THE LAW REFORM COMMISSION

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: THE PROBLEM OF REMEDIES

CHAPTER 1 INTRODUCTION

1.1 Until well into the nineteenth century the responsibilities of the state were few and classical - the maintenance of public order, the conduct of foreign affairs and the disposition of the armed forces. It is far different nowadays. In the interests of protecting the public and regulating the economy, the state intervenes to a very consisiderable degree in the lives of its citizens. The law provides for controls over prices, restrictive practices and planning. Certain types of business - examples are banking, employment agencies and livestock marts - may not be carried on without a licence; and that licence may be subject to such conditions as the licensing authority sees fit to impose. A variety of discretionary grants, most notably in the area of industrial development, is available, as is a wide range of benefits in the spheres of health, social welfare, education and redundancy.

1.2 The administration of these controls and services brings many persons and institutions into contact with administrative agencies and naturally provides a fertile source of grievances. With many of these the courts could have no concern; it is not their function to entertain appeals from decisions of administrative bodies. However, it is the business of the courts to ensure that administrative actions and decisions are taken in accordance with law.

Hence the aggrieved citizen who contests the legality of an administrative decision must have access to the courts to litigate his claim. Indeed, access to the High Court would appear to be one of the unspecified personal rights guaranteed by the Constitution[1].

1.3 In many recent decisions the courts have demonstrated their ability to intervene for the protection of the citizen. To take but a few examples, limits have been placed on administrative discretion[2]; a judicial power to compel disclosure of administrative files has been established[3]; and the right to a fair hearing has been vindicated in several different contexts[4]. The substantive law, then, is generally adequate to present needs and will doubtless be developed by the courts to cope with future requirements. But while there can be little doubt about the courts' power to give relief in appropriate cases, the means of access to that relief is capable of improvement.

1.4 The problems of the present system lie in the multiplicity of remedies available. While some of these overlap, the correspondence is not complete and this gives

---

1 See Macauley v. Minister for Posts and Telegraphs /1966/ I.R. 345.

2 East Donegal Co-Operative v. Attorney General /1970/ I.R. 317.

3 Murphy v. Dublin Corporation and Minister for Local Government /1972/ I.R. 215; Geraghty v. Minister for Local Government /1975/ I.R. 300.

4 e.g. In re Haughey /1971/ I.R. 217 (inquiry by Dáil Committee into expenditure of moneys); State (Shannon Atlantic Fisheries Ltd) v. McPolin /1976/ I.R. 93 (statutory inquiry into wreck of ship); Moran v. Attorney General /1976/ I.R. 400 (revocation of taxi-driver's licence); State (Gleeson) v. Minister for Defence /1976/ I.R. 280 (discharge of private from Defence Forces); Garvey v. Ireland (not yet reported, Supreme Court, 9 March 1979)(removal from office of Garda Commissioner).

rise to doubts about the appropriate one to choose. Yet that choice may be critical, for if one applies for the wrong remedy the suit will be dismissed on that procedural ground alone. No such difficulty would arise were it possible to seek alternative remedies in the same proceedings, but the current system does not allow for this. Finally, damages may be sought in conjunction with some - but not all - of the specialised remedies.

1.5 Apart from damages, what the aggrieved citizen wants from the court is relief under one of more of the following headings: (a) an order invalidating an administrative decision, (b) an order to desist from or to discontinue some course of action and (c) an order to command the fulfilment of a legal obligation. While the present system of remedies offers such relief, it does not do so in the most effective manner possible. A ruling that an administrative decision is invalid may be obtained either by seeking an order of certiorari or by proceedings for a declaration. These two remedies - which cannot be sought in the same proceedings - are by no means completely interchangeable. They differ in their effect, since certiorari operates to quash the decision complained of, while a declaration, as its name implies, merely declares the true legal position. In many instances this distinction may not matter, since a public authority is hardly likely to ignore a judicial declaration of the law. Difficulties may arise, however, in cases where statute makes an administrative authority's decision final[5] and provides no means for

---

[5] e.g. certain decisions of appeals officers under the Social Welfare Acts (See Social Welfare Act 1952 s. 44(5).)

reconsideration. In such situations the declaration may be inappropriate, for should the administrative decision be incompatible with the law as declared by the court, there would be no means of resolving the ensuing impasse.[6] No such problem can arise with certiorari. It will quash the administrative decision, thereby conferring implicit authority to reconsider the matter.

1.6 It might appear that the proper course in such cases is quite simple - the aggrieved citizen should seek an order of certiorari. But the scope of this order is uncertain and it is not clear that it would extend to all the situations in question. There is an additional factor. The person who seeks a ruling that a decision is invalid and damages for loss consequent upon that decision faces a problem. If the decision he complains of is one for which certiorari seems the safer remedy, he must first seek that. Having thus obtained the annulment of the decision he must then institute fresh proceedings for damages; under the current law it is not possible to add a claim for damages to an application for certiorari. If, on the other hand, the decision he assails is within the scope of the declaration, his position is more favourable. There is no bar to seeking damages and a declaration in the same proceedings.

1.7 Similar problems arise where the relief desired is an order to desist from or discontinue some course of action. The remedy of prohibition is appropriate in some such cases, that of the injunction in others. Here too uncertainty

---

[6] The English Court of Appeal refused to make a declaration in such circumstances in Punton v. Ministry of Pensions and National Insurance (No. 2) /1964/ 1 W.L.R. 226. (See further para. 2.25 infra.)

arises, and it is exacerbated by the fact that these remedies may not be sought in the alternative. It is necessary to opt for one or other and the choice of the wrong remedy will involve starting all over again. Furthermore, damages may be sought together with an injunction; but it is not possible to join a claim for damages with an application for prohibition.

1.8 Two distinct remedies are available to secure the fulfilment of a legal obligation - the order of mandamus and the mandatory injunction. The first is the classic form of relief and has an extensive scope; the latter is becoming popular, no doubt because of its greater flexibility. The two orders do not correspond completely and the line of demarcation between them has not yet been worked out. It is thus possible that a litigant could apply for the one only to discover that the other was alone appropriate. The choice may thus be crucial, but it must be made; for once again these two remedies cannot be sought in the alternative. In addition, it is not possible to seek damages and mandamus in the same proceedings, but there is nothing to prevent one from coupling a claim for damages with an application for a mandatory injunction.

1.9 The present system cannot be defended on any rational grounds; its foibles and imperfections result from no conscious policy choices but solely from the accidents of history. Reform is essential and relatively simple. What is required is a single comprehensive procedure enabling the aggrieved citizen to bring his case - whatever its nature - before the courts. It will then be for the judge to decree that form of relief, including where appropriate an order for payment of damages, which seems best adapted to the particular case.

1.10 In Chapters 2 to 5 infra, the present system of remedies is explored in greater detail. Certiorari, declaration, prohibition, injunction and mandamus are dealt with under the four headings of (a) scope, (b) procedure, (c) time limits and (d) locus standi. The mandatory injunction and procedure by way of quo warranto, as well as the title of proceedings, are also examined. Chapter 6 deals with reforms made in other jurisdictions and the suggestions for reform sketched in the present Chapter are more fully elaborated. Chapter 7 summarises the recommendations made in Chapter 6; and the General Scheme of a Bill to implement the recommendations is set out in Chapter 8.

CHAPTER 2 ORDERS TO INVALIDATE

2.1 It was pointed out supra that the individual who seeks the annulment of an administrative decision has available to him, potentially at least, two distinct remedies - certiorari and a declaration. The existence of two separate remedies is due mainly to historical causes, but this does not mean that each is capable of doing the work of the other. In some cases certiorari alone would be competent while in others a declaration would be exclusively appropriate. A prime example is an invalid expulsion from a club, trade union, or business or professional association. This may be contested only by proceedings for a declaration. It is well established that certiorari will not issue to a body whose authority springs from contract; it lies only to bodies which derive their powers from statute or the common law.[7] Certiorari, unlike a declaration, is thus a remedy peculiar to public law.

2.2 These two remedies will now be examined more fully under four headings: (a) scope, (b) procedure, (c) time-limits and (d) locus standi; and the differences between them will then be summarised.

---

[7] State (Colquhoun) v. D'Arcy /1936/ I.R. 641. In R. v. Aston University /1969/ 2 Q.B. 538 it was assumed that a university established by charter was within the reach of certiorari, but this has been criticised on the ground that the university/student relationship may be contractual: see Russell L.J. in Herring v. Templeman /1973/ 3 All E.R. 569, 585. However, it is possible that certiorari will lie where a university is established by statute.

A CERTIORARI

(a) Scope

2.3 Together with prohibition (considered infra) certiorari was originally the means by which the Court of King's Bench in both England and Ireland restrained inferior courts from exceeding their jurisdiction; and both are still used for that purpose by the High Court today[8]. But their scope has been extended far beyond this, as Atkin L.J. explained in a classic passage[9]:

> "Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

---

[8] e.g. State (Cunningham v. District Justice Ó Floinn [1960] I.R. 198 (certiorari to District Court); State (Tynan) v. Judge Sweeney [1965] I.R. 444 (certiorari to Circuit Court). The Special Criminal Court is also an inferior court for this purpose: see Attorney General v. Connolly [1947] I.R. 213, 224-5; State (O'Duffy) v. Bennett [1935] I.R. 70.

[9] R. v. Electricity Commissioners [1924] 1 K.B. 171, 204-5. This passage was cited with approval in State (Colquhoun) v. D'Arcy [1936] I.R. 641.

