a special circumstance, Laffoy J held that mere compliance with a statutory requirement could not of itself constitute a special circumstance.⁶⁴ The applicant also alleged that an order for security for costs should not be granted where it is the true purpose of the respondent to stifle the applicant’s legitimate claim. Laffoy J held that this ground, on its own, could not justify a refusal of an application for security for costs. In this regard, Laffoy J referred to the *dicta* of Morris J in *Lancefort v An Bord Pleanála*⁶⁵ where he stated that:

“the opportunity now presents itself to [the applicants] to demonstrate their commitment by providing the necessary funds to support the company's application. For this reason I do not see that an order requiring that provision be made for security for costs will in any way stifle the action.”⁶⁶

Thus, if an order for security for costs is made against an applicant in such circumstances, the proceedings will only be halted if the members choose not to finance the applicant company to enable it to provide the amount of security required.

(b) Recommendation

3.37 *The Commission is satisfied that the present system in relation to security for costs in the context of judicial review proceedings operates satisfactorily and is sufficiently flexible to allow the court to make an order which is fair in the circumstances of each individual case.*

⁶⁴ Laffoy J also referred to the well established principle, derived from such cases as *Lismore Homes v Bank of Ireland Finance* [1999] 1 IR 501 that the strength of a party’s case is not an appropriate consideration on an application for security for costs unless the applicant’s case is unanswerable, in which case security should be refused.

⁶⁵ [1998] 2 IR 511.

⁶⁶ [1998] 2 IR 511, 517.

V. Undertaking as to Damages

(a) The present position

3.38 The jurisdiction to require an applicant to provide an undertaking as to damages in judicial review proceedings is derived from Order 84 rule 20(6). The operation of the provisions of Order 84 rule 20(6) was considered in some detail by Laffoy J in the case of *Broadnet Ireland Ltd v Office of the Director of Telecommunications*.⁶⁷ A requirement was imposed on the applicant company, which had been granted leave to apply for judicial review, to provide an undertaking as to damages. Laffoy J stated that she was satisfied that the court's jurisdiction to require an undertaking as to damages provided for in Order 84 rule 20(6) was not limited to situations in which a stay is granted under Order 84 rule 20(7)(a) or an interim injunction under Order 84 rule 20(7)(b). In her view Order 84 rule 20(6) by implication recognises that granting leave to impugn the decision of a public body may have the potential to cause damage not only to the public body, but also to third parties affected by that body's decision.⁶⁸ Laffoy J said that in her view Order 84 rule 20(6) was open to the construction that the court might, at the leave stage, on its own motion put a condition on the grant of leave by requiring an undertaking as to damages. She had no doubt that this course was open under Order 84 rule 20(6) because the application for leave being an *ex parte* one, a respondent or notice party would have no opportunity to seek an undertaking until after leave had been granted.

3.39 In addition, the High Court may also entertain an application from a respondent or notice party after leave is granted that it be a term of the continuance of leave and of the proceedings that an undertaking as to damages be given by the applicant. In relation to the manner in which the court's jurisdiction pursuant to Order 84 rule 20 (6) should be exercised Laffoy J stated as follows:

⁶⁷ [2000] 3 IR 281. See further Costello "Costs Principles and Environmental Judicial Review" (2000) 35 Ir Jur 121, 131-134.

⁶⁸ As in the case of *Broadnet*, where the six recipients who had successfully obtained licences pursuant to the impugned decision of the respondent, were likely to suffer serious financial prejudice as a result of the applicant's challenge.

“In considering whether to exercise the discretion under sub-rule (6) to require an undertaking as to damages as a condition to the grant or the continuance of leave to apply for judicial review, the essential test is whether such requirement is necessary in the interests of justice or, put another way, whether it is necessary to mitigate injustice to parties directly affected by the existence of the pending application. If, in substance, the existence of the application has an effect similar to the effect of an interlocutory injunction in private litigation – that activity which would otherwise be engaged in is put “on hold” pending final determination of the controversy, with resulting loss and damage – in my view, it is appropriate for the court to adopt the approach traditionally adopted in private law litigation in determining whether an interlocutory injunction should be granted and to require that the applicant should give an undertaking to make good that loss and damage if it is ultimately found that the applicant’s case is unsustainable, provided there is no countervailing factor arising from the public nature of the jurisdiction it exercised under Order 84 which precludes it from adopting that approach.”⁶⁹

3.40 Laffoy J concluded that it would be patently unfair and unjust to allow the proceedings to continue without the applicant carrying the risk occasioned by them if the proceedings were ultimately found to be unsustainable.

(b) Recommendation

3.41 *Although the decision of Laffoy J in Broadnet v Office of the Director of Telecommunications has been the subject of some criticism,⁷⁰ the Commission is satisfied that there may well be*

⁶⁹ [2000] 3 IR 281, 258-259. Quoted with approval in *Seery v An Bord Pleanála* [2001] 2 ILRM 151.

⁷⁰ For example, Costello argues that the *Broadnet* rule is inconsistent with what the legislative history reveals as the intention behind sub-rule 6 and also argues that it results in an anomaly as between judicial review proceedings and ordinary civil proceedings (where no undertaking as to damages may be required in relation to the latter, although the institution of such proceedings may have the same “chilling effect” as the initiation of judicial review proceedings). See Costello “Costs Principles and Environmental Judicial Review” (2000) 35 Ir Jur 121, 131-134.

circumstances in which such discretion of the court will be vital to protect the interests of innocent third parties who may suffer serious prejudice by the institution of judicial review proceedings. This was agreed to be particularly true in relation to so-called “commercial judicial review”, where there is clearly a substantial negative impact caused to third parties by the institution of such proceedings. In such circumstances the Commission is satisfied that the existence of an “exceptional jurisdiction” to require an applicant to provide an undertaking as to damages, in accordance with the strict criteria laid down by Laffoy J in relation to the exercise of this jurisdiction, is both necessary and a fair balance of all the interests at stake.

CHAPTER 4 CASE MANAGEMENT

Introduction

4.01 Whilst delay in private law actions is undesirable, it is generally agreed that it is particularly damaging in the area of judicial review because of the impact on the public administration of the state with its widespread ramifications.¹ Thus, the Law Commission has stated that there is a “need for speed and certainty in administrative decision-making in cases where the whole community, or large sections of it, will be affected by the decisions of public bodies.”² It is also beyond doubt that there has been an increasingly significant rise in the numbers of applications for judicial review in recent times.³ The Working Group agreed that the issue of case management will be central to the manner in which the High Court copes with such a high volume of applications, with a view to minimising periods of delay and there are a number of recommendations to be made in this regard.⁴

¹ *Review of the Crown Office List* (A Report to the Lord Chancellor March 2000) at 18-19; Law Commission *Administrative Law: Judicial Review and Statutory Appeals* (No 226 1994).

² Law Commission *Administrative Law: Judicial Review and Statutory Appeals* (No 226 1994) at 2-3.

³ As set out in the Introduction, fn 2, there was a total of 990 applications for judicial review for the years 1998 and 1999; there was a sharp increase to 808 applications made in 2000, with a further rise to 888 in 2001. As of 7 August 2002, the High Court had received 501 applications for judicial review, indicating that the total number for 2002 should at least equal those of 2001, if not exceed them.

⁴ Note that the issue of case management was the subject of the *Second Report of the Expert Group on a Courts Commission: Case Management* (Government Publications 1996). The Second Report made no recommendations as to case management, but set out various basic matters to be considered further at, *inter alia*, a conference on the point; see Expert Group on a Courts Commission *Conference on Case Management* (Government Publications 1997). The Expert Group’s recommendations on

4.02 It should also be noted at the outset that the Commission agrees with the observations of the Case Management Group of the Superior Court Rules Committee⁵ that a “root and branch” reform of existing court procedures, on a par with the Woolf reforms,⁶ is not necessary in this jurisdiction. While a more coherent and consistently operated system of case management is clearly warranted, it is suggested that such reform should be effected through more moderate reform of existing procedures and a stricter enforcement of compliance with the Rules of Court, as concluded by the Case Management Group of the Superior Court Rules Committee.⁷

I. Devising a System to Facilitate Early Settlement

4.03 The possibility of devising a system whereby the court could facilitate or encourage early settlement was raised as one method of reducing the increasing volume of applications in the area of judicial review. This issue was also considered by the *Review of the Crown Office*⁸ in which it was accepted that there is ordinarily little scope for alternative dispute resolution in judicial review. This observation would appear to hold true in relation to similar proceedings in this jurisdiction, where the settlement rate is estimated to be a maximum

case management were to follow this conference and other consultative procedures. However, in its Sixth Report *Conclusion* (Government Publications 1998) the Expert Group stated that with the establishment of the Courts Service, it considered that matters of case management were matters properly left to this service. The Expert Group therefore transferred all documentation of its work in this field to the Courts Service with no final recommendations being made.

⁵ Report of the Case Management Group to the Superior Court Rules Committee, May 2001.

⁶ Lord Woolf’s *Access to Justice* (July 1996) Final Report to the Lord Chancellor, contained a total of 303 recommendations on reform of the civil justice system in England and Wales.

⁷ Note however, that the focus of this report was aimed more at case management approaches to complex litigation such as high value chancery matters, multi-party product liability actions etc, and much of the considerations and recommendations of the Report are not appropriate to a consideration of the particular needs of case management in relation to judicial review.

⁸ *Review of the Crown Office List* (A Report to the Lord Chancellor March 2000) at 67-68.

of 5%.⁹ Plainly, early settlement of cases is desirable, though in practice it would seem that such cases are relatively rare.

4.04 However, one concern raised in this context was in relation to a small number of cases where the respondent would not seek to contest the application. This issue originally arose when it was suggested that conducting the leave stage on notice could allow the respondent to concede to the claim prior to the grant of leave, thereby relieving the court of the time which would otherwise be spent hearing the application for leave and also greatly reducing the burden on the parties in terms of costs. One possibility is the introduction of a procedure, similar in its aim to an O’Byrne Letter, which would allow the respondent to concede to the small number of claims where it would not be sought to resist the application.¹⁰ An O’Byrne Letter is defined as follows:

“[A] letter which is normally sent by a plaintiff in an action where there are two or more defendants and he wishes to have evidence to ground a subsequent application to the court, for an order that the unsuccessful defendant pay the costs of the successful defendant.”¹¹

4.05 The contents of an O’Byrne Letter¹² will also generally include a statement that unless an admission of liability is received

⁹ Thus, for the period of 1998-1999, the total number of applications granted leave to seek judicial review was 631. The number of cases recorded as “settled” was 35, representing a settlement rate of 5.5%.