2.4 The words "act in excess of their legal authority" in the above passage are to be understood broadly. Certiorari is available in three distinct situations:

(a) where there is a total want of jurisdiction - i.e. no legal authority whatever to make such a decision;

(b) where the procedure leading to a decision is vitiated by failure to observe constitutional or natural justice;[10]

(c) where the decision is flawed by an error of law on the face of the record.

2.5 In situations (a) and (b), either certiorari or a declaration will apparently be available. The jurisdiction of the Adoption Board to make an order has been challenged by both methods.[11] Likewise, decisions of the Garda Commissioner revoking taxi-drivers' licences have been attacked for violation of natural justice in each type of proceeding.[12] It would seem, however, that in situation (c) supra, certiorari alone may correct the error. The reason is technical. The declaration is an appropriate remedy where a decision is void. This obtains in situations (a) and (b) above. A decision that violates natural justice,

---

[10] "Constitutional or natural justice", as used supra, means the "basic fairness of procedures" that is guaranteed to the citizen by Article 40.3 of the Constitution. See Garvey v. Ireland (not yet reported, Supreme Court, 9 March 1979).

[11] State (Attorney General) v. An Bord Uchtála [1957] Ir. Jur. Rep. 35; M. v. An Bord Uchtala [1977] I.R. 287.

[12] Ingle v. O'Brien (1974) 109 I.L.T.R. 7 (certiorari); Moran v. Attorney General [1976] I.R. 400.

like one made without legal authority, is an excess of jurisdiction. Hence it can be declared ultra vires so that it loses its legal efficacy as against the plaintiff. But in situation (c) the error is within jurisdiction.[13] If, therefore, the plaintiff seeks a declaration that the decision is invalid, he may be refused relief. Unless the decision-maker has power to rescind or vary his initial determination, any declaration that might be granted could prove useless. For there would be two binding - but incompatible - decisions in regard to the plaintiff, with no means of resolving the

---

[13] In Walsh v. Minister for Local Government /1929/ I.R. 377 the local government auditor had held the prosecutor, who was clerk to a Rural District Council, liable to surcharge in respect of overpayments of salary. The auditor's certificate stated reasons which, it was alleged, disclosed errors of law. Mr Walsh exercised his statutory right of appeal to the Minister for Local Government, who issued a sealed order upholding the surcharge. This order mentioned - but did not set out - the reasons given by the auditor. The prosecutor now sought certiorari to quash this order. The former Supreme Court refused to grant it. Giving the judgment of the Court, Murnaghan J. said that, if the Minister made an erroneous determination in a matter of law in arriving at his decision, his order could be attacked by certiorari if it was a "speaking order" - i.e. one stating the Minister's views on a point of law, so as to make an erroneous view of the law apparent on the record. This order, however, did not fall into that category. "If the Minister had gone on to declare his view as to the meaning of some section of an Act of Parliament as the ground of his upholding the reasons given by the auditor, the case might be within the rule dealing with speaking orders." - p. 404. The Court also declined to hold that the Minister's order incorporated the auditor's reasons so as to make those reasons the view of the law taken by the Minister.

conflict between them.[14] No such difficulty arises with certiorari, since this quashes - i.e. positively invalidates - the impugned decision. The person who (or body which) took that decision is thus free to consider the matter afresh.

2.6 It may be noted in passing that error of law on the face of the record has not been a frequent ground for seeking certiorari in Ireland. This is probably due to the fact that the Oireachtas, when conferring decision-making powers, often provides specifically for an appeal on a point of law to the High Court.[15] Because of the great flexibility of

---

[14] See the decision of the English Court of Appeal in Punton v. Ministry of Pensions (No. 2) [1964] 1 W.L.R. 226; S.A. de Smith, Judicial Review of Administrative Action 462-4 (3rd ed. 1973); H.W.R. Wade, Administrative Law 508 (4th ed. 1977). The point does not appear to have been canvassed in Loftus and Others v. Attorney General (not yet reported, Supreme Court, 11 May 1979). The plaintiffs sought to have their organisation registered as a political party under the provisions of the Electoral Act 1963. This was refused by the Registrar and their appeal to the Appeal Board was dismissed. They sought declarations, inter alia, that the Appeal Board's decision was made without jurisdiction, in that it was improperly constituted, and that it was vitiated by errors of law. The Supreme Court held that the Appeal Board had been properly constituted, but that it had misinterpreted the relevant Act, and granted declarations accordingly. But it is to be noted that section 13(8)(c) of the Act provides that: "A decision of the Appeal Board shall be complied with by the Registrar"; and the declarations granted by the Supreme Court would not quash the Appeal Board's decision.

[15] See, for example, Social Welfare Act 1952, s. 45; Redundancy Payments Acts 1967 and 1971, s. 39(14) and s. 40; Central Bank Act 1971, s. 21(3); Anti-Discrimination (Pay) Act 1974, s. 8(3); Employment Equality Act 1977, s. 26(3). Some statutes go further and provide for a full-blooded appeal to the High Court against an administrative decision: see, for example, the Employment Agency Act 1971, s. 5 (right of appeal to High Court against Minister's decision to revoke, or refusal to grant, a licence); Dangerous Substances Act 1972, s. 34.

the phrase "point of law", this device eliminates many problems of remedy. Nonetheless situations arise where no such statutory right of appeal is available.[16]

2.7 In modern practice certiorari has been adapted to cover the activities of many persons and bodies. It has issued to the Adoption Board[17], the Land Commission[18] and other adjudicative bodies.[19] A local authority vesting order under compulsory acquisition provisions may be challenged thereby[20], as may certain kinds of Ministerial order.[21] It has recently been used to quash a report following upon an inquiry[22] and appears to be available to challenge decisions of the Criminal Injuries Compensation Tribunal.[23]

---

16 For example, s. 45 of the Social Welfare Act 1952 provides, inter alia, that no appeal lies as to whether a person is disqualified for benefit.

17 State (Attorney General) v. An Bord Uchtála /1957/ Ir. Jur. Rep. 35.

18 State (Crowley) v. Irish Land Commission /1951/ I.R. 250.

19 State (Horgan) v. Exported Live Stock Insurance Board /1943/ I.R. 581.

20 State (Redmond) v. Wexford Corporation /1946/ I.R. 409.

21 e.g. State (Curtin) v. Minister for Health /1953/ I.R. 93 (order for removal from office); State (Gleeson) v. Minister for Defence /1976/ I.R. 280 (dismissal of private from Defence Forces).

22 State (Shannon Atlantic Fisheries Ltd) v. McPolin /1976/ I.R. 93.

23 State (Hayes) v. Criminal Injuries Compensation Tribunal (not yet reported, Finlay P., 24 May 1977).

2.8 These latter cases are of particular interest since they demonstrate the flexibility of this remedy and its capacity to develop. It had previously been understood that certiorari could issue only if there was something akin to a decision or determination.[24] A report following an inquiry may not seem to fall into that category: yet Finlay P. was satisfied that certiorari would lie to quash it.[25] Payments under the Criminal Injuries Compensation Scheme are expressed to be ex gratia, and therefore on a strict analysis a decision of the Tribunal does not affect rights or impose liabilities. Nonetheless, it appears that certiorari would, in an appropriate case, issue to quash such a decision (as it does under the corresponding scheme in England[26]). In this respect it is appropriate to quote some recent observations of Kenny J:

> "The cases in which this State-side order /of certiorari/ may be granted cannot, and should not, be limited by reference to any formula or final statement of principle. The strength of this great remedy is its flexibility."[27]

---

24 State (Stephen's Green Club) v. Labour Court /1961/ I.R. 85; State (Pharmaceutical Society) v. Fair Trade Commission (1965) 99 I.L.T.R. 24 (per Murnaghan J. at 31).

25 State (Shannon Atlantic Fisheries Ltd) v. McPolin /1976/ I.R. 93. See, however, the Canadian case of Landreville v. The Queen (1973) 41 D.L.R. (3d) 574.

26 R. v. Criminal Injuries Compensation Board, ex p. Lain /1967/ 2 Q.B. 864.

27 State (Healy) v. Donoghue /1976/ I.R. 325 at 364. See, too, the remarks of Lord Widgery C.J. in R. v. Hull Prison Board of Visitors, ex p. St. Germain /1978/ 2 All E.R. 198 at 202.

2.9 Though clearly valuable, this flexibility is not without limits. A direct challenge to the validity of subordinate legislation may not be made by means of certiorari.[28] As has been shown, certiorari traditionally presupposes a duty to act judicially, and no such duty arises where a legislative function is involved. Indeed the main problem about certiorari concerns this requirement to act judicially, since its meaning is far from clear.

2.10 In State (Crowley) v. Irish Land Commission[29] the former Supreme Court accepted that not all decisions made by an administrative body were subject to certiorari. The order would issue only in cases of judicial acts. Explaining this term, O'Byrne J.[30] quoted the test laid down by May C.J. in R. v. Corporation of Dublin[31]:

> "In this connexion the term 'judicial' does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others."

O'Byrne J. cited also the statement of Palles C.B. in R. (Wexford County Council) v. Local Government Board:[32]

---

28 Re Local Government Board, ex p. Kingstown Commissioners (1885) 16 L.R. Ir. 150; (1886) 18 L.R. Ir. 509.

29 [1951] I.R. 250.

30 Maguire C.J., Murnaghan, Black and Lavery JJ. concurring.

31 (1878) 2 L.R. Ir. 371, 377.

32 [1902] 2 I.R. 349, 373-4.

> "I have always thought that to erect a tribunal into a 'Court' or 'jurisdiction', so as to make its determinations judicial, the essential element is that it should have power, by its determination within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed, or the right affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If the existence of such a power depend upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power his determination does not bind. The happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of facts or law, then the power authorising it is judicial."