¹⁰ An example of the limited circumstances in which this would arise is the case of a clear error, or where there is established law on the point indicating that the applicant’s case would succeed.

¹¹ *Murdoch’s Dictionary of Irish Law* (3rd ed Topaz Publications 2000).

¹² Full contents set out in Murdoch *ibid* as follows:

“Our client cannot be expected to elect between respective defendants and unless we have an admission of liability by you within 10 days, we will institute proceedings against you and Mr X. In the event that Mr X is not held liable and an order is made dismissing the claim against him with costs, application will be made to the court under the Courts of Justice Act 1936, s. 78, for an order that, in addition to damages and our client’s costs, you should pay to our client such sum as he may have to pay for the costs of Mr X and this letter will be produced at the hearing of the said application.”

within 10 days, proceedings will be instituted against both/all defendants. It was suggested that an analogous procedure could be introduced in judicial review proceedings, by the applicant issuing a letter at the date of institution of proceedings, informing the respondent of intention to proceed with the application for judicial review unless the respondent indicates its intention not to contest the matter within 10 days.

4.06 Similar concerns and suggestions were made by the *Review of the Crown Office* and the solution proposed is one which may be informative in this context. The Review team suggested the introduction of a “pre-action protocol” whereby the applicant intending to apply for leave to seek judicial review, is first encouraged to write a letter of pre-action protocol, with the simple aim of identifying the applicant and the subject matter of the intended application and allowing the intended respondent to concede to the claim prior to the leave stage. It was suggested by the *Review of the Crown Office* that it would not be appropriate for the pre-action protocol procedure to be mandatory, but where the applicant has failed to issue such a letter prior to seeking leave, then such matter might be considered by the Court in relation to any requests by the applicant for extension of time in relation to timetables, or even in relation to costs.¹³ However, one caveat which should be entered requires a recognition of the fact that on occasion, *ex parte* applications in conventional judicial review are made urgently and immediately upon the papers being filed in the Central Office.¹⁴ In such extremely urgent applications, compliance with the requirement to notify the respondent by letter of the existence of proceedings

¹³ (A Report to the Lord Chancellor March 2000) at 67-68. Although this recommendation was not originally part of the reforms undertaken with the introduction of CPR Part 54, the pre-action protocol was brought into force on 4 March 2002. Thus, it is now the case in England that before making a claim, an intending applicant for judicial review should send a letter to the proposed respondent identifying the issues in dispute with a view to establishing whether litigation can be avoided. The respondent should reply within fourteen days; failure to do so can be taken into account by the court, and sanctions may be imposed unless the respondent can demonstrate good reason for the failure to respond.

¹⁴ These papers naturally comprise the statement of grounds and affidavit. On occasion, it has even been the case that papers have not even been filed in the Central Office prior to the application being made to a Judge of the High Court; this situation is contemplated by the Practice Direction dated 16 February 1999.

would be neither practical, nor even possible. Thus, whilst it is desirable to have in place a mechanism wherein the respondent can consent to the review prior to the application for leave thereby minimising the costs incurred, where the applicant can demonstrate extenuating circumstances for the failure to comply with the proposed procedure,¹⁵ no order for costs should be made against such applicant.

Recommendation

4.07 *It is therefore recommended that prior to the application for leave to apply for judicial review, the applicant should send to the respondent a letter informing the respondent that failure to concede the claim within 10 days will result in the applicant proceeding to seek leave to apply for judicial review. Whilst this procedure should not be mandatory, failure to issue such letter may be taken into account in determining costs, save where the failure to comply with this procedure is attributable to the fact that the making of the application for leave was a matter of justifiable or demonstrable urgency.*

II. Examination of a Proposal to Establish a Specialised Division of the High Court

4.08 At the outset of the Working Group's consideration of these issues, one proposed method of ensuring and regulating a system of efficient case management was the possibility of establishing a specialised division of the High Court dealing with judicial review and certain categories of administrative appeal. An alternative, but more moderate proposal, was the nomination of particular judges to hear such matters and to whom a specified number of reading days should be allowed in order to assist them in the exercise of their function. We consider each of these options in turn.

4.09 The Working Group's initial reaction to the proposal of establishing a specialised division tended to be mixed, although many members on further consideration of the issue, suggested that this is in practice how the system presently operates. It was therefore suggested that there might be a number of benefits to be derived from formally recognising this *de facto* method of operation. The benefits

¹⁵ Such as extreme urgency in making the application.

of operating a specialised division in this manner include the accrual of experience and expertise in the areas concerned, the introduction of stability and consistency in the administration of the list and the time that would be saved as a result, thereby reducing delays. In England the establishment of a specialised division of the Crown Office was considered and ultimately recommended by the *Review of the Crown Office*, who concluded that:

“speed, certainty, efficiency, consistency and quality of decisions in public law cases can only be realised by a dedicated office to administer cases and dedicated judicial resources to hear them”.¹⁶

4.10 Indeed, it has been suggested that the question of establishing a separate administrative court or division of the English High Court has been debated intermittently over the past three or four decades, arising from dissatisfaction in certain quarters over the informal operation of the Crown Office List.¹⁷ However, there was by no means a consensus on the point, with the contrary argument being made that rather than further fragmentation of the High Court, what was required was multiple, “substance-sensitive” procedural and administrative arrangements reflecting the wide jurisdiction of the court.¹⁸

4.11 From its analysis of the expanding caseload of the Crown Office List and in anticipation of further growth with the coming fully into force of the *Human Rights Act 1998*, the *Review of the Crown Office* therefore concluded that there was a continuing need for a specialist court as part of the High Court to deal with public and administrative law cases. To emphasise the nature of the principal work of such a specialised court, it was also recommended that the Crown Office List should be renamed “The Administrative Court”.¹⁹

¹⁶ (A Report to the Lord Chancellor March 2000) at 19.

¹⁷ De Smith Woolf & Jowell *Judicial Review of Administrative Action* (Sweet & Maxwell 1995) at 658.

¹⁸ Scott [1989] CJK 4, cited in de Smith Woolf & Jowell *ibid.*

¹⁹ This recommendation came into effect on 25 July 2000; however, the change effected might be regarded as somewhat cosmetic, in that whilst the Crown Office List has now been renamed “the Administrative Court”, there do not appear to have been any further institutional reforms accompanying this reform.

4.12 Alternatively, if the notion of establishing a specialised division of the High Court to deal with administrative law and related issues was to prove too difficult, a more informal solution would be the nomination of a specified judge to administer the list for a fixed period of time, with the assistance as required of other specified judges.

4.13 An informative example of how such a system might be implemented can be seen from the operation of the Commercial List in Northern Ireland by Mr Justice Kerr, who also has responsibility for the Judicial Review List of the High Court of Northern Ireland.²⁰ The Commercial List was established in 1992 by Order 72 of the Rules of Superior Courts (Northern Ireland) 1980. The introduction of Order 72 is described by Mr Justice Kerr as having been prompted to a large extent by representations made by the commercial community in Northern Ireland about the cumbersome and protracted nature of commercial litigation in that jurisdiction. This order and its implementation have been the legal community's reaction to those representations and its own acknowledgement of the need to streamline and adapt traditional procedures – particularly at the preparatory or interlocutory stage – to cater for the particular requirements of commercial actions.

4.14 Order 72 comprises a relatively concise direction as to the manner of the operation of the Commercial List in the High Court of Northern Ireland, defining the types of actions which may be entered on that List and then going on to vest a large discretion in the judge administering the List as to the case management approach to be adopted in relation to its operation. Thus, Order 72 rule 2(3) provides that once a matter is entered into the Commercial List, it comes under the direct control of the judge administering that list. Various other provisions in Order 72 aimed at copperfastening the case management philosophy of that list include:

- (i) copies of all pleadings, notices, lists of documents etc must be furnished to the Registrar not later than two days after service thereof on other parties: Order 72 rule 4.

²⁰ See the comments on the operation of the Judicial Review List in the High Court of Northern Ireland by Mr Justice Kerr in his paper "Commercial Actions: An example of Case Management in Northern Ireland" presented to the Expert Group on a Courts Commission, Conference on Case Management, November 1996 (Government Publications 1997).

- (ii) all interlocutory applications are made to the commercial judge: Order 72 rule 5.
- (ii) directions as to the conduct of the action are given by the commercial judge after the close of pleadings: Order 72 rule 6.

4.15 Mr Justice Kerr's paper also set out the types of directions which would normally be given in a commercial case. He refers to the relatively standard directions imposed on the Commercial List in relation to the setting of deadlines for the transaction of the usual interlocutory matters, which are described as no different to such orders as might be given in "laissez faire" litigation save that the time limits are somewhat more prompt. However, one significant item is the requirement that a report on progress be drawn to the Commercial Judge's attention in each case. This allows the judge to review whether the case is required, whether stimulation of the parties to more concerted effort is necessary or whether some assistance from the court is warranted or feasible. Such review is conducted at an informal conference held in chambers, the average length of which is estimated to be five to seven minutes by Mr Justice Kerr, with the emphasis being on compliance with previous directions. In this regard, it is noted that strict adherence to deadlines imposed in terms of directions is essential to the proper working of the case management system and as such, counsel are well aware that failure to comply with any direction of the court must be explained at the next review hearing.

4.16 It should be noted that this consideration of the operation of the Commercial List in the High Court of Northern Ireland is not intended to provide a blueprint for the operation of an identical system in the Judicial Review List in this jurisdiction. Rather, it is submitted that Mr Justice Kerr's system of case management of the Commercial List might be viewed as providing an informative illustration of one potential approach to the issue of case management which seems to have operated successfully since its introduction. The precise method of introducing and implementing a system of case management in the Judicial Review List in this jurisdiction will ultimately be a matter for the lead judge nominated to administer the List.

III. Duration of Appointment

4.17 The Working Group agreed that the commitment of time necessary for the successful operation of a case management system on the Judicial Review List would be a period of one year from the “lead judge” who would take overall responsibility for the management of the list and a commitment of two to three terms from judges nominated to hear cases from the list.²¹ Indeed, the judicial review list of the High Court has actually operated for a number of years in this manner; between 1999 and 2001 Mr Justice Kelly acted as “lead judge” with overall responsibility for the list,²² while the nominated judges available to hear cases from the list varied from between three and six. Since then, Mr Justice Ó Caoimh has taken over this role. It would appear that the list has operated in an efficient manner under this system and considerable progress has been made in clearing the backlog of cases.