The former Supreme Court held that, when exercising the power in question in Crowley's case, the Land Commission was acting judicially. It should be noted, however, that in that case the Land Commission were committed by statute to follow a procedure modelled on that of the courts, with the formal hearing of evidence, the arguments of counsel and the delivery of a judgment. This must have made it easy to infer a duty to act judicially. In the case of many other administrative bodies the materials for such an inference would be much more scanty, and the application of the above tests correspondingly more difficult.

2.11 In other common law countries the requirement to act judicially has caused difficulties. For a period after the Second World War many judges took the view that the order would issue only to a body that was under a statutory obligation to follow a procedure resembling that of the courts. This led to the conclusion that certiorari would

not lie to quash the revocation of a licence,[33] or to review proceedings of a disciplinary character.[34] These decisions have now been disapproved in England,[35] where it seems that a duty to act judicially may be inferred simply from the power to make a determination.[36] The consequence has been to extend the availability of certiorari to a wider range of administrative decisions.[37]

2.12 In Ireland the requirement of a duty to act judicially did not produce the unfortunate consequences experienced elsewhere - perhaps because in the 1950s and early 1960s there was not a great deal of litigation on administrative law matters. This has changed in recent years; but while it is now clear that certiorari may issue to question the revocation of a licence,[38] the courts have not yet had occasion to reconsider or reformulate the requirement of a duty to act judicially. Until this happens it will still be capable of giving rise to difficulties: for example, certain decisions involving the exercise of discretion may be beyond the reach of certiorari and challengeable only by means of a declaration.

---

33 Nakkuda Ali v. Jayaratne [1951] A.C. 66 (P.C.).

34 Ex parte Fry [1954] 1 W.L.R. 730.

35 R. v. Gaming Board, ex p. Benaim [1970] 2 Q.B. 417.

36 Ridge v. Baldwin [1964] A.C. 40.

37 e.g. R. v. London Borough of Hillingdon, ex p. Royco Homes Ltd [1974] 2 All E.R. 643.

38 Ingle v. O'Brien (1974) 109 I.L.T.R. 7.

2.13 A serious restriction on the scope of certiorari is that it may not be sought in conjunction with damages. Thus where someone wishes to obtain the annulment of a decision revoking a licence, together with damages for any loss occasioned thereby, he must ask for a declaration and damages. This is appropriate where the challenge is based on lack of jurisdiction or violation of natural justice; the claims for annulment and damages can be disposed of in one set of proceedings. It is otherwise, however, where the flaw alleged is an error of law within jurisdiction. As has been shown, the declaration is not adapted to this situation. Consequently it will be necessary to apply for certiorari to quash the decision and subsequently to institute fresh proceedings for damages. (See pp. 3 and 4 supra.)

(b) Procedure

2.14 As with the other State Side orders, the procedure for obtaining certiorari is governed by Order 84 of the Rules of the Superior Courts 1962. It begins with a motion ex parte for a conditional order - which is made to a single High Court judge and not, as in England, to the Divisional Court. If the conditional order is granted,[39] it is served, together with a copy of the grounding affidavit, on the respondent, who may then show cause against the conditional order[40]. The process has to be completed within ten days

---

[39] Though a conditional order is not granted automatically, refusal appears to be infrequent. In the event of refusal an appeal lies to the Supreme Court. This occurred in State (Nicolaou) v. An Bord Uchtála [1966] I.R. 567. In State (Killian) v. Attorney General (1958) 92 I.L.T.R. 182 the former High Court and Supreme Court both refused the prosecutor a conditional order of mandamus.

[40] Cause may be shown either by notice or by affidavit; and there is provision for the use, by leave of the court, of additional affidavits.

from the pronouncement of the conditional order, save where the order itself allows a longer period. When cause is shown the prosecutor applies to the court, by motion on notice, to make absolute the conditional order. He must serve notice of such motion on the respondent within six days from the service on him of notice that cause has been shown.

2.15 Order 84 thus contemplates a two-stage procedure - the application for the conditional order, then the motion to make that order absolute. This is a method of screening out those applications that are obviously unsustainable; there is an analogy with the court's power, in an ordinary civil action, to strike out any pleading on the ground that it discloses no reasonable cause of action.[41] The order may also be said to contemplate a speedy method of obtaining relief. Since it contains no reference to cross-examination or discovery, it appears to envisage a procedure based on affidavits alone, and hence appropriate for the resolution of disputed issues of law, but not of fact. It is noteworthy that while Order 84, rule 51 provides that the court may direct a plenary hearing at any stage in proceedings for prohibition or quo warranto, no similar provision is made in respect of certiorari.

2.16 Although Order 84 does not mention oral evidence, there is a general power under Order 40, rule 1, to compel the attendance of deponents for cross-examination. In England this power is most sparingly used in certiorari applications, and it appears to have been invoked in only one case in the present century.[42] The courts here do not

---

[41] Order 19, rule 28.

[42] R. v. Stokesley, Yorkshire, JJ., ex p. Bartram [1956] 1 W.L.R. 254.

seem to adopt so restrictive an attitude. In a recent application for certiorari the service of notices to cross-examine occasioned no comment from counsel or the Court.[43] Again under Order 31 the court has power to order discovery in "any cause or matter", and this too may be exercised on an application for certiorari.[44] Thus while in England it has been said that there is no discovery on certiorari,[45] that would not seem to be the position in Ireland.

(c) Time-limits

2.17 Under the former rules in England an application for leave to apply for certiorari normally had to be made within six months of the proceedings it was sought to challenge.[46] The court could extend this limit but would do so only with reluctance.[47] In Ireland, however, the six months time limit applies only where certiorari is sought to quash a decision of the District or Circuit Court;[48] in any other case the matter lies in the discretion of the court. In State (Kelly) v. District Justice for Bandon[49] the former Supreme Court said (per Murnaghan J.): ".... there is no doubt that delay may be a ground for depriving an applicant

---

43 State (McGarrity) v. Deputy Commissioner, Garda Siochana (1978) 112 I.L.T.R. 25. The notices were not persisted in.

44 In McGarrity's case D'Arcy J. refers to the affidavit of discovery at p. 29.

45 Barnard v. National Dock Labour Board [1953] 2 Q.B. 18, 43 (per Denning L.J.).

46 R.S.C. Ord. 53, r. 2(2).

47 See, e.g., R. v. Secretary of State for War, ex p. Price [1949] 1 K.B. 1.

48 Order 84, rule 10 which refers to "any judgment, order, conviction or other proceeding".

49 [1947] I.R. 258, 262. See also State (Walsh) v. District Justice Maguire (not yet reported, Supreme Court, 19 February 1979).

of the order for certiorari." Thus whilst there are no fixed limits, a prosecutor slow to assert his claim may be denied the order. Like Shakespeare's Richard the Second he may find himself lamenting:

"I wasted time: and now doth time waste me."[50]

(d) Locus standi

2.18 Certiorari, like the other State Side orders and the equitable remedies of declaration and injunction, is a discretionary remedy. It follows that, even where the prosecutor proves his case, he may nonetheless, in the exercise of the court's discretion, be refused the remedy he seeks. This discretion is exercised, not in an arbitrary or capricious, but rather in a judicial, manner; and some of the factors proper to be taken into account are well settled. Delay has been mentioned already: others are acquiescence[51] or failure to show uberrima fides.[52]

2.19 Subject to the element of discretion, it is well established that certiorari issues ex debito justitiae - i.e. as a matter of course - to a "person aggrieved".[53] This phrase is usually understood to refer to someone whose legal interests are affected. Thus a Dublin ratepayer was

---

50 Act Five, Scene Five.

51 State (Redmond) v. Wexford Corporation [1946] I.R. 409, 418, 421, 426.

52 State (Vozza) v. District Justice Ó Floinn [1957] I.R. 227. Here, however, the Supreme Court indicated that, where certiorari is sought to quash a conviction made without jurisdiction, it would require exceptional circumstances for the Court to exercise its discretion against the prosecutor.

53 State (Kelly) v. District Justice for Bandon [1947] I.R. 258; Vozza's case (supra).

a person aggrieved and could obtain certiorari to quash an auditor's allowance of certain unlawful expenditures.[54] It mattered not that he shared his grievance with others. In contrast, five Kerry ratepayers were not persons aggrieved

---

[54] Reg. (Bridgman) v. Drury [1894] 2 I.R. 489. Among the expenditures allowed by that auditor was the cost of a lunch taken by members of Dublin Corporation on a visit to the Vartry Waterworks. Of this Sir Peter O'Brien C.J. said (at 496-7):

> "I have before me the items in the bill. Amongst the list of wines are two dozen champagne, Ayala, 1885 - a very good brand - at 84s. a dozen; one dozen Marcobrunn hock - a very nice hock; one dozen Château Margaux - an excellent claret; one dozen fine old Dublin whiskey - the best whiskey that can be got; one case of Ayala; six bottles of Amontillado sherry - a stimulating sherry; and the ninth item is some more fine Dublin whiskey! Then Mr Lovell supplies the 'dinner' (this was a dinner, not a mere luncheon!) including all attendance, at 10s. per head. There is an allowance for brakes; one box of cigars, 100; coachmen's dinner; beer, stout, minerals in syphons, and ice for wine. There is dessert, and there are sandwiches, and an allowance for four glasses broken - a very small number broken under the circumstances.
>
> In sober earnestness, what was this luncheon and outing? It seems to me to have been a pic-nic on an expensive scale. What authority is there for it? No statutable authority exists. By what principle of our common law is it sustainable? By none that I can see. In McEvoy's Case, to which I have already referred, there was a question of maintaining the Mansion House, being the property of the Corporation. But this is a question of providing a sumptuous repast for the members of the Corporation on the Wicklow hills. It is not certainly for the benefit of the property of the Corporation, or of the rate-paying citizens of Dublin, that the members of the Corporation should lunch sumptuously. I asked for statute or for case, but neither was cited. The Solicitor-General in his most able argument - I have always to guard myself against his plausibility - appealed pathetically to common sense; he asked, really with tears in his voice, whether the members of the Corporation should starve; he drew a most gruesome picture; he represented that the members of the Corporation would really traverse the Wicklow hills in

so as to obtain certiorari to quash a Ministerial order directed to the Kerry County Council.[55] They are, said the former Supreme Court, "not in any real sense interested." This was, no doubt, because the Minister's order resulted in a saving on, rather than an increase in, the rates. It did not affect the legal interests of the ratepayers since it did not interfere with their rights or impose any obligations upon them. Hence the only "interest" they could show was one shared with the public at large - that of securing the observance of the law; but so generalised an interest has not usually been thought sufficient.

2.20 There are also many judicial statements to the effect that certiorari may, at the court's discretion, be awarded to a "stranger" - i.e. to one who is not a person aggrieved.[56] If, therefore, the only interest a given prosecutor can show is one shared with the general public, this need not be fatal to his application. But it is rare indeed for courts to award the remedy to a "stranger", and

---

54 Cont'd

> a spectral condition, unless they were sustained by lunch. I do not know, whether he went so far as Ayala, Marcobrunn, Château Margaux, old Dublin whiskey, and cigars. In answer to the pathetic appeal of the Solicitor-General, we do not say that the members of the Corporation are not to lunch. But we do say that they are not to do so at the expense of the citizens of Dublin. They cannot banquet at their expense in the Mansion House, and, in our opinion, they cannot lunch at their expense in Wicklow."

55 State (Kerry County Council) v. Minister for Local Government /1933/ I.R. 517.

56 e.g. Reg. v. Surrey JJ. (1870) L.R. 5 Q.B. 466, 473; State (Doyle) v. Carr /1970/ I.R. 87, 93.

the power to do so was not even mentioned in a case where it would have seemed particularly relevant - State (Kerry County Council v. Minister for Local Government.[57] In that case the (part-time) solicitor to the Kerry County Council had resigned. The Secretary to the County Council happened to be a qualified solicitor, and the Department of Local Government suggested to the Council that the legal work should be assigned to him, stressing the economies which would result. The County Council declined to follow this advice. Purporting to act under statutory authority, the Minister on 1 April 1930 issued a sealed order directing that the Secretary's duties should henceforward include that of acting as County Solicitor. The County Council and five named ratepayers then sought certiorari to quash this order, on the ground that the Minister had no authority to make it. These prosecutors obtained a conditional order; but by the time the matter next came before the Court the Kerry County Council had been dissolved by Ministerial order, and the Commissioner appointed to exercise its powers had resolved that there should be no further proceedings on the Council's behalf. When the matter eventually came before the former Supreme Court, it was held that the Minister had had no legal authority to issue the order of 1 April 1930. Nonetheless, the Court declined to quash that order by certiorari. Although by then the Kerry County Council had been restored to its functions and was willing to join in the appeal,[58] the Court said that the appeal must be treated as that of the five ratepayers alone. But they were not persons aggrieved.

---

[57] [1933] I.R. 517.
[58] [1933] I.R. 517, 543.

> "If the Kerry County Council moved in the matter, as their statutory rights are interfered with, they would be persons aggrieved and competent prosecutors .... But it is necessary to keep the principles on which the Court acts in view; and, if the County Council do not move in the matter, there is no reason why the individual prosecutors, who are not in any real sense interested, should be granted the writ."[59]

2.21 This is curious reasoning. It seems to have been overlooked that the County Council's failure to move in the matter sprang, firstly, from its dissolution by the Minister and, secondly, from the Court's refusal to allow it to join in the proceedings at the appellate stage. And even if the ratepayers were not persons aggrieved, the Court still had a discretion to award them the remedy they sought. This point, however, is nowhere adverted to in the judgment. The odd result was that the Minister's order, though found to be ultra vires, was not quashed. Had that order been spent - so that no public good would have been served by quashing it (as in State (Doyle) v. Carr[60]) - one could understand this, but there is no suggestion in the report that such was the case.

2.22 There is no report of any similar application having come before the Irish courts in recent years; but it may be doubted whether so strict and technical an approach would now find favour. In other common law countries the tendency is to give a broad meaning to the phrase "person aggrieved". In a recent English case Mr Raymond Blackburn and his wife (who was a ratepayer) sought prohibition to restrain the Greater London Council's exercise of its film censorship

---

[59] At 546.

[60] [1970] I.R. 87.

functions. It was claimed that the Greater London Council was applying a test which was bad in law and was thus permitting the exhibition of films that were grossly indecent. On the question of locus standi Lord Denning M.R. said:

> "Mr Blackburn is a citizen of London. His wife is a ratepayer. He has children who may be harmed by the exhibition of pornographic films. If he has no sufficient interest, no other citizen has."[61]

And he added

> "I regard it as a matter of high constitutional principle that, if there is good ground for supposing that a government department or public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate."[62]

B DECLARATION

(a) Scope

2.23 By contrast with the State Side orders such as certiorari, the declaration is a modern remedy. It originated in section 155 of the Chancery (Ireland) Act 1867,

---

61 Reg. v. Greater London Council, ex. p. Blackburn /1976/ 3 All E.R. 184, 191. The other members of the Court were less emphatic. Stephenson L.J. said: ".... /the applicants/ live in the GLC's jurisdiction...." - at 197. Bridge L.J. said: ".... Mrs Blackburn has sufficient locus standi, as a ratepayer...." - at 199. It is not clear, therefore, what the result would have been had Mr Blackburn applied on his own.

62 At 192.

which provided that no suit in the Court should be open to objection on the ground that a merely declaratory decree or order was sought thereby, and that it should be lawful for the Court to make binding declarations of right without granting consequent relief. Again, whereas the State Side orders are pure public law remedies, the declaration plays a role in private law as well.[63] The declaration has become widely known as a remedy in Irish public law because of its frequent use to challenge the constitutionality of statutes,[64] and it has come to occupy some of the ground covered by certiorari; decisions of An Bord Uchtála[65] and the Censorship of Publications Board[66] have been brought up for review by this means. It is not, however, a complete substitute, and certiorari is probably still the only appropriate means of challenge to an inferior court's conviction in excess of jurisdiction.

2.24 In some respects the scope of the declaration is wider; in particular, its reach is not confined to situations where there is a duty to act judicially. Unlike certiorari, therefore, it can be used to contest the

---

63 See, e.g., Kingston v. Irish Dunlop Ltd /1969/ I.R. 233.

64 Examples are: O'Donovan v. Attorney General /1961/ I.R. 114; Cowan v. Attorney General /1961/ I.R. 411; Deaton v. Attorney General /1963/ I.R. 170; Ryan v. Attorney General /1965/ I.R. 294; East Donegal Co-Operative v. Attorney General /1970/ I.R. 317; McMahon v. Attorney General /1972/ I.R. 69; Maher v. Attorney General /1973/ I.R. 140.

65 M. v. An Bord Uchtála /1977/ I.R. 287.

66 Irish Family Planning Association Ltd v. Ryan and Others (not yet reported, Supreme Court, 27 July 1976).

validity of subordinate legislation - a recent example is Cassidy v. Minister for Industry and Commerce.[67] It is available to question the lawfulness of withholding a discretionary benefit from the plaintiff, as in Latchford v. Minister for Industry and Commerce,[68] and has been used in many other situations as well. Some instances are: the validity of a development plan;[69] a demolition order on a house;[70] removal from office[71] or a statutory register;[72] the revocation of a taxi-driver's licence;[73] the validity of tax assessments;[74] and the legality of certain deductions from statutory grants.[75] Nor does this list exhaust its scope. A noted authority has written:

> "The categories of cases in which declarations have been awarded in the field of public law cannot be defined with exactitude; and the categories are not closed."[76]

---

67 Not yet reported, Supreme Court, 13 May 1977. See a note by J.P. Casey in [1978] Public Law 130.

68 [1950] I.R. 33. See also Byrne v. Dun Laoghaire Corporation [1939] I.R. 585.