4.18 It should be noted that delay in this context can arise in three distinct stages of the judicial review list. The first stage is the period of time prior to the entry of a case to the list to fix dates. At present, the practice in judicial review proceedings is for cases to appear for mention in the High Court from time to time until all pleadings and affidavits are exchanged. Proceedings can be delayed at this stage for a considerable period of time; the Commission addresses this difficulty in the recommendations below regarding the introduction of a pro forma timetable to operate at this stage of proceedings.²³ The second stage at which delay can arise is the list to fix dates, which is called over at the end of each term and dates are fixed for the succeeding term. It appears that there are currently so many cases in the list to fix dates that only a proportion of the cases are actually assigned a date for the following term; those cases not assigned a date are simply adjourned to the next list to fix dates, ie the following term. The third stage at which delay can occur is on the hearing date: if there are no judges available to hear a case on the day on which it is listed for hearing, the case will usually be returned to the list to fix

²¹ Similar recommendations as to commitments of time were made by the *Review of the Crown Office List* (A Report to the Lord Chancellor March 2000) at 104, who suggested one year’s commitment for the “lead judge”.

²² Previously, the lead judge on the judicial review list had been Mr Justice Geoghegan, who was nominated by Morris P.

²³ See further below, at paragraph 4.35.

dates (with priority) and the process of obtaining a hearing date begins again. With regard to these latter two stages, the Commission is of the opinion that resources are a crucial element in any attempt to tackle this problem and recommendations on this issue are also made.²⁴

4.19 In relation to the number of judges necessary to administer the judicial review list, it would appear that there should be one judge appointed as lead judge to administer the list, and a further three judges available to hear cases from the list. The duration of appointment of the lead judge should be fixed at not less than one year, with nominated judges making a commitment to hear cases from the judicial review list for three terms. Whilst the Commission appreciates that this is a matter for the President of the High Court, the consideration of the issue of case management in this chapter involves a number of different matters which together constitute a “package” of recommendations. The Commission is of the view that in order for the proposals contained herein to operate successfully, it will be necessary for each individual recommendation to be implemented and as such we believe it appropriate to refer to the numbers of judges necessary to ensure the effective administration of the judicial review list.

4.20 *The Commission recommends that a minimum of three judges from the current bench be nominated to administer the judicial review list, with one judge to act as “lead judge” with overall responsibility for the list and a minimum of two other judges available to hear cases from the judicial review list. If sufficient judges are not available to meet this recommendation, then it is suggested that consideration be given to the appointment of sufficient judges to fulfil these recommendations.*

4.21 A contrast can be made between the operation of the judicial review list and the Chancery 1 & 2 lists, operating as an informal Commercial Law division of the High Court. Whilst there is clearly no comparable degree of public urgency in commercial law matters, nor are there comparable periods of delay, despite the fact that the length of time required for the hearing of commercial law matters would generally be longer than judicial review matters; as against

²⁴ The need for adequate resources in order to enable the efficient and effective administration of the list is dealt with below at paragraph 4.47.

this, there is also a greater need for the delivery of reserved judgments in judicial review matters. This leads on to the next issue to be considered in the context of case management, namely the provision of reading days.

4.22 The Working Group agreed that allowing for reading days for both the lead judge and nominated judges on the judicial review list would be highly beneficial. This would have the effect of greatly reducing the delay between substantive hearing and the delivery of judgment, an area causing increasing frustration in terms of delay. It remains to be seen how the introduction of s. 46 of the *Courts and Court Officers Act 2002* will impact on this situation.²⁵ A further point to be noted in this regard is as follows: in seeking to ensure compliance by practitioners with the time limits imposed by the Rules or by practice direction, it is vital that, as a form of *quid pro quo*, cases not only get on for hearing within a reasonable time, but also that judgment also be delivered within a reasonable time, so that the matter can be brought to conclusion without the parties being subjected to unacceptable levels of delay.²⁶

4.23 It was also suggested that such reading time could also be used to remove the requirement of opening affidavits in court, which was generally agreed to add to the delay in the judicial review list. Whilst acknowledging that the process of opening affidavits in court can be useful, by allowing counsel to draw attention to certain matters, the same result could be achieved where the affidavits are

²⁵ S. 46 of the 2002 Act authorises the establishment of a “register of reserved judgments” in relation to every judgment reserved by the Supreme Court, High Court, Circuit Court and District Court in any civil proceedings. S. 46(3) provides that, subject to exceptions laid down in subs. (6), if judgment is not delivered within the prescribed period from the date on which it was reserved, the Courts Service is required to list the proceedings before the judge who reserved the judgment and to give notice of such listing to the parties to the proceedings and a copy of the notice to the President of the Court concerned. The judge is then required by subss. (4) and (5) to fix a date for the giving of judgment, which date will then be entered in the register.

²⁶ One suggestion which might be of some use in combating serious delays in obtaining judgment goes to the length of judgment. Whilst one cannot overstate the importance that written judgments be given in many cases, it is also the case that it may not be necessary to restate at length well known principles of law established in landmark judgments in the particular areas concerned.

read in advance, with counsel then being asked at the hearing if there were any areas to which they wished to draw attention. The question might be raised whether removing the requirement that affidavits be opened in court could lead to difficulties as regards the constitutional imperative that justice be administered in public pursuant to Article 34.1. However, the majority of the Working Group was of the opinion that such concerns were misplaced, particularly in light of the fact that affidavits are documents of public record, filed in court.²⁷ This practice ought to be provided for in the Rules of Court.

4.24 *It is therefore recommended that in appropriate cases, affidavits should not be read in open court. To facilitate this, and also having regard to the generally greater need for reserved judgments in judicial review matters, it is strongly recommended that both the lead judge and nominated judges on the judicial review list be permitted sufficient reading days to allow affidavits to be read in chambers prior to hearing and also to eliminate as much as possible the period of delay between substantive hearing and delivery of judgment.*

4.25 It has also been suggested that the requirement that counsel submit written legal submissions in accordance with practice direction,²⁸ can help reduce the time needed for the substantive hearing, thereby further reducing overall delays in the list. However, it seems that where counsel are required to lodge papers in advance of the leave hearing in particular, then it is important that the court be afforded a real opportunity to see the papers in advance, rather than

²⁷ Note the comments of Geoghegan J in the recent case of *O'Dwyer v Boyd* Supreme Court 4 July 2002. The appellants, who represented themselves, had raised a query as to the manner in which affidavits had been presented in the High Court. Although this did not constitute a stateable ground of appeal, Geoghegan J clarified the position for the appellants as follows (at 10):

“As the Chief Justice explained to the appellants at the hearing of the appeal, there is nothing unusual about affidavits not being opened publicly in court. In crowded motion lists it is frequently the case that a judge may quietly read the affidavits himself or herself or may indicate that they will be read in his or her chambers. None of the matters referred to ... amount to unfair procedures or unlawful procedures or affect the validity or correctness of the High Court decision”.

²⁸ Practice Direction November 1993.

counsel simply paying lip service to the court by filing papers in court at the hearing of the *ex parte* application for leave.

4.26 Having regard to the recommendation that affidavits should no longer be opened in court in every case, it would be most conducive to the efficient operation of the List if counsel were required to file all papers in *ex parte* leave applications in advance of the leave hearing. This was the case in England from October 1994, where papers were required to be filed five clear working days in advance of the leave hearing.²⁹ The Commission proposes that a similar requirement should operate in this jurisdiction; where the application for leave is heard on Monday, we recommend that the papers should be filed by the preceding Wednesday, or by two clear days in all other cases. However, we also acknowledge the need to guard against a situation whereby the rules of court become an instrument of injustice and we consequently recommend that this requirement may be waived in urgent applications. The Commission is of the opinion that this practice would allow the court to give a better, more informed order as to leave. Written submissions at the substantive stage are also subject to time limits, and must be lodged seven days in advance of the hearing. The Working Group agreed that counsel should be encouraged to submit succinct but comprehensive, well-drafted submissions, as in certain cases it might then be possible to give judgment *ex tempore*, with the court adjourning for a short time after the hearing, requesting that the parties return with a stenographer so that a note can be taken of the judgment.

4.27 A final issue arises in relation to the length of time required for the hearing of *ex parte* applications for leave. It is generally accepted that such motions should usually last no longer than 20 minutes, although it was also accepted that on occasion, they could take significantly longer periods of time. In this regard, it might be worthwhile for consideration to be given to the introduction of a practice direction similar to that issued by Watkins LJ in relation to

²⁹ *Practice Note (Judicial Review: Applications for Leave)* [1994] All ER 671, per Lord Taylor CJ, Scott Baker and Longmore JJ. The practice direction stated that failure to comply with the terms of the direction could result in adjournment, and the applicant might be penalised in costs. Note however, that as a result of the recent reforms, and the fact that the permission hearing is now always on notice, the issue of time limits for filing papers in *ex parte* applications does not arise.

the Crown Office List. This practice direction has been in force since 1991 and provides as follows:

“With effect from 9 April 1991 applications for leave to apply for judicial review will be listed on the footing that the application will take no more than 20 minutes, and any reply by a respondent who attends such an application will take no more than 10 minutes. Where counsel considers that the hearing of the application will require more than the time allowed he should provide a written estimate and a special fixture must be arranged.”³⁰

Recommendation

4.28 *The Commission recommends that in ex parte applications for leave, counsel be required to file papers by the preceding Wednesday, or otherwise two clear days in advance of the hearing. This requirement should be waived in urgent applications and should be provided for in either Rules of Court or by Practice Direction. In order to ensure compliance with this requirement, we recommend that applicants in default of this requirement be liable to penalisation in costs. It is also recommended that written legal submissions filed in accordance with the ruling practice direction should be as succinct but comprehensive as possible and should be filed in sufficient time to allow the court a real opportunity to consider the contents of such submissions.*

IV. Imposition of Time Limits

4.29 Another potential tool in the context of case management was the imposition of time limits for the various stages of the proceedings (eg exchange of affidavits and replies etc), to try to ensure that proceedings move efficiently through this process. Concerns have been raised that the absence of a follow-up facility to prevent long delays in the exchange of affidavits and replies can create difficulties, since the only mechanism currently available is to wait until the case comes up for mention to raise such issues. Against this there is a need

³⁰ *Practice Note* [1991] 1 All ER 1055. This practice direction remains in force: see *Blackstone's Civil Practice 2002* (Oxford University Press 2002) at 869.

to retain an element of flexibility, as a rigidly pre-ordained system could give rise to problems of its own.

4.30 One possibility is to request the parties to set out their own time limits to which they will then be required to adhere. However, even this system can create difficulties, particularly where there is no mechanism for dealing with parties in default of their own nominated time limits. One suggested mechanism for dealing with failure to meet such time limits is for this fact to be considered when deciding the award of costs, though the appropriateness of such practice is at present unclear.