69 Finn v. Bray U.D.C. [1969] I.R. 169.

70 Cassels v. Dublin Corporation [1963] I.R. 193.

71 Gardiner v. Kildare County Council [1951] I.R. 76; O'Mahony v. Arklow U.D.C. [1965] I.R. 710.

72 Fitzpatrick v. Minister for Industry and Commerce [1931] I.R. 457.

73 Moran v. Attorney General [1976] I.R. 400.

74 Hogan v. Special Commissioners of Income Tax [1932] I.R. 53.

75 Louth County Council v. Attorney General [1936] Ir. Jur. Rep. 61.

76 S.A. de Smith, Judicial Review of Administrative Action 431 (3rd ed. 1973).

In Transport Salaried Staffs' Association v. C.I.E.[77] Walsh J. said:

> "In modern times the virtues of the declaratory action are more fully recognised than they formerly were and English decisions and dicta in recent years have indicated a departure from the conservative approach to the question of judicial discretion in awarding declarations. A discretion which was formerly exercised 'sparingly' and 'with great care and jealousy' and 'with extreme caution' can now, in the words of Lord Denning in the Pyx Granite Co. Ltd. Case,[78] be exercised 'if there is good reason for so doing', provided, of course, that there is a substantial question which one person has a real interest to raise and the other to oppose. In Vine v. The National Dock Labour Board,[79] Viscount Kilmuir L.C. at p. 112 cites with approval the Scottish tests set out by Lord Dunedin in Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.[80] who said, at p. 448:- 'The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought'. It is also to be observed that the fact that the declaration is needed for a present interest has always been a consideration of great weight."[81] (emphasis supplied)

2.25 The declaration, however, is not a remedy of universal scope. It is not adapted to deal with error of law on the face of the record, for the reasons outlined supra. This

---

77 [1965] I.R. 180.
78 [1958] 1 Q.B. 554, 571.
79 [1957] 2 W.L.R. 106.
80 [1921] 2 A.C. 438.
81 [1965] I.R. 180 at 202-3.

may be a particular problem where the decision under attack is made final by statute, and where the decision-maker has no power to reconsider it in the light of a contrary judicial declaration. In the English case of Punton v. Ministry of Pensions and National Insurance (No. 2)[82] the Court of Appeal refused to make a declaratory order in such circumstances. The plaintiffs contended that the National Insurance Commissioner, whose decisions were by statute final, had erred in law in disallowing their claims for benefit. They were outside the time-limits for seeking certiorari: hence the proceedings for a declaration. The Court of Appeal took the view that certiorari alone was appropriate because it would operate to quash the decision under review. The declaration could not do this. If it were granted, therefore, one would have the embarrassing situation of two conflicting decisions in the same matter, with no machinery for resolving the impasse.

2.26 O'Doherty v. Attorney General and O'Donnell[83] is an Irish case of a similar nature, where the claim failed purely because the wrong remedy was sought. The plaintiff had lodged a claim for a military service pension with the Minister for Defence. It was the statutory duty of the Referee (Judge O'Donnell) to investigate such claims and report thereon to the Minister. Regulations made under the Acts required him not to report until he had sent the applicant an indication of his provisional view and given him an opportunity to tender additional evidence or make representations. A notice on these lines was served on the plaintiff, informing him that, on the evidence then before him, the Referee had concluded that he (the plaintiff) did

---

82 [1964] 1 W.L.R. 226.

83 [1941] I.R. 569.

not come within the Military Service Pensions Acts. Mr O'Doherty sought, inter alia, a declaration that this conclusion was wrong in law. The defendants argued, inter alia, that since Mr O'Doherty had tendered further evidence and made additional representations, and since the matter was still under consideration by the Referee, the action was premature and irregular and the Court in its discretion should refuse any relief.

2.27 Gavan Duffy J. held that the Referee's conclusion was wrong in law; he had failed to address his mind to an important part of the plaintiff's claim. But the learned Judge also concluded that he could not grant the remedy sought. It was, he said, established law that the High Court was most reluctant to make a declaration of right in a matter entrusted by law to a special tribunal. The plaintiff's application for a pension was a matter of that sort. He stressed the fact that no final report had yet been made, and that the matter was still in progress before the Referee. It was manifest that a declaration, without any mandatory order, made by the Court while the statutory proceedings were going on, "might be most inconvenient and the sequel might be embarrassing on either side".[84] The learned Judge continued:

> "It is decidedly not the practice to make a declaration where there is an appropriate remedy to which the plaintiff ought to have resorted: Everett v. Griffith.[85] Both here and under a similar jurisprudence in England the Courts have shown a strong reluctance to depart from this rule; to escape it the plaintiff must show good reason, as that there is a doubt as to the alternative

---

[84] At 582.

[85] [1924] 1 K.B. 941 at 956.

> remedy being open to him: Doyle v. Griffin,[86] or that that remedy cannot give him the relief which is his due: Simmonds v. Newport Coal Co,[87] or that the normal alternative would in the special circumstances be inadequate or useless: The Merthyr Tydfil Case[88] and Cooper v. Wilson,[89] or exceptionally on final appeal that more litigation and inordinate expense would follow the refusal of any relief: The Russian Bank Case;[90] cp. Halligan v. Davis[91]."[92]

In Gavan Duffy J.'s view the proper course for the plaintiff was to have sought an order of mandamus,[93] and on that basis a declaration should be refused.

2.28 O'Doherty's case well illustrates the difficulties which can be caused by the present pattern of remedies. Despite the fact that his main contention was upheld, the plaintiff lost - on what must appear to be a technicality. This risk will remain so long as the present pattern continues; for even if the defence does not raise such procedural points, it is possible that the Court itself may - as happened in this case.[94] Gavan Duffy J.'s refusal of a declaration, of course, condemned Mr O'Doherty to further

---

86 [1937] I.R. 93 at 111.

87 [1921] 1 K.B. 616.

88 [1907] 1 Ch. 516.

89 [1937] 2 K.B. 309.

90 [1921] 2 A.C. 438, at 454.

91 [1930] I.R. 237.

92 [1941] I.R. 569 at 583.

93 The learned Judge gave liberty to reopen the matter; but after further argument he adhered to the view set out above.

94 [1941] I.R. 569 at 584.

litigation, since there was (and is) no machinery for granting mandamus in proceedings framed for a declaration. Nor is it certain that fresh proceedings for mandamus would have met with success. Gavan Duffy J.'s view on this point would not have bound any other judge. Moreover, the form of the order in such a case is "to hear and determine according to law",[95] and another court might have accepted the contention that since the Referee did not determine he could not be subject to such an order.[96] Perhaps certiorari might have been the most appropriate remedy - though this is nct free from doubt.[97] Finally, while Gavan Duffy J. had laid emphasis on the fact that the case was still pending before the Referee, the plaintiff would not necessarily have avoided all problems of remedy by waiting until a final report had been made.

(b) Procedure

2.29 Under the former rules of court in England there were procedural benefits in asking for a declaration rather than applying for certiorari, since the former permitted discovery of documents, oral evidence and cross-examination. As was

---

95 de Smith, op. cit. 299.

96 This proposition was advanced by Mr Kevin Dixon S.C., counsel for the respondents: [1941] I.R. 569, 583.

97 An application for certiorari to quash a Ministerial decision based on the Referee's report might have caused difficulties. The Minister's decision might not have been held to incorporate the Referee's erroneous legal reasoning - cf. Walsh v. Minister for Local Government [1929] I.R. 377 (supra fn. 13).

pointed out above, procedure on certiorari in Ireland does not seem to preclude these advantages. Yet here too they are more usually the concomitants of an action for a declaration. In M. v. An Bord Uchtála[98] Henchy J. remarked of the plaintiffs (who were seeking to have an adoption order declared invalid):

> "They might have sought an order to the same effect by applying to have the adoption order quashed on certiorari. Instead, they chose to apply for a declaratory order, doubtless because they wished to have the case fully presented with oral evidence on a plenary hearing". (italics supplied)

Proceedings for a declaration are commenced, as in an ordinary civil action, by plenary summons. This gives a flexibility not found with the State Side orders, so that, as noted earlier, one can claim a declaration, an injunction and damages in the same set of proceedings.

(c) Time-limits

2.30 There are no formal time-limits within which proceedings for a declaration must be commenced. The order is, however, discretionary and a plaintiff who makes out a case for relief may nonetheless be refused it if he is guilty of undue delay. In Loftus and Others v. Attorney General[99] the Supreme Court, though upholding the plaintiff's contentions, refused to grant certain declarations sought by them. This was grounded upon their inordinate and inexcusable delay in bringing the proceedings (to challenge the refusal to register their political party in 1965). The Court was, however, willing to grant a declaration regarding erroneous legal rulings of the relevant Appeal Board, since persons other than the plaintiffs were affected by them.

---

98 [1977] I.R. 287 at 297.

99 Not yet reported, judgment delivered 11 May 1978.

(d) Locus standi

2.31 It is clear from the terms of Order 19, rule 29, of the Rules of the Superior Courts 1962 that the power to grant declarations does not depend upon whether any consequential relief is or could be claimed. To obtain an order, therefore, it is not necessary for the plaintiff to show that he has an independent cause of action, e.g. for damages.[100] Must he, however, prove that his legal rights stricto sensu have been infringed? In the English case of Gregory v. Camden London Borough Council[101] Paull J. answered this question in the affirmative. There the defendant council had granted planning permission for the construction of a school on grounds adjacent to the plaintiff's house. He contended that this grant was ultra vires on a number of grounds and sought declarations accordingly. Paull J. refused to grant them because, in his view, the plaintiff had no locus standi. Though the amenities of his house might be affected, no legal rights of the plaintiff's had been infringed. The learned Judge said:

> "I think that the real answer is that what is taking place on this land.... is something as to which, as between the plaintiffs and the trustees [of the school], there are no legal rights whatsoever, and, there being no legal rights between those parties, the plaintiffs cannot come here and say: 'But I want to interfere by getting at you through a third party, whose permission you must get before you can build the building'."[102]

---

100 See Kingston v. Irish Dunlop Ltd [1969] I.R. 233.

101 [1966] 1 W.L.R. 899.

102 At 909.

2.32 This decision has been trenchantly criticised[103] and it seems doubtful whether it would be followed in England today. As Mr B.C. Gould has pointed out, if the declaration was available only to protect common law or statutory rights, it would be severely limited as an administrative law remedy. He continues:

> "It would fail to deal with all cases where, instead of imposing a liability, a tribunal merely withdrew or refused a benefit, whether it be a licence, a pension or compensation, because in such cases, the plaintiff would have no statutory or common law right. Similarly, a plaintiff who was adversely affected by an administrative action would not be able to have it declared invalid unless he could also show that he could protect his interest by an action in tort".[104]

And of Gregory's case he asserts: "The only question which Paull J. should have asked himself was, have the plaintiffs a sufficient interest in the invalid exercise of power by the defendants?"

2.33 It seems unlikely that this restrictive view of locus standi would find favour in the Irish courts. As noted supra, Walsh J., in Transport Salaried Staffs' Association v. C.I.E.,[105] referred to "a substantial question[106]

---

[103] See A.W. Bradley [1966] C.L.J. 156; S.M. Thio (1967) 30 M.L.R. 205.

[104] "Anisminic and Jurisdictional Review" [1970] Public Law 358, 369.

[105] [1965] I.R. 180, 202 - quoted at p. 28 supra.

[106] To be distinguished from a hypothetical matter on which, in the exercise of its discretion, the court will decline to pronounce - Blythe v. Attorney General (No. 2) [1936] I.R. 549.

which one person has a real interest to raise...." This suggests that the proper test of locus standi in any particular case is - have the plaintiff's interests been adversely affected by the defendant's invalid exercise of power? Since "interests" has a wider connotation than "rights", this is a flexible formula - which is what seems to be required.

2.34 In most cases where a declaration has been granted, the plaintiff's interest is one peculiar to himself - that is, he is the person who is uniquely affected by the decision he wishes to challenge. This is seen at its clearest in the cases relating to removal from office; indeed, it is not easy to envisage anyone other than the plaintiff wishing to take proceedings. Is it then the law that, to have locus standi, it must be shown that an interest peculiar to oneself - or at least to a limited class of persons - is affected? This problem is not unique to the declaration. It arises also in connection with the injunction and can most conveniently be discussed in relation to that remedy.

CHAPTER 3 ORDERS TO RESTRAIN

3.1 A citizen affected by proposed or continuing administrative action may desire, for the protection of his interests, a court order requiring that such action be halted. As noted in paragraph 1.7 supra, two distinct remedies are available for this purpose. Between them they cover the ground completely, but neither does so on its own. If they could be sought in the alternative this would not matter, but that is not possible under the present system. Consequently, a choice - crucial, and expensive if wrong - must be made as to the proper one to apply for. The orders in question are prohibition and injunction.

A PROHIBITION

(a) Scope

3.2 The name of this order is unfortunate in that it conveys a misleading impression of its scope. The order issues to restrain a person or body from embarking on or continuing a given course of action; but its reach is far from all-embracing. Historically, prohibition was the means by which the superior courts of common law restrained inferior courts from exceeding their jurisdiction. It has, therefore, close affinities with certiorari, and the difference between them is essentially one of timing. Prohibition issued to restrain the making of a decision in excess of jurisdiction, certiorari to quash such a decision where it had already been made. Both followed the same course of development, being extended to cover administrative bodies insofar as these resembled courts. Consequently a person or body amenable to certiorari would also be subject to prohibition, and vice versa.

3.3 It follows that where the decisions of an administrative body affect rights or impose liabilities, that body may be controlled by prohibition - provided it has a duty to act judicially. As was observed supra in connection with certiorari, this latter requirement is capable of giving rise to difficulties. It is clear that the order would issue to a body such as the Land Commission or the Censorship of Publications Board; but only in respect of a limited range of their activities would it issue to local authorities or Ministers. So far as these institutions are concerned, its availability will depend upon whether, in a particular case, they are under a duty to act judicially. If they are, prohibition will be appropriate; not so if they are acting administratively. Since the distinction between acting "judicially" and acting "administratively" is far from clear, there is a possibility that someone may seek prohibition against a local authority or Minister only to find that the activity in question is not within the reach of this type of order.

3.4 This is not to suggest that in such cases local authorities, Ministers and other agencies are immune from judicial control. When they are acting "administratively" their proceedings may be restrained - but not by prohib tion. In cases of this kind an injunction is the appropriate remedy. This distinction is founded, not upon reason, but upon historical accident. Prohibition was a common law remedy; the injunction, on the other hand, sprang from the equitable jurisdiction of the Lord Chancellor. Prohibition is a pure public law remedy, with a circumscribed reach. The injunction, by contrast, is infinitely flexible in scope and although it is primarily a private law remedy, this flexibility has enabled it to win a place in public law as well. In fact the injunction is quite capable of

discharging all the functions performed by prohibition, and when the common law and equity jurisdictions were fused in the nineteenth century prohibition ought to have been abolished as redundant. But it survived to cause confusion, even today.

3.5 Two Irish cases illustrate the limited scope of prohibition, and amply demonstrate the inconvenience arising from the present law. The first is State (Colquhoun) v. D'Arcy.[107] Here the Rev. Mr Colquhoun was to be arraigned before the Court of the General Synod of the Church of Ireland for alleged uncanonical practices. In his view this body had no jurisdiction to deal with the complaints in question; and he accordingly sought an order of prohibition to prevent it from hearing them A Divisional Court[108] unanimously rejected the application - not because his contentions were incorrect but simply because he had sought the wrong remedy. For prohibition could not issue to a body such as this. Its scope was restricted to persons who, or bodies which, acted in pursuance of common law or statutory powers. The jurisdiction of ecclesiastical tribunals of whatever church - depended upon contract, not on statute or the common law.

3 6 It needs to be emphasised that the Rev. Mr Colquhoun was represented by experienced junior and senior counsel.[109] If they could fall into error as to the appropriate remedy

---

107 /1936/ I.R. 641

108 Sullivan P., Hanna and O'Byrne JJ. Divisional Courts of the High Court, though once common, are now rarely assembled, but the President of that Court has power to convene one where he thinks it appropriate to do so.

109 Messrs W.M. Jellett, F. FitzGibbon and Maurice Walker

the chances of a similar slip by a litigant in person must be considerable. It will be an expensive mistake since the applicant must normally bear the costs of the abortive proceedings. And, since his basic complaint has not yet been processed, he will have to steel himself for another round in court. The Rev. Mr Colquhoun managed this. In fresh proceedings he sought a declaration that the Court of the General Synod had no jurisdiction over the complaints against him and an injunction to restrain it from hearing them: Colquhoun v. FitzGibbon.[110] On this occasion no procedural problems arose, so the Court was able to deal with the substance of the plaintiff's case. Unfortunately for him, however, Meredith J. found that the Court of the General Synod did have jurisdiction.

3.7 The second case is State (Stephen's Green Club) v. Labour Court.[111] Here the Labour Court had announced its intention to investigate a dispute between the club and its employees. The club argued that, on the proper construction of the relevant legislation, the Labour Court had no authority to intervene; and it accordingly sought an order of prohibition. In the High Court, Walsh J. held that the matter was within the Labour Court's jurisdiction; but he added that, had this not been the case, he could not have granted the order sought. This was because all the Labour Court could do was to make a recommendation, which could not

---

110 [1937] I.R. 555.

111 [1961] I.R. 85.

affect rights or impose liabilities. Prohibition, however, would issue only to a body whose decisions had consequences for rights or obligations. While an excess of jurisdiction by the Labour Court in this sphere could be restrained, the proper way of doing this was by injunction.

3.8 Doubts about the scope of prohibition also arise in the case of persons or bodies authorised by law to conduct inquiries and report thereon. The Restrictive Practices Commission, for example, is empowered to inquire whether a restrictive practice is contrary to the public interest and to report to the Minister for Industry, Commerce and Energy. It is for the Minister to decide what, if any, action should be taken on foot of a report. Legislation relating to shipping and aircraft authorises the Minister for Tourism and Transport to appoint a person to inquire into accidents. While the ensuing report may attribute blame, it does not otherwise determine rights or impose liabilities.

3.9 Such an inquiry, if ultra vires, could certainly be halted; but the means by which this may be done are uncertain. In particular, it is not clear whether prohibition could issue. In State (Stephen's Green Club) v. Labour Court Walsh J. expressed a tentative view that prohibition could issue to a tribunal which had no power to make a binding determination, but whose recommendation or report formed part of a statutory scheme in which explicit provision was made for the findings to acquire finality upon the taking of consequential action by a superior authority.[112] If this were so, prohibition would be available

---

[112] [1961] I.R. 85 at 94.

to restrain excesses of jurisdiction by the Restrictive Practices Commission. There is, however, a dictum to the contrary. In State (Pharmaceutical Society) v. Fair Trade Commission[113] prohibition was sought to restrain the defendant body (the predecessor of the Restrictive Practices Commission) from embarking on an inquiry alleged to be outside its jurisdiction. Murnaghan J. held that prohibition could not issue to a body such as this, since it did not determine questions affecting individuals' rights.[114] On appeal the Supreme Court left the point open.[115]

3.10 Murnaghan J. had no doubt that should such a body attempt to exceed its jurisdiction, the High Court could intervene to prevent this. His decision was simply that such intervention could not be by way of prohibition; and he must obviously have contemplated the injunction as the appropriate remedy But the uncertainty in this area has increased as a result of the recent decision in State (Shannon Atlantic Fisheries Ltd) v. McPolin.[116] There the respondent had been directed by the Minister for Tourism and Transport to hold an inquiry into the wrecking of a fishing vessel. There was no explicit provision for disciplinary or other action following receipt of the report. The prosecutors alleged that the respondent had violated natural

---

113 (1965) 99 I.L.T.R. 24.

114 At 31 2. The other members of the Divisional Court which heard this application - Haugh and McLoughlin JJ - held that the Commission had jurisdiction and thus found it unnecessary to express any view on this point.