4.31 Some of the problems which have arisen may be attributable to the fact that it can be very difficult to gauge the length of a case at the leave stage, or indeed at any stage. In light of these competing considerations, it would therefore seem clear that flexibility remains crucial and that the preferable method of preventing long delays prior to the substantive hearing might be achieved by the operation of a strict case management approach by the lead judge in charge of the list, with the possibility of the imposition of costs penalties for parties in continual and inexcusable breach of time limits imposed by the court.

4.32 The Commission agreed that it was somewhat anomalous for parties in judicial review proceedings to be subject to strict time limits in relation to the application for leave, yet effectively operate without any time limits once the order to leave is granted, with the consequence that much of court time is spent on effectively administrative matters, such as the exchange of pleadings, seeking directions, etc. In recommending the introduction of a timetable to operate post-leave, we are aware of the competing considerations at issue³¹ and also of the fact that there is a distinction to be drawn between standard cases where such time limits would be workable and other cases where such time limits would not be realistic, eg sexual abuse/delay cases.³²

³¹ These issues include the need to ensure the effective administration of the List, as against the need to retain an element of flexibility in these matters, as well as the danger of Rules of Court becoming an instrument of injustice.

³² Indeed, we believe the proposed timetable might be particularly effective in the context of such matters as planning judicial review, where there is no impetus on the applicant to move, where delay can operate in favour of the applicant at the expense of the respondent.

4.33 The Commission is satisfied that there is scope for the introduction of a realistic *pro forma* timetable to operate post-leave. Although Order 84 rule 22(4) imposes a time limit on a respondent seeking to file a statement of opposition, ie seven days, we accept that this time limit is unrealistic and as a consequence is rarely, if ever, complied with. We propose a time limit of 28 days for the respondent to file the statement of opposition, with the applicant subject to a further 28 day time limit for the reply. While this timetable would include a limited facility to extend the time, the onus should be on the defaulter to seek permission to file (in contrast with common law default proceedings). We propose that the provision for extension should be based on the statutory phraseology, namely that the time should not be extended save where there is good and sufficient reason.

4.34 In order for the proposed timetable to operate successfully, it is vital that these time limits are observed by all parties. With this in mind, the Commission considered a number of alternatives aimed at ensuring compliance with these time limits. One possibility was to stipulate that failure to act within the prescribed time limits would result in the grant of leave lapsing, with the onus on the applicant to move an application to reinstate. However, this proposal would entail a number of drawbacks, including the question of how to penalise a respondent in default and also the danger that the number of applications by parties in default seeking to reinstate could cause an even greater backlog than exists under the present regime. Instead, we recommend that in the event of non-compliance with these time limits, the party in default should be fixed with an immediate costs order. As noted above, the Commission accepts that in order for such a proposal to work, it is imperative that cases get on for hearing within a reasonable period in order for this proposal to operate successfully.³³

³³ See, in this regard, s. 46 of the *Courts and Court Officers Act 2002*, involving the compilation of a register of reserved judgments; the impact of this section on the current situation *vis-à-vis* obtaining judgments remains to be seen. This issue is considered further above at paragraph 4.22.

Recommendation

4.35 *The Commission recommends the introduction of a pro forma timetable to operate once the applicant has obtained an order granting leave to apply for judicial review. The respondent should be required to file a statement of opposition within 28 days and the applicant should file any reply within a further 28 days. These time limits should not be extended save where there is “good and sufficient reason”. Failure to comply with this procedure should be subject to the imposition of an immediate costs order against the party in default.*

V. Miscellaneous

4.36 A related matter which arose in the context of case management and the Commission’s consideration of delay in the judicial review list and the various proposals for promoting efficiency in such matters is the issue of conversion of judicial review proceedings to the plenary procedure. Order 84 rule 18(2) provides:

“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”.

4.37 Hogan and Morgan, noting that rule 18(2) is phrased in discretionary rather than mandatory language, suggest that the effect of this provision is that the applicant is given a choice: “he may apply for a declaration or injunction by way of an application for judicial review or he may, as in the pre-1986 era, commence the proceedings by way of plenary summons”.³⁴ The question arising in this context

³⁴ Hogan & Morgan, *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 788. However, in so noting the authors point out that

is whether an applicant, seeking a declaration or injunction in respect of a public law matter, is restricted to proceeding by way of judicial review or whether such applicant may choose to proceed by way of plenary summons.

4.38 Order 84 rule 26(5) provides as follows:

“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 application, order the proceedings to continue as if they had been begun by plenary summons”.

4.39 Hogan and Morgan note that there is “no converse power” to that contained in Order 84 rule 26(5) whereby proceedings, commenced by way of plenary summons, may be converted to judicial review proceedings. The rationale for preventing the courts allowing the conversion of plenary proceedings to judicial review proceedings is not immediately apparent, although it is most likely that such prohibition stems from a concern that:

“were such a power to exist, it would facilitate litigants who wished to circumvent the inherent restrictions in the Order 84 procedure (the need for leave, strict time limits, etc) by commencing their action by way of plenary summons, and for this reason the Superior Courts Rules Committee deliberately elected to allow conversion in one direction only”.³⁵

4.40 The English law on procedural exclusivity in this regard was established in *O’Reilly v Mackman*³⁶ where the applicants had commenced proceedings by way of plenary summons, eschewing the option of proceeding by way of judicial review in light of the numerous disputes as to fact likely to arise. The House of Lords held

the choice is not an unrestricted one: the proceedings must relate to the exercise of public law powers by a public body.

³⁵ Hogan & Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 790.

³⁶ [1983] 2 AC 237.

that the proceedings constituted an abuse of process and should have been struck out on that basis. In so holding, the House of Lords pointed to the features unique to an application proceeding by way of judicial review, particularly in relation to time limits and the need to obtain leave and to the fact that the periods of delay often encountered in plenary proceedings could have the effect of negating the policy that challenges to the validity of an administrative action should be determined in an expeditious manner. Lord Diplock stated:

“to delay the judge’s decision [by proceeding by way of plenary summons rather than judicial review] would defeat the public policy that underlies the grant of those protections: *viz.* the need, in the interest of good administration and of third parties who may be indirectly affected by the decision, for speedy certainty as to whether it has the effect of a decision which is valid in public law ... An action for a declaration and an injunction need not be commenced until the very end of the limitation period and the plaintiffs are not required to support their allegations by evidence on oath until the actual trial ... Unless such an act can be struck out summarily at the outset as an abuse of process of the court, the whole purpose of the public policy ... would be defeated”.³⁷

4.41 The decision in *O’Reilly v Mackman* has been subjected to much criticism³⁸ and it should be noted that the decision was disapproved by the Irish courts in *O’Donnell v Dun Laoghaire Corporation*.³⁹ Rejecting the respondent’s claim that the reliefs sought were subject to the exclusive procedure of Order 84 (ie judicial review proceedings) and that the applicant’s case should be struck out as an abuse of process, Costello J held that an applicant would not be barred from obtaining declaratory relief simply by failing to seek an order of *certiorari*, since the courts cannot decide as

³⁷ [1983] 2 AC 237, 284. See Hogan & Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 791.

³⁸ Described at the time as a “singularly unfortunate step back to the technicalities of a bygone age” by Jolowicz “The Forms of Action Disinterred” (1983) Camb LJ 15, quoted in Hogan & Morgan *ibid* at 790. There have also been a number of judicially created exceptions to the rule in *O’Reilly v Mackman*; for a discussion of these criticisms and the judicially carved exceptions to the decision in *O’Reilly v Mackman*, see Hogan & Morgan *ibid* at 790-792.

³⁹ [1991] ILRM 301.

a matter of public policy that litigants who ask the courts to exercise their statutory discretion are in abuse of process. Having so stated, Costello J went on to apply by analogy the applicable safeguards under Order 84 to the applicant's case, namely the issue of time limits, holding:

“[I]n considering the effects of delay in a plenary action there are now persuasive reasons for adopting the principles enshrined in Order 84, rule 21 relating to delay in applications for judicial review, so that if the plenary action is not brought within the three months from the date on which the cause of action arose the court would normally refuse relief unless it is satisfied that had the claim been brought under Order 84, time would have been extended.”⁴⁰

4.42 On the facts of the case, Costello J was satisfied that the applicant's use of the plenary summons procedure had not amounted to a “device to defeat the protections given by Order 84”⁴¹ and as such held that there was no justification for the court acceding the respondent's claim that the applicant's case should be dismissed as an abuse of process.

4.43 As noted above, the issue of conversion of judicial review proceedings to plenary procedure arose in the course of the Commission's consideration of delay on the judicial review list and the various proposals for promoting efficiency in such matters. It has been suggested that delay in filing opposition papers arises from the fact that it is necessary, generally, to file affidavit evidence in support of the opposition papers, as a result of the fact that judicial review proceedings generally proceed on the basis of affidavit evidence only, without oral hearing. One way in which this difficulty can be overcome is for the High Court to direct that the more complex cases proceed by way of plenary summons, utilising the procedure set out in Order 84 rule 26(5). However, it has been suggested that this procedure is rarely used in practice and that instead, in such cases there is an exchange of extremely large numbers of affidavits, clearly an undesirable occurrence.

⁴⁰ [1991] ILRM 301, 314.

⁴¹ *Ibid* at 315.

4.44 *The Commission is satisfied that in appropriate cases, recourse should be had to Order 84 rule 26(5) in order to ensure efficiency and to prevent unnecessary (and avoidable) delays on the judicial review list.*

4.45 Some members of the Working Group also raised concerns as to the appropriateness of traversing by the respondent in its statement of grounds in judicial review proceedings; traversing in this context refers to the concept of a general traverse, defined as “one preceded by a general indorsement and denying in general terms all that is last before alleged on the opposite side, instead of pursuing the words of the allegations which it denies”.⁴² However, it would appear that the requirement arising by Practice Direction that written submissions be filed (seven days before the substantive hearing) has the effect of removing any necessity for the respondent to file another pleading simply to repeat the grounds of denial. Thus, the Practice Direction entitled “Pre-Trial Written Submissions on Legal Issues”⁴³ provides:

- “1. In civil proceedings in which substantial legal issues arise which in counsel’s opinion will require legal argument at the hearing, a written summary of the submissions should be filed in the Central Office at least seven days before the hearing, by both sides and then exchanged between the parties.
2. In all applications for judicial review, written submissions should be filed by both parties, unless an order dispensing with written submissions is made.”

4.46 The issue of discovery in judicial review proceedings was also agreed to be a difficult area, where it is necessary to ensure a balance between various competing considerations. Thus, on the one hand there is the notion that public bodies should, as a matter of principle, be subject to a relatively extensive obligation to make available all documents in relation to the decision which is the subject of the judicial review proceedings.⁴⁴ As against this there is the general

⁴² *Black’s Law Dictionary* (7th ed West Publishing Co 1999).

⁴³ Practice Direction November 1993.

⁴⁴ This refers to the notion that judicial review of an act or decision of a respondent authority constitutes a process, “which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority’s hands”: *R v Lancashire CC, ex parte Huddleston* [1986] 2 All ER 941, 945 (*per* Sir John Donaldson MR).

policy of the courts to control the use and scope of applications for discovery, with recent developments demonstrating an intention to limit the scope of such applications.⁴⁵

4.47 *On balance, the Commission was satisfied that current practice in relation to discovery is operating satisfactorily, achieving the necessary balance between the various elements.*⁴⁶

4.48 A further issue to which attention was drawn relates to a matter of practice which can have an appreciable effect on the progress of a case. Concern has been expressed that when drafting a statement of grounds, counsel fail to sufficiently distinguish the facts from the grounds.

4.49 *In the interests of clarity, the Commission recommends that greater attempts be made to observe the distinction between facts and grounds and for drafting to focus only on grounds in the statement of grounds.*

4.50 The final issue to be mentioned is the need for adequate resources in the High Court to achieve the various objectives set out above as regards the operation of an efficient system of case management. The Working Group agreed that resources were the key to managing the list efficiently and effectively. It has been suggested that there is a current shortage of judges of the High Court⁴⁷ and also supportive resources and it is clear that the absence of the necessary judges, registrars and administrative support would be seriously detrimental to any attempt at a system of case management in the judicial review list.

⁴⁵ See Rules of Superior Courts (No 2) (Discovery) 1999 (SI No 233 of 1999) considered in Delany & McGrath *Civil Proceedings in the Superior Courts* (Round Hall Sweet & Maxwell 2001) at paragraphs 7.005-7.048.

⁴⁶ The point was also made that the files of most public bodies the subject of judicial review proceedings would be a matter of public record. There is also the possibility of overlap with the *Freedom of Information Act 1997*.

⁴⁷ For example, Murphy, "Secondment of judges to tribunals disrupts justice system, causes delay" *Irish Times* 15 February 2002; "Shortage of High Court judges delaying start of criminal trials" *Irish Times* 26 April 2002. Note however the announcement by the Courts Service that it is intended to appoint six more High Court judges by the beginning of Michaelmas Term, 2002: "Six more judges due this year for the High Court" *Irish Times* 15 June 2002.

4.51 *In light of the Commission's recommendation as to the minimum number of judges to be appointed to administer the judicial review list, it is essential that serious efforts be made to ensure that a lack of resources is not permitted to undermine attempts to administer the judicial review list effectively.*

CHAPTER 5 SINGLE ORDER

Introduction

5.01 One of the Law Reform Commission's most successful papers was the 1979 Working Paper on *Judicial Review of Administrative Action: The Problem of Remedies*.¹ This paper recommended various reforms focusing primarily on the issue of procedural exclusivity and resulted in the reforms introduced to judicial review procedure by the Rules of the Superior Courts 1986.² The terms of the Bill designed to amend the procedure for judicial review of administrative action appear to be based on the provisions of the Ontario legislation considered below, which had the effect of introducing the procedure for the "single order for judicial review". However, this reform was not part of the recommendations adopted in the 1986 amendment to the Rules.

5.02 The issue discussed in this chapter is whether the six traditional remedies in judicial review (*certiorari*, *mandamus*, *quo warranto*, prohibition, declaration and injunction) ought to be replaced by a single order for judicial review. The essential point is that, since it is now possible for a court to award whichever remedy it considers appropriate,³ the difference between the remedies (which is so rich in antiquarian learning) might, on one view, be regarded as having become unimportant.

¹ (Working Paper No 8 1979).

² Whereby Order 84 rule 19 of the new Rules of Superior Courts collapsed the distinction between the stateside remedies and private law remedies, and provided that irrespective of the remedies claimed in the pleadings, "the Court may grant any relief mentioned in [Order 84] rules 18(1) or (2) which it considers appropriate notwithstanding that it has not been specifically claimed".

³ Introduced by Order 84 rule 19.

5.03 In the examination of comparative materials on judicial review, it became apparent that a number of common law jurisdictions have already effected such change in the nature of the remedies available in judicial review proceedings and the Commission undertook to consider the nature and effect of these changes and to invite consideration of whether such reforms might also be appropriate in this jurisdiction.

I. Canada

5.04 In 1971 the Ontario *Judicial Review Procedure Act*⁴ merged most of the prerogative and private law remedies into one “application for judicial review” a reform described by Jones and de Villars⁵ as reminiscent of the abolition in the nineteenth century of the forms of action in tort. The purpose of these reforms has been described as the creation of a single application to the court to take the place of the prerogative remedies and proceedings for a declaration or injunction and thereby do away with the legal technicalities which had come to be associated with them.⁶ The practical effects of this reform are described by Jones and de Villars as minimising the importance of choosing the correct remedy to rectify a particular type of administrative wrong⁷ and permitting the court to determine whether there are any grounds for judicial review without regard to the confines of one of the nominated remedies. S. 2(1) of the Ontario *Judicial Review Procedure Act* provides:

“On an application by way of originating notice, which may be styled “Notice of Application for Judicial Review”, the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of *mandamus*, prohibition or *certiorari*.

⁴ Originally SO 1971 c 48, now RSO 1990 c J1.

⁵ Jones & de Villars *Principles of Administrative Law* (Carswell 1995) at 525-531.

⁶ Ontario *Report of the Royal Commission of Inquiry into Civil Rights* Report 1 (Toronto: Queen’s Printer 1968) Volume 1.

⁷ Jones & de Villars *op cit* fn 5 at 526.

2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise, or purported exercise of a statutory power.”

5.05 Jones and de Villars also note that in order to achieve essentially the same reform aims, the Alberta Rules of Court were amended in 1987 to deal with remedies available in administrative law matters. Part 56.1 of the Alberta Rules create a new remedy called an “application for judicial review” which encompasses the prerogative remedies of prohibition, *certiorari*, *mandamus* and *quo warranto*, as well as the private law remedies of declarations and injunctions. The authors suggest that this revised procedure makes judicial review simpler, although (and this is a point which should be emphasised) it does not alter the grounds upon which judicial review may be granted. The significant point is that it is not necessary to specify the nature of the application or the remedy desired, though it has been suggested that in practice it is possible and probably desirable to do so. The court has jurisdiction under Part 53.1 to grant any of the remedies, whether specified or not, providing the grounds for obtaining that remedy have been established.

5.06 Reform of this type also took place at federal level, although in a slightly different manner to the provincial changes. In the early 1970s, the Canadian Federal Parliament enacted the *Federal Court Act*,⁸ which dealt with both the transfer of jurisdiction in specified administrative law matters, as well as creating a generalised “application for judicial review” available from the Federal Court of Appeal. Despite initial difficulties, the provisions establishing the “application for judicial review” in place of the old prerogative remedies appear to have operated satisfactorily since their introduction.⁹ However, despite these procedural reforms, Jones and de Villars note that the adoption of this new uniform procedure does not really constitute a new remedy, as its scope, availability and

⁸ Originally RSC 1970 c 10 (2nd Supp); now RSC 1985 c F-7, as amended by SC 1990, c 8 (came into force on 1 February 1992).

⁹ Thus, there are four Canadian statutes dealing with the single “application for judicial review”: *Federal Court Act* RSC 1985 c F-7, s. 18.1; *Judicial Review Act* RSPEI 1988, c J-3, s. 2(1); *Judicial Review Procedure Act* RSC 1990 c J1, s. 2(1); *Judicial Review Procedure Act* RSBC 1996, c 241, s. 2(1). See Brown & Evans *Judicial Review of Administrative Action* (Canvasback Toronto 1998).

limitations depend upon the various prerogative and private law remedies which have traditionally been available in an application for judicial review.¹⁰

II. New Zealand

5.07 As is the case in Canada, judicial review in New Zealand is derived from the English common law prerogative writs and the public law manifestations of the normally private law remedies of declaratory and injunctive relief.¹¹ However, opinion in New Zealand gradually leaned toward the view that the complicated procedural rules which governed these reliefs were a major obstacle to litigants. Deficiencies in these processes led to the enactment of the *Judicature Amendment Act 1972* and the *Judicature Amendment Act 1977* to simplify the procedure. The New Zealand Law Commission has noted¹² that these legislative provisions were based on the Ontario *Judicial Review Procedure Act 1971*. The 1972 Act provided for a single action, known as an application for judicial review, which would enable applicants to claim any relief that they would have been entitled to in proceedings for *mandamus*, *certiorari*, declaration, prohibition or injunction. Thus, s. 4(1) of the *Judicature Amendment Act 1972* provides:

“On an application which may be called an application for review, the High Court may, notwithstanding any right of appeal possessed by the applicant in relation to the subject-matter of the application, by order grant ... any relief that the applicant would be entitled to, in any one or more of the proceedings for a writ or order in the nature of *mandamus*, prohibition or *certiorari* or for a declaration or injunction, against that person in any such proceedings.”

5.08 The New Zealand Law Commission notes that the *Judicature Amendment Act* was not intended to bring about substantive change but rather to simplify the procedures for applying for relief and to

¹⁰ Jones & de Villars *Principles of Administrative Law* (Carswell 1995) at 526.

¹¹ See the Law Commission (NZ) paper *Mandatory Orders Against the Crown and Tidying Judicial Review* (Study Paper 10 March 2001).

¹² *Ibid* at 14.

extend the nature of the relief that could be granted. The Act did not abolish the old remedies which continued as an alternative to the new application for review, although it was expected that the old actions would wither away as practitioners became used to the new proceedings.¹³ The New Zealand Law Commission's Paper stated that the statutory procedure for judicial review, pursuant to the *Judicature Amendment Act 1972* as amended, has been highly successful, with the Commission suggesting that this procedure has "allowed New Zealand to compete with, and in many respects surpass, comparable jurisdictions in the provision of effective and acceptable processes for judicial review."¹⁴

III. Consideration of Proposal for Reform

5.09 From this analysis of comparative reform, it might be suggested that no harm has been caused to the substantive law on judicial review by the various legislative amendments. It would seem that these changes have been welcomed as removing the antiquated and unnecessary complications, involving a large degree of unnecessary learning, verbiage and inaccessibility for laypersons, students and practitioners alike. The Commission also considered the suggestion that it was not helpful or necessary that the vocabulary of the law be loaded with the Byzantine complexities of a bygone era.

5.10 In considering the proposal for reform of the present law by replacing the six discrete traditional remedies with the single remedy of an order for judicial review, the Commission accepted that it would be likely that under any new scheme, it would still remain necessary

¹³ The alternative procedural avenue for judicial review under New Zealand law is by reference to Part VII of the High Court Rules (where, for example, there has been no exercise of statutory power and the *Judicature Amendment Act 1972* is therefore of no application).