115 (1965) 99 I.L.T.R. 24 at 40

116 [1976] I.R. 93

justice in his conduct of the inquiry and sought certiorari to quash his report. Finlay P. held that the respondent was exercising a decision-making function and that, if grounds existed, his report could therefore be quashed by certiorari. Since it has always been understood that prohibition and certiorari are similar in their coverage, it would follow that if certiorari lies to quash the findings of such an inquiry, prohibition could issue to restrain its initiation.

3.11 The result is to place the litigant in a dilemma If he applies for prohibition in such a case he will fail if the judge, following Murnaghan J., rules that his proper remedy is an injunction. Yet to seek the latter might be hazardous, for it would be open to the court to hold that prohibition could issue and would be the more convenient remedy.

3.12 The objection to the present duality of remedies is that it allows matters of procedure to dominate issues of principle. The principle is clear. The courts have authority to restrain any ultra vires act or decision of an administrative authority; and the basic question in any proceedings must be whether the relevant act or decision is or is not ultra vires. The defect of the current procedure is that it can cause unnecessary and expensive delay in having that question determined.

(b) Procedure

3.13 As with certiorari, the procedure in respect of applications for prohibition is governed by Order 84 of the Rules of the Superior Courts 1962 and is thus similar to that set out in paragraphs 2.14 to 2.16 supra. One difference, however calls for notice. Order 84, rule 51, provides

that in any stage in proceedings in prohibition the court may, on the application of either party or of its own motion, direct a plenary hearing with such directions as to pleadings, discovery or otherwise as may be appropriate. Thereupon, all further proceedings are to be conducted as in an action originated by plenary summons. No such power is conferred in relation to proceedings on certiorari.

(c) Time-limits

3.14 While the rules of court impose no time limit on applications for prohibition, the nature of the order entails its own restrictions; it would be pointless to apply for it if there was nothing left to prohibit. Further, like the other State Side orders, this is a discretionary remedy and undue delay may influence the court's decision.[117]

(d) Locus standi

3.15 There does not appear to be any reported Irish decision as to the locus standi necessary for prohibition. There is English authority for the proposition that it will, in some situations, issue to a stranger,[118] though normally it is granted only to a "person aggrieved". The modern tendency is to give the latter phrase a wide connotation. Reference was made in paragraph 2.22 above to the case of

---

117 R. (Ryan) v. Recorder of Cork [1913] 2 I.R. 241. (In 1911 the prosecutor sought to prohibit further action being taken by a local authority on foot of a County Court order made in 1908. The Court of Appeal refused his application in part because it was too late.)

118 See de Smith, op. cit. 367-8.

R. v. Greater London Council, ex p. Blackburn - an application for prohibition. In R. v. Liverpool Corporation, ex p. Liverpool Taxi Fleet Operators' Association[119] Lord Denning M.R. said:

> "The writs of prohibition and certiorari lie on behalf of any person who is a 'person aggrieved', and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him; but it includes any person who has a genuine grievance because something has been done or may be done which affects him."[120]

B INJUNCTION

(a) Scope

3.16 The injunction was described supra as a flexible remedy, and this flexibility applies both in relation to its form and its scope. As regards form, the injunction may be either positive or negative - that is, it can be worded so as to restrain someone from doing an unlawful act, or it can be framed so as to command the performance of a legal obligation. In this chapter the concern is with the negative - or prohibitory - form only.

3.17 So far as its scope is concerned, this appears to be virtually infinite. It is a familiar remedy in many areas of private law, such as contract, tort and family law. The existence of prohibition has resulted in its role in public law being more circumscribed, but even here it performs an essential function - since, as noted above, it may be granted against bodies whose functions contain no judicial element. There is thus no reason in principle why it should not issue

---

119 [1972] 2 All E.R. 589.
120 At 595.

to restrain the making or confirming of an invalid statutory instrument. However, it would probably not be granted to restrain the presentation of an allegedly unconstitutional Bill to either House of the Oireachtas. The former Supreme Court refused to do this in Wireless Dealers' Association v. Fair Trade Commission,[121] holding that the proper course for the plaintiffs was to defer their constitutional challenge until the Bill was enacted [122]

3.18 In the Irish Courts injunctions have been sought against administrative bodies in a wide variety of situations. Examples are: to restrain Dublin Corporation from changing the name of Sackville Street to O'Connell Street,[123] to prevent the Rathmines and Rathgar Improvement Commissioners interfering with the waters of the Dodder river otherwise than in accordance with a local Act;[124] to restrain Belfast Corporation from disposing of surplus lands in an allegedly unlawful manner;[125] to stop Cork Corporation committing nuisance by discharging sewage on to the plaintiff's lands;[126] to prevent the erection of a hospital for

---

121 Unreported, judgment delivered 14 March 1956.

122 The High Court of Australia has taken a similar view: Cormack v. Cope (1974) 131 C.L.R. 432.

123 Anderson v. Dublin Corporation (1885) 15 L.R. Ir. 410. It was held that the Corporation had no authority, either by statute or common law, to effect such a change.

124 Herron v. Rathmines and Rathgar Improvement Commissioners (1890) 27 L.R. Ir. 179. See too O Callaghan v. Balrothery R.D.C. [1907] 1 I.R. 494.

125 Attorney General (Curley and Others) v. Belfast Corporation [1898] 1 I.R. 200.

126 Gibbings v. Hungerford and Cork Corporation [1904] 1 I.R. 211.

infectious diseases;[127] to stop Bray U D.C using compulsorily purchased land otherwise than in accordance with plans deposited in compliance with statutory requirements;[128] to restrain local authorities from unlawful lettings of cottages,[129] from acting on an ultra vires resolution,[130] and from interfering with a national monument;[131] to prevent an unlawful arrest;[132] and to restrain Ministerial enforcement of an order alleged to be ultra vires.[133]

3.19 It was stated supra that the original function of the order of prohibition was to prevent inferior courts from exceeding their jurisdiction; and this has in fact been its main use in modern Irish law. While, therefore, prohibition will certainly lie to prevent the District or Circuit Court from hearing a criminal or civil case in excess of jurisdiction, it has not been clearly decided

---

127 Attorney General (Boswell) v. Rathmines and Pembroke Joint Hospital Board /1904/ 1 I.R. 161.

128 Bradshaw v. Bray U.D.C. /1907/ 1 I.R. 152.

129 O'Shea v. Cork R.D.C. /1914/ 1 I.R. 16; Marron v. Cootehill (No. 2) R.D.C. /1914/ 1 I.R. 201; Condon v. Mitchelstown R.D.C. /1914/ 1 I.R. 113.

130 Weir v. Fermanagh County Council /1913/ 1 I.R. 193.

131 Martin v. Dublin Corporation (The Irish Times 15 December 1977).

132 O'Boyle and Rodgers v. Attorney General /1929/ I.R. 558.

133 Irish Hotels' Federation v. Minister for Labour (The Irish Times 1 August 1978) (to restrain the defendant from enforcing a Labour Court Employment Regulation Order alleged to be ultra vires); Purcell v. Minister for Agriculture (The Irish Times 1 August 1978) (to restrain testing of plaintiff's cattle under a Bovine TB order alleged to be ultra vires).

whether it is competent to seek an injunction for this purpose.[134] In at least one instance an injunction has been granted to restrain the District Court from hearing a criminal case, but the circumstances were somewhat special. In October 1964 the constitutionality of section 49 of the Road Traffic Act 1961 was being argued in the High Court (Conroy v. Attorney General).[135] One James Gilbert applied to District Justice Molony for the adjournment, pending the High Court decision, of a charge against him under Section 49 - but this was refused. Thereupon Gilbert instituted proceedings for a declaration that section 49 was unconstitutional and on the same day applied ex parte to Kenny J. for an injunction restraining District Justice Molony from proceeding with his case. The injunction was granted; and after holding section 49 invalid in Conroy's case, Kenny J. extended the injunction pending the Supreme Court's determination of the appeal in that case.[136]

3.20 In the United Kingdom it is not possible to obtain an injunction against the Crown, nor against a Crown servant (such as a Minister) if the result would be to grant, indirectly, relief against the Crown that could not be obtained directly. This is the consequence of section 21 of

---

134 In Scotland, where the common law/equity dichotomy and the order of prohibition were equally unknown, interdict is used for this purpose: see Gibson and Reid v. Glasgow Profiteering Act Committee 1920 2 S.L.T. 84.

135 [1965] I.R. 411.

136 See [1973] I.R. 151, 152. The Supreme Court in Conroy's case reversed Kenny J. and held that section 49 was not repugnant to the Constitution.

the Crown Proceedings Act 1947, which also provides that in lieu of an injunction the court may make a declaratory order. Unfortunately, this denies the plaintiff any possibility of interim relief equivalent to an interlocutory injunction pending final determination of the cause. The Court of Appeal has held that since an order declaring the rights of parties must of necessity be a final order, it is not possible to obtain a declaration intended only to preserve the status quo.[137] On this the late Professor de Smith commented: "The state of the law is tolerable only in so far as Departments voluntarily agree to expedited hearings of very urgent declaratory proceedings against them".[138]

3.21 These difficulties do not seem to exist in Irish law. We have no equivalent of the Crown Proceedings Act and hence no statutory bar to the granting of injunctions against Ministers. It may be noted that before the 1947 Act, English[139] and Scottish[140] courts had awarded injunctions or interdicts against Ministers, so that there appears to be no insuperable common law impediment to such relief.