¹⁴ Law Commission (NZ) *Mandatory Orders Against the Crown and Tidying Judicial Review* (Study Paper 10 March 2001) at 15. However, note that the Law Commission also suggested that the "split jurisdiction" (between the pre-existing common law procedures and the more recent statutory scheme) in judicial review was unacceptable, and in need of reform. The 2001 paper therefore suggested the abolition of the *Judicature Amendment Act* and its replacement with an all-encompassing, skeletal Act. Not all members of the New Zealand Law Commission agreed with this proposal however and the paper was therefore published as a study, not a recommendation. See Preface at vii-viii.

to refer to the traditional remedies in the Rules of the Superior Courts, in order to delimit the scope of judicial review. This might be said to render these proposals susceptible to the accusation of admitting by the back door that which was ceremoniously expelled at the front door. As against this, it was suggested that this was probably more a theoretical danger than a practical one, because it was most unlikely that the argument in relation to the scope of judicial review would be resolved by reference to the technicalities of the old remedies.

5.11 Commenting on the distinction between the various judicial review remedies, Hogan and Morgan¹⁵ conclude that probably the main distinction between the individual remedies is that in relation to time limits.¹⁶ However, the authors also note that other distinctions between the various remedies, though unlikely to arise very often, include the fact that due to the wording of Order 84 rule 20(7)(a) it seems possible for an applicant to obtain a form of interlocutory relief on an *ex parte* basis where *certiorari* (or prohibition) is sought, whereas this is not the case if a declaration is sought.¹⁷ It has also been suggested that as the declaration is not a coercive remedy, there may be circumstances in which a coercive remedy is required, for

¹⁵ Hogan & Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 692-694.

¹⁶ Order 84 rule 21 which provides for six months in relation to *certiorari* and a time limit of three months for all other remedies sought by way of judicial review.

¹⁷ Order 84 rule 20(7) provides that where leave to apply for judicial review is granted, then:

“If the relief sought is an order or prohibition or *certiorari* and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders; or

if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by plenary summons.”

See Hogan & Morgan *op cit* fn 15 at 692 fn 7 where it is suggested that “as an interpretation of Order 84 rule 20(7)(a) which allows the Court to grant what amounts to an interlocutory injunction on an *ex parte* basis might well be *ultra vires* the powers of the Rules Committee, it may be that there will not prove to be any great difference between r.(7)(a) and r. (7)(b)”.

example to expunge a conviction and other circumstances in which the declaratory remedy will be preferred.¹⁸

5.12 These two points aside, it might be said the crucial substantive difference between the remedies is the fact that the time limit within which *certiorari* must be sought is six months, whilst all other remedies have a time limit of three months. Under the proposed new regime, the particular remedies would no longer exist; this raises the question of what the time limits should be.

5.13 In considering these proposals, the Commission considered three possible methods of introducing reform, having regard to the potential difficulties which might arise in relation to the issue of time limits.¹⁹ These three methods were:

- (i) retaining the status quo, by providing that an application for an order in the nature of *certiorari* must be filed within six months, whilst applications seeking orders in the nature of *mandamus*, *quo warranto*, prohibition, declaration or injunction should be filed within three months;
 - (ii) making a distinction between applications for judicial review in criminal matters, with a time limit of six months and applications for judicial review in all other matters, where the time limit should be three months;
- or

¹⁸ Hogan & Morgan *op cit* fn 15 at 692 refer to the *dicta* of Lord Goddard in *Pyx Granite Ltd v Ministry of Housing and Local Government* [1960] 260, 290, where he stated:

“I know of no authority for saying that if an order or decision can be attacked by *certiorari* the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive, though no doubt there are some orders, notably convictions before justices, where the only appropriate remedy is *certiorari*.”

¹⁹ The point essentially refers to the terms of RSC Order 84 rule 21(1), which provides that an application for leave to apply for judicial review must be made “promptly, and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*, unless the court considers that there is good reason for extending the period within which the application shall be made”. For consideration of the approach of the courts to applications for extension of time, see Chapter 1, Part B.

- (iii) removing the distinction as regards time limits between *certiorari* and the other judicial review remedies, to create a single time limit, either three or six months, to apply to all applications for a judicial review order.

5.14 Prior to the introduction of the 1986 reforms, there was only one instance in which an applicant for judicial review was required to act within a definite time limit: where *certiorari* was sought to quash a decision of the District or Circuit Court, the applicant was subject to a six month time limit.²⁰ All other applications were subject to the discretion of the court, informed by principles of undue delay. Indeed, the Law Reform Commission's 1979 paper on *Judicial Review of Administrative Action: The Problem of Remedies*, concluded that the discretion of the court *vis-à-vis* time limits afforded the necessary flexibility in such matters and consequently recommended that there should be no general time limit for the presentation of an application for review, but rather, that the doctrine of laches should continue to apply.²¹ Despite this recommendation, the Rules Committee in its 1986 reforms saw fit to introduce time limits of six months in the case of *certiorari*, and three months in respect of all other remedies.

5.15 With regard to the three potential avenues of reform outlined above, the Commission saw no merit in option (i), effectively retaining the status quo. The entire point of the proposals for reform in this chapter, if undertaken, is that by today, there is little relevant difference in the grounds on which an order for *certiorari* or declaration is granted and certainly not one which would justify a time limit of six months in the case of one and three months in the case of the others. Considering then options (ii) and (iii) above, on balance the Commission believed that if the proposals for reform were to be adopted, it would be preferable to impose a single, universal time limit of six months in all conventional judicial review proceedings. To impose a universal three month period might raise concerns from a civil liberties point of view, whilst to differentiate between criminal matters and all other matters would cause unnecessary complexity in reforms aimed at simplifying the present

²⁰ This requirement was set out in Order 84 rule 10 of the Rules of the Superior Courts, 1962.

²¹ (Working Paper No 8 1979) at paragraph 6.10.

procedure. In relation to the proposal that the time limit in conventional judicial review proceedings comprise a period of six months, the Commission accepted that such proposal might cause some concerns at extending the time limits in areas previously governed by orders for *mandamus*, *quo warranto*, prohibition, declaration and injunction.

IV. Conclusion

5.16 In the event, the question of how to resolve the issue of time limits under any “single order” scheme does not arise, as the Commission is satisfied that the case for retaining the traditional distinctions between the remedies comprising an “order for judicial review” is stronger than that advocating its abolition. The primary criticism of the proposal to abolish the separate orders and recommend their replacement with a single order is that such an approach would serve little purpose other than to encourage an amorphous approach to drafting in judicial review proceedings, whereby the papers as filed might not necessarily disclose the specific nature of the remedy sought. In light of the emphasis on the issues of expedition and efficiency in judicial review proceedings, such a result would clearly be undesirable and in contradiction of much of the focus of this paper. It should also be noted that although the Law Commission in New Zealand hailed the unified procedure as “highly successful”, the criteria by which such success is measured are not apparent. A further and related point is the use in the statutory provisions in both Canada and New Zealand, of the phrase “relief in the nature of [*mandamus*, prohibition, *certiorari* ...]”. By continuing to define the new single order by reference to the individual remedies, the question might be asked as to the real value of the reforms as effected.

5.17 Whilst the Working Group was agreed that the proposal to abolish the distinctions between the separate remedies should not be adopted, one issue on which consensus was apparent is in relation to the individual remedy of *quo warranto*. In its 1979 Working Paper,²² the Commission recommended the abolition of the remedy of *quo warranto*, although this recommendation was not adopted in the formulation of Order 84 of the Rules of the Superior Courts 1986.

²² Law Reform Commission *Judicial Review of Administrative Action: The Problem of Remedies* (Working Paper No 8 1979).

5.18 The order of *quo warranto* derives from the old writ of *quo warranto* which was a means of determining whether someone who claimed an office, franchise or liberty had a right thereto. As Kenny J observed in *Garvey v Ireland*.²³

“In former times, when the holder of an office was removed and he claimed that this was not justified, he applied for the issue of an information in the nature of a *quo warranto* directed to the new holder of the office to show how he held the office from which the prior holder had been removed”.²⁴

5.19 However, in 1979 the Commission stated that “no application for such an order has been made for many years, and it would appear to be obsolescent, if not indeed obsolete”.²⁵ Thus, it has been suggested that those proceedings formerly raising issues which would have been determinable pursuant to the remedy of *quo warranto* would now be dealt with by way of declaratory relief, namely by seeking a declaration that the office had not been lawfully filled and an injunction to restrain the purposes office-holder from acting.

5.20 As the Commission concluded in 1979, “[t]his being so, it seems unnecessary – and a possible source of confusion – to retain the separate procedure by way of *quo warranto*”.²⁶ It should also be noted that the remedy of *quo warranto* was abolished in England by s. 9 of the *Administration of Justice (Miscellaneous Provisions) Act 1938*, which instead provided the High Court with the power to grant an injunction and if necessary, declaration.

²³ [1981] IR 75.

²⁴ [1981] IR 75, 113. As the Commission noted in 1979, “this procedure could also be used where the ground of challenge was the lack of qualification for office of the person appointed, rather than the way the vacancy had been brought about”; see, for example *R (Moore) v Moriarty* [1915] 2 IR 375.

²⁵ Law Reform Commission *Judicial Review of Administrative Action: The Problem of Remedies* (Working Paper No 8 1979) at 73. Indeed, there have been no reported cases in which the remedy of *quo warranto* has been sought since the publication of the 1979 Report, lending credence to the description of the remedy as “obsolete”.

²⁶ *Ibid* at 73.

Recommendation

5.21 *The Commission is satisfied that there would be little, if anything, to be gained by collapsing the distinction between the six remedies available in judicial review proceedings, to a procedure involving a “single order”; specifically, the Commission accepts concerns that such reform could have adverse consequences for court time and also for public bodies as respondents.*

5.22 *However, the Commission is satisfied that the remedy of quo warranto no longer serves any purpose and should any cases arise in future which would formerly have been dealt with by way of quo warranto, the extant remedies of declaration and injunction would be sufficient to remedy the complaint. The Commission therefore reiterates the recommendation in the 1979 Report that the remedy of quo warranto be abolished.*

6.01 The provisional recommendations contained in this paper may be summarised as follows:

I. Chapter 1 – Conventional Judicial Review

6.02 It is the view of the Commission that where the leave stage is operated in such a manner that it performs an effective filtering function and where the test at this stage is consistently applied, then the argument for retention of the leave stage is stronger than that which advocates its abolition. The Commission recommends the retention of the leave stage in conventional judicial review proceedings. [paragraph 1.09]

6.03 The Commission recommends the retention of the “arguable case” test in conventional judicial review proceedings, although again it is stressed that it is essential that this test is applied consistently. Thus, while there is no certainty that explicitly stating the “arguable case” test in the Rules would lead to greater consistency in its application, this would avoid any residual uncertainty about the precise formula to be applied and would reinforce the desirability of its imposition. For this reason the Commission would also recommend that the “arguable case” test should be set out in Order 84 rule 20(4). [paragraph 1.14]

6.04 It is recommended that the discretion residing in the Court to conduct *inter partes* applications for leave to apply for judicial review should remain but that the discretion of the High Court to conduct the leave stage on notice should be exercised “only in exceptional cases”. The Commission also recommends that the test to be applied at this hearing should be that the applicant has an arguable case, rather than a more onerous standard. [paragraph 1.25]

6.05 The Commission accepts that the possibility of setting aside leave is a necessary procedural safeguard, and its total abolition is therefore unwarranted. Further, in light of the recommendation on the limited circumstances in which applications for leave should be conducted *inter partes* the Commission accepts that the potential for seeking to have a grant of leave set aside remains necessary. [paragraph 1.36]

6.06 The Commission is satisfied that the *dicta* of McGuinness J in *Adam v Minister for Justice*,¹ as approved by Fennelly J in *Gordon v Director of Public Prosecutions*,² suggesting that “the exercise of the court’s inherent jurisdiction to discharge orders giving leave should, therefore, be used only in exceptional cases” is the sensible approach. Where the application for leave is conducted *inter partes* the respondent should not be permitted to seek to have the grant of leave set aside unless there is a change in circumstances such as to render the substantive hearing nugatory. The Commission recommends that these tests be explicitly set out in the Rules of Court as a practical guideline. [paragraph 1.37]

6.07 In relation to the issue of time limits, the Commission suggests that while it is useful to consider the issue of prejudice as one of a number of factors to be weighed up, it is important to stress that it is well established that the onus lies on the applicant to establish good reason to extend time and in order to ensure consistency the courts must not lose sight of this in determining applications of this nature. [paragraph 1.50]

6.08 Clearly if one of the underlying purposes of judicial review is to be met, namely to achieve certainty in relation to decisions made by public bodies without undue delay, realistic time limits must be set down. While some flexibility to extend time is probably desirable to meet the needs of justice of individual cases, it is necessary to try to achieve consistency in the manner in which any extension of time will be granted. [paragraph 1.51]

6.09 Experience has shown that the existing provisions have worked reasonably well in practice and the Commission recommends

¹ [2001] 2 ILRM 452.

² [2003] 1 ILRM 81.

that the courts continue to apply the guidelines set out above in relation to what will constitute ‘good reason’ to extend time, namely that the applicant must demonstrate that there are reasons which both explain the delay and afford a justifiable excuse for it. [paragraph 1.52]

6.10 The Commission is satisfied that it is generally not appropriate for the courts to reach a conclusive decision on such matters as the sufficiency of interest of an applicant at the leave stage. We endorse the principles set out in such cases as *G v Director of Public Prosecutions*³ and *Lancefort v An Bord Pleanála*⁴ namely that for the court to decide such issues at the leave stage in conventional judicial review proceedings would be inconsistent with the purpose of that stage. However, we are also mindful of the need to avoid duplication of arguments between the leave stage and substantive hearing, which can contribute to significant delays. The Commission therefore suggests that the High Court exercise caution at the leave stage so as to prevent such duplication, in light of the fact that such issues will be fully argued and determined at the substantive hearing. [paragraph 1.56]

6.11 The area of alternative remedies is a complex one, a fact reflected by the original confusion and divergence of *dicta* on the matter. From the case law, there would appear to be three lines of authority: the *dicta* of Henchy J in *State (Abenglen Properties Ltd) v Dublin Corporation*⁵ might be seen as representing the high watermark of the law in this area whilst the approach of Finlay CJ in *P & F Sharpe v Dublin City and County Manager*⁶ might be seen as the opposite extreme. The Commission is of the opinion that the decision of O’Higgins CJ in *Abenglen* represents a fair middle ground in this area, and we endorse the more recent trend of the courts in following the approach of O’Higgins CJ. [paragraph 1.70]

³ [1994] 1 IR 374.

⁴ [1999] 2 IR 270.

⁵ [1984] IR 381.

⁶ [1989] IR 701.

II. Chapter 2 – Statutory Schemes in Judicial Review

6.12 The Commission provisionally recommends the retention of the leave stage in specialised (statutory) judicial review procedure. [paragraph 2.03]

6.13 The Commission is satisfied that the higher standard of “substantial grounds” is justifiable in the context of specialised statutory schemes in light of the subject matter of challenges undertaken pursuant to these schemes and it is therefore recommended that there be no alteration to this test. However, concern was expressed at the potential for discrepancies in the application of this test and the Commission accepts that it is essential that there be consistency in the interpretation and application of the test of “substantial grounds.” [paragraph 2.09]

6.14 The Commission recommends that conducting the application for leave on notice under the various statutory schemes should be a discretionary matter only and that such discretion should be exercised only in exceptional cases. Legislative amendment will be required to give effect to this proposal. [paragraph 2.12]

6.15 The Commission is satisfied that the 14 day time limit prescribed by s. 5(2)(a) of the *Illegal Immigrants (Trafficking) Act 2000* achieves the necessary balance between the rights of applicants and the policy concerns of the Legislature. The Commission therefore recommends no change to the present regime of time limits in judicial review of immigration matters. [paragraph 2.28]

6.16 It is recommended that amendments should be permitted to the grant of leave, in both conventional judicial review proceedings and specialised statutory schemes, where the material on which it is based was not or could not have been discovered with reasonable diligence at the time, provided that there is no unacceptable delay in making the application. [paragraph 2.41]

6.17 It is recommended that the requirement of obtaining a certificate of appeal from the High Court should be retained, but subject to modification in that the specific grounds of appeal should also be certified by the High Court when granting the certificate. It is the opinion of the Commission that this should remedy any reluctance on the part of the High Court in granting such certificates, while also

moderating the necessarily heavy onus resting on an applicant in such cases. It is also recommended that 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 guard against injustice or arbitrariness. [paragraph 2.53]

III. Chapter 3 – Costs

6.18 The Commission recommends that in appropriate cases, the courts should make greater use of their discretion in relation to the issue of costs at the leave stage. Specifically, the Commission suggests that greater use should be made of the possibility of apportioning the costs of the leave stage to allow recovery of costs only in relation to those grounds successfully argued or challenged. [paragraph 3.09]

6.19 The Commission accepts that it is not appropriate for the Director of Public Prosecutions to be joined in judicial review proceedings solely for the purposes of being made liable for an award of costs. Having regard to the approach adopted in England, the Commission recommends the establishment of a central fund from which costs, appropriately taxed, can be awarded in judicial review proceedings involving respondent judges where the error was made *bona fide* and the application was unopposed. [paragraph 3.25]

6.20 It is recommended that the jurisdiction of the courts in relation to pre-emptive costs should be exercised only in exceptional circumstances and that where any doubt exists, the court should instead simply indicate the approach to be taken in relation to costs at the conclusion of the judicial review proceedings. [paragraph 3.30]

6.21 The Commission is satisfied that the present system in relation to security for costs in the context of judicial review proceedings operates satisfactorily and is sufficiently flexible to allow the court to make an order which is fair in the circumstances of each individual case. [paragraph 3.37]

6.22 Although the decision of Laffoy J in *Broadnet v Office of the Director of Telecommunications*⁷ has been the subject of some

⁷ [2000] 3 IR 281.

criticism, the Commission is satisfied that there may well be circumstances in which such discretion of the court will be vital to protect the interests of innocent third parties who may suffer serious prejudice by the institution of judicial review proceedings. This was agreed to be particularly true in relation to so-called “commercial judicial review”, where there is clearly a substantial negative impact caused to third parties by the institution of such proceedings. In such circumstances the Commission is satisfied that the existence of an “exceptional jurisdiction” to require an applicant to provide an undertaking as to damages, in accordance with the strict criteria laid down by Laffoy J in relation to the exercise of this jurisdiction, is both necessary and a fair balance of all the interests at stake. [paragraph 3.41]

IV. Chapter 4 – Case Management

6.23 It is recommended that prior to the application for leave to apply for judicial review, the applicant should send to the respondent a letter informing the respondent that failure to concede the claim within 10 days will result in the applicant proceeding to seek leave to apply for judicial review. Whilst this procedure should not be mandatory, failure to issue such letter may be taken into account in determining costs, save where the failure to comply with this procedure is attributable to the fact that the making of the application for leave was a matter of justifiable or demonstrable urgency. [paragraph 4.07]

6.24 The Commission recommends that a minimum of three judges from the current bench be nominated to administer the judicial review list, with one judge to act as “lead judge” with overall responsibility for the list and a minimum of two other judges available to hear cases from the judicial review list. If sufficient judges are not available to meet this recommendation, then it is suggested that consideration be given to the appointment of sufficient judges to fulfil these recommendations. [paragraph 4.20]

6.25 It is recommended that in appropriate cases, affidavits should not be read in open court. To facilitate this and also having regard to the generally greater need for reserved judgments in judicial review matters, it is strongly recommended that both the lead judge and

nominated judges on the judicial review list be permitted sufficient reading days to allow affidavits to be read in chambers prior to hearing and also to eliminate as much as possible the period of delay between substantive hearing and delivery of judgment. [paragraph 4.24]

6.26 The Commission recommends that in *ex parte* applications for leave, counsel be required to file papers by the preceding Wednesday or otherwise two clear days in advance of the hearing. This requirement should be waived in urgent applications and should be provided for in either Rules of Court or by Practice Direction. In order to ensure compliance with this requirement, we recommend that applicants in default of this requirement be liable to penalisation in costs. It is also recommended that written legal submissions filed in accordance with the ruling practice direction should be as succinct but comprehensive as possible and should be filed in sufficient time to allow the court a real opportunity to consider the contents of such submissions. [paragraph 4.28]

6.27 The Commission recommends the introduction of a *pro forma* timetable to operate once the applicant has obtained an order granting leave to apply for judicial review. The respondent should be required to file a statement of opposition within 28 days and the applicant should file any reply within a further 28 days. These time limits should not be extended save where there is “good and sufficient reason”. Failure to comply with this procedure should be subject to the imposition of an immediate costs order against the party in default. [paragraph 4.35]

6.28 The Commission is satisfied that in appropriate cases, greater recourse should be had to Order 84 rule 26(5) in order to prevent delay by virtue of the exchange of large volumes of affidavits. Greater use of the facility to convert judicial review proceedings to plenary hearings could ensure efficiency and prevent unnecessary (and avoidable) delays on the judicial review list. [paragraph 4.44]