---

137 International General Electric Co. v. Customs and Excise Commissioners /1962/ Ch. 784; R. v. Inland Revenue Commissioners, ex p. Rossminster Ltd /1979/ 3 All E.R. 385. See, too, Underhill v. Ministry of Food /1950/ 1 All E.R. 591; Ayr Town Council v. Secretary of State for Scotland 1965 S.C. 394; Robertson v. Lord Advocate (1950) 1965 S.C. 400.

138 Op. cit. 400.

139 Rankin v. Huskisson (1830) 4 Sim. 13; Ellis v. Earl Grey (1833) 6 Sim. 214. But Professor Street regards these cases as of slight authority, and points out that there is disagreement among commentators on this topic: Governmental Liability 140, n. 5. Cp. Glanville Williams, Crown Proceedings 136, n. 26.

140 Russell v. Hamilton Magistrates (1897) 25 R. 350; Bell v. Secretary of State for Scotland 1933 S.L.T. 519.

Further, in Boland v. An Taoiseach,[141] where the plaintiff sought, inter alia, an injunction to restrain the Government from entering into an allegedly unconstitutional agreement, there was no suggestion either by counsel or the Court that such an order was not competent.

(b) Procedure

3.22 Proceedings for an injunction follow the lines of those for a declaration; indeed the two remedies may be sought in the same proceedings and a claim for damages joined therewith. As noted above, it is possible to obtain interim relief pending trial of the claim for a perpetual injunction. This can be secured very speedily on an ex parte application grounded upon affidavit.[142]

(c) Time-limits

3.23 While there are no specific time-limits for injunction proceedings, the injunction is an equitable remedy and consequently laches (i.e. acquiescence, negligence or undue delay) on the plaintiff's part may disentitle him to relief.[143]

(d) Locus standi

3.24 The usual understanding is that he who seeks an injunction against an administrative body must show that he has been specially affected by the action complained of. Thus is Weir v. Fermanagh County Council[144] the plaintiff, a ratepayer,

---

141 /1974/ I.R. 338.

142 For the considerations relevant to the grant of such relief, see Educational Co. of Ireland Ltd v. Fitzpatrick /1961/ I.R. 323; E.I. Co. Ltd v. Kennedy /1968/ I.R. 69.

143 See Coey v. Pascoe /1899/ 1 I.R. 125; In the Goods of Corcoran /1934/ I.R. 571; Cahill v. Irish Motor Traders' Association /1966/ I.R. 430.

144 /1913/ 1 I.R. 193.

sought an injunction to restrain the defendants from acting on a resolution for the construction of a new road, claiming that the resolution was ultra vires. At first instance Ross J. held that the plaintiff could sue on his own behalf; the construction of the road would involve an increase in the rates, and Weir had the right to protect himself against an illegal levy - if illegal it was. But the Court of Appeal[145] ruled otherwise. This, said Palles C.B., was a suit to enforce a public trust, and the rule regarding such suits was unquestioned. The plaintiff must be the public, represented by the Crown, which sued by its officer, the Attorney General. He continued:

> "No doubt the plaintiff 'has a right' to protect himself against an illegal levy of rates, and could successfully appeal against a rate struck upon an estimate which included a charge for this road, but he has in addition, in common with all other ratepayers, a right to restrain the construction of the road; and if he can maintain this suit, to enforce this latter right, so can every other ratepayer; and thus there would be the multiplicity of suits which Courts of Equity, following the Common Law, hold to be an evil, and to avoid which they adopted a practice analogous to that of the Common Law. This practice, with this ancient origin, has endured to the present time, and has been uniformly applied in all cases in which either the public generally, or, as here, a particular class of the public, is interested."[146]

3.25 The decision in Weir's case reflects a judicial attitude which prevailed generally in Common Law countries until quite recently. It seems to have been inspired by the fear that to allow an individual to sue in his own name would open the way for a flood of litigation, with the possibility that public authorities would be harassed

---

[145] Palles C.B., Holmes and Cherry L.JJ.

[146] At 198-9.

by multiple proceedings. The intervention of the Attorney General would operate as a control on this; presumably he would lend his name to one plaintiff so that the relevant legal point could be tested, while refusing it to others who wished to raise the same question.

3.26 It would follow that where an administrative agency takes action adversely affecting a section of the public, or fails to perform a duty owed to the citizens at large, only the Attorney General may institute proceedings for an injunction or a declaration. This he may do either of his own motion, or at the instance of a relator (e.g. private individual, company, local authority). Should the Attorney not move of his own accord, the relator may seek leave to use his name; and if this is denied the legality of the action (or inaction) may not be tested. The orthodox view is that the Attorney General is not obliged to give reasons should he refuse his consent, and that he cannot be compelled to lend his name to proceedings. The Irish Court of Appeal so held in Attorney General (Humphreys) v. Governors of Erasmus Smith's Schools[147] and the House of Lords took the same view in Gouriet v. Union of Post Office Workers.[148] While the position has not been tested in the Irish courts since independence, it may be that the law is as stated in Gouriet's case. In Macauley v. Minister for Posts and Telegraphs[149] Kenny J. considered section 2(1) of the Ministers and Secretaries Act 1924, which provided that a Minister of State could be sued in his

---

147 [1910] 1 I.R. 325.
148 [1977] 3 All E.R. 70; [1978] A.C. 435.
149 [1966] I.R. 345.

official name, subject to the grant of the Attorney General's fiat. The learned Judge held that the Attorney was free to grant or withhold his fiat as he thought fit; that he was not obliged to give reasons; and that should he withhold it, no proceedings to review his decision could successfully be brought in the courts.[150] There is clearly an analogy between the Attorney's fiat under section 2(1) and his consent to relator proceedings, and Kenny J.'s conclusions may apply to the latter as well as to the former.

3.27 In Gouriet v. Union of Post Office Workers[151] the House of Lords reaffirmed that, in the words of Lord Wilberforce, it was "the exclusive right of the Attorney General to represent the public interest, even where individuals might be interested in a larger view of the matter".[152] Their Lordships declined to remould the law in this regard, considering that the present arrangements were "wise". However, in the context of the Gouriet case - an injunction to restrain the commission of an offence - this conclusion is not self-evident. Its result is to make the Attorney General - a political figure - the unchallengeable arbiter of a legal question. Of course, it has been argued that since the Attorney General is responsible to parliament, his decisions can be challenged there. Whatever its merits[153] this argument has little relevance in Ireland, where the Attorney General has seldom been a member of the Dáil;[154] indeed even when he is a

---

150 At 355-6.

151 [1977] 3 All E.R. 70; [1978] A.C. 435.

152 [1977] 3 All E.R. 70, 83.

153 It found no favour with Lord Denning M.R. in the Court of Appeal: [1977] 1 All E.R. 696 at 715.

154 Of the eighteen persons who have held office as Attorney General since the foundation of the State, only six have been members of Dáil Éireann. One, the late Mr Cecil Lavery S.C. (as he then was), was a member of the Seanad.

Deputy there is no procedure for putting questions to him.[155]

3.28 It may be that a wider concept of the individual citizen's right of access to the courts in now emerging in Irish law. In Martin v. Dublin Corporation[156] the plaintiff, Professor F.X. Martin, instituted proceedings for a declaration that part of the site at Wood Quay proposed for Dublin Corporation Offices was a national monument; and he sought an interlocutory injunction to restrain interference therewith by building operations, pending the trial of his action. The defendants argued that Professor Martin had no locus standi since he had no greater interest than any other member of the public. Costello J. took the view that on this aspect of the case the plaintiff had made out a question of substance. It might well be that at the trial he would be able to establish that the general tendency of the courts in constitutional law questions[157] should be applied to cases where a citizen claimed that a public body was not carrying out the law. Further, it might be that the plaintiff, given his professional concern with medieval history and particularly the history of medieval Dublin, would have an interest over and above that of the ordinary citizen.

---

155 Article 30.4 of the Constitution provides that the Attorney General shall not be a member of the Government. Standing Order 32 of the Dail Standing Orders of 1974 requires that questions be addressed to a member of the Government.

156 The Irish Times, 15 December 1977.

157 Costello J. may have had in mind cases such as O'Donovan v. Attorney General [1961] I.R. 114 and McMahon v. Attorney General [1972] I.R. 69, in which citizens challenged the validity of certain provisions of the Electoral Acts.

3.29 Subsequent events show that the position is still uncertain. When the above case was brought to the Supreme Court the defence indicated that it would strenuously contest the issue of locus standi. The plaintiff then secured the Attorney General's consent to relator proceedings, and the Supreme Court gave liberty for the action to be reconstituted by joining the Attorney as plaintiff.[158] It thus became unnecessary for the Court to rule on Professor Martin's locus standi.

3.30 In other Common Law jurisdictions there is a tendency towards a wider notion of the interest necessary to support an application for an injunction or a declaration. The Supreme Court of Canada has held that a tax-payer has standing to challenge the constitutionality of federal[159] or provincial[160] legislation that affects the public at large, though him no more than others.[161] In the realm of congressional taxing and spending power the United States Supreme Court has pursued a similar policy of liberalisation,[162] and it has also given a wide interpretation to the Administrative Procedure Act 1946. This confers standing to challenge administrative action on persons "aggrieved" or "adversely affected", and these elastic terms have been stretched considerably in recent decisions, particularly in

---

158 The Irish Times, 24 January 1978.

159 Thorson v. Attorney General for Canada (1974) 43 D.L.R. (3d) 1.

160 McNeil v. Nova Scotia Board of Censors (1975) 55 D.L.R. (3d) 632.

161 In Thorson's case the plaintiff challenged the constitutionality of the Official Languages Act: in McNeil's case the attack was upon the validity of legislation providing for film censorship in Nova