6.29 The Commission is satisfied that current practice in relation to discovery is operating satisfactorily, achieving the necessary balance between the various elements. [paragraph 4.47]

6.30 In the interests of clarity, the Commission recommends that greater attempts be made to observe the distinction between facts and

grounds and for drafting to focus only on grounds in the statement of grounds. [paragraph 4.49]

6.31 The Commission is of the opinion that resources are the key to managing the list efficiently and effectively. The absence of the necessary judges, registrars and administrative support would be seriously detrimental to any attempt at a system of case management in the judicial review list. In light of the Commission's recommendation as to the minimum number of judges to be appointed to administer the judicial review list, it is essential that serious efforts be made to ensure that a lack of resources is not permitted to undermine attempts to administer the judicial review list effectively. [paragraph 4.51]

V. Chapter 5 – Single Order

6.32 The Commission is satisfied that there would be little, if anything, to be gained by collapsing the distinction between the six remedies available in judicial review proceedings, to a procedure involving a “single order”; specifically, the Commission accepts concerns that such reform could have adverse consequences for court time, and also for public bodies as respondents. [paragraph 5.21]

6.33 However, the Commission is satisfied that the remedy of *quo warranto* no longer serves any purpose and should any cases arise in future which would formerly have been dealt with by way of *quo warranto*, the extant remedies of declaration and injunction would be sufficient to remedy the complaint. The Commission therefore reiterates the recommendation in the 1979 Report⁸ that the remedy of *quo warranto* be abolished. [paragraph 5.22]

⁸ Law Reform Commission *Judicial Review of Administrative Action: The Problem of Remedies* (Working Paper No 8 1979).

**Appendix A: Rules of the Superior Courts, 1986: Order 84, rules
18 - 27**

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 an 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 a statement of:
 - (i) the name, address and description of the applicant,

- (ii) the relief sought and the grounds upon which it is sought,
- (iii) the name and registered place of business of the applicant's solicitors (if any), and
- (iv) the applicant's address for service within the jurisdiction (if acting in person); and

(b) an affidavit which verifies the facts relied on.

Such affidavit shall be entitled:-

THE HIGH COURT

JUDICIAL REVIEW

BETWEEN

A.B. APPLICANT

AND

C.D. RESPONDENT

(3) The Court hearing an application for leave may allow the applicant's statement to be amended, whether by specifying different or additional grounds of relief or otherwise, on such terms, if any, as it thinks fit.

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

(5) Where leave is sought to apply for an order of *certiorari* to remove for the purpose of its being quashed any judgment, order, conviction or other proceeding which is subject to an appeal and 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.

(6) 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.

(7) Where leave to apply for judicial review is granted then-

(a) if the relief sought is an order of prohibition or *certiorari* and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;

(b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by plenary summons.

21. (1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*, unless the Court considers that there is good reason for extending the period within which the application shall be made.

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

(3) The preceding paragraphs 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 unless the Court directs that it 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 14 days after the grant of leave, or within such other period as the Court may direct. In default of service within the said time the stay of proceedings referred to in rule 20(7) shall lapse. In the case of a motion on notice it shall be returnable for the first available motion day after the expiry of 10 days from the date of service thereof, unless the Court otherwise directs.

(4) Any respondent who intends to oppose the application for judicial review by way of motion on notice shall file in the Central Office a statement setting out concisely the grounds for such opposition and, if any facts are relied on therein, an affidavit verifying such facts. Such respondent shall serve a copy of statement and affidavit (if any) on all parties not later than seven days from the date of service of the notice of motion or such other period as the Court may direct. The statement shall include the name and registered place of business of the respondent's solicitor (if any).

(5) 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.

(6) 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 paragraph (2). No grounds shall be relief 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 or 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 any new matters arising out of any 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) On an application for judicial review the Court may, subject to paragraph (2), award damages to the applicant if-

(a) he has included in the statement in support of his application for leave under rule 3 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.

25. (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.
26. (1) On the hearing of any motion or summons under rule 22, any person who desires to be heard in opposition to the motion or summons, 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 proceedings.
- (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 question 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 person against whom an order of *certiorari* is to be directed do make a record of the judgment, conviction or decision complained of.
- (3) Where an order of *certiorari* is made in any such case as is referred to in paragraph (2), the order shall, subject to paragraph (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 application, 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 proceedings 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 of right of that person.

(7) At any stage in the proceedings in prohibition, in the nature of *quo warranto*, 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 judgment and make such order as if the trial were the hearing of an application to make absolute a conditional order to show cause.

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

APPENDIX B: LIST OF LAW REFORM COMMISSION PUBLICATIONS

First Programme for Examination of Certain Branches of the Law with a View to their Reform (December 1976) (Prl 5984)	€0.13
Working Paper No 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977)	€1.40
Working Paper No 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (November 1977)	€1.27
Working Paper No 3-1977, Civil Liability for Animals (November 1977)	€3.17
First (Annual) Report (1977) (Prl 6961)	€0.51
Working Paper No 4-1978, The Law Relating to Breach of Promise of Marriage (November 1978)	€1.27
Working Paper No 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harboursing of	

a Spouse (December 1978)	€1.27
Working Paper No 6-1979, The Law Relating to Seduction and the Enticement and Harbours of a Child (February 1979)	€1.90
Working Paper No 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979)	€1.27
Working Paper No 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (December 1979)	€1.90
Second (Annual) Report (1978/79) (Prl 8855)	€0.95
Working Paper No 9-1980, The Rule Against Hearsay (April 1980)	€2.54
Third (Annual) Report (1980) (Prl 9733)	€0.95
First Report on Family Law - Criminal Conversation, Enticement and Harbours of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981)	€2.54
Working Paper No 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (September 1981)	€2.22
Fourth (Annual) Report (1981) (Pl 742)	€0.95

Report on Civil Liability for Animals (LRC 2-1982) (May 1982)	€1.27
Report on Defective Premises (LRC 3-1982) (May 1982)	€1.27
Report on Illegitimacy (LRC 4-1982) (September 1982)	€4.44
Fifth (Annual) Report (1982) (PI 1795)	€0.95
Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983)	€1.90
Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (November 1983)	€1.27
Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (December 1983)	€1.90
Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (December 1983)	€3.81
Sixth (Annual) Report (1983) (PI 2622)	€1.27
Report on Nullity of Marriage (LRC 9-1984) (October 1984)	€4.44
Working Paper No 11-1984, Recognition of Foreign Divorces and Legal Separations (October 1984)	€2.54
Seventh (Annual) Report (1984) (PI	

3313)	€1.27
Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985) (April 1985)	€1.27
Report on Vagrancy and Related Offences (LRC 11-1985) (June 1985)	€3.81
Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12-1985) (June 1985)	€2.54
Report on Competence and Compellability of Spouses as Witnesses (LRC 13-1985) (July 1985)	€3.17
Report on Offences Under the Dublin Police Acts and Related Offences (LRC 14-1985) (July 1985)	€3.17
Report on Minors' Contracts (LRC 15-1985) (August 1985)	€4.44
Report on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (LRC 16-1985) (August 1985)	€2.54
Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors (LRC 17-1985) (September 1985)	€3.81
Report on the Liability in Tort of Mentally Disabled Persons (LRC 18-1985) (September 1985)	€2.54

Report on Private International Law Aspects of Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage (LRC 19-1985) (October 1985)	€4.44
Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decrees, and the Hague Convention on the Celebration and Recognition of the Validity of Marriages (LRC 20-1985) (October 1985)	€2.54
Eighth (Annual) Report (1985) (Pl. 4281)	€1.27
Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries (LRC 21-1987) (September 1987)	€5.71
Consultation Paper on Rape (December 1987)	€7.62
Report on the Service of Documents Abroad re Civil Proceedings -the Hague Convention (LRC 22-1987) (December 1987)	€2.54
Report on Receiving Stolen Property (LRC 23-1987) (December 1987)	€8.89
Ninth (Annual) Report (1986-1987) (Pl. 5625)	€1.90
Report on Rape and Allied Offences (LRC 24-1988) (May 1988)	€3.81

Report on the Rule Against Hearsay in Civil Cases (LRC 25-1988) (September 1988)	€3.81
Report on Malicious Damage (LRC 26-1988) (September 1988)	€5.08
Report on Debt Collection: (1) The Law Relating to Sheriffs (LRC 27-1988) (October 1988)	€6.35
Tenth (Annual) Report (1988) (Pl. 6542)	€1.90
Report on Debt Collection: (2) Retention of Title (LRC 28-1988) (April 1989)	€5.08
Report on the Recognition of Foreign Adoption Decrees (LRC 29-1989) (June 1989)	€6.35
Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989) (June 1989)	€6.35
Consultation Paper on Child Sexual Abuse (August 1989)	€12.70
Report on Land Law and Conveyancing Law: (2) Enduring Powers of Attorney (LRC 31-1989) (October 1989)	€5.08
Eleventh (Annual) Report (1989) (Pl 7448)	€1.90
Report on Child Sexual Abuse (LRC 32-1990) (September 1990)	€8.89

Report on Sexual Offences against the Mentally Handicapped (LRC 33-1990) (September 1990)	€5.08
Report on Oaths and Affirmations (LRC 34-1990) (December 1990)	€6.35
Report on Confiscation of the Proceeds of Crime (LRC 35-1991) (January 1991)	€7.62
Consultation Paper on the Civil Law of Defamation (March 1991)	€25.39
Report on the Hague Convention on Succession to the Estates of Deceased Persons (LRC 36-1991) (May 1991)	€8.89
Twelfth (Annual) Report (1990) (PI 8292)	€1.90
Consultation Paper on Contempt of Court (July 1991)	€25.39
Consultation Paper on the Crime of Libel (August 1991)	€13.97
Report on the Indexation of Fines (LRC 37-1991) (October 1991)	€8.25
Report on the Civil Law of Defamation (LRC 38-1991) (December 1991)	€8.89
Report on Land Law and Conveyancing Law: (3) The Passing of Risk from Vendor to Purchaser (LRC 39-1991) (December 1991); (4) Service of Completion Notices (LRC 40-1991) (December 1991)	€7.62

Thirteenth (Annual) Report (1991) (PI 9214)	€2.54
Report on the Crime of Libel (LRC 41-1991) (December 1991)	€5.08
Report on United Nations (Vienna) Convention on Contracts for the International Sale of Goods 1980 (LRC 42-1992) (May 1992)	€10.16
Report on the Law Relating to Dishonesty (LRC 43-1992) (September 1992)	€25.39
Land Law and Conveyancing Law: (5) Further General Proposals (LRC 44-1992) (October 1992)	€7.62
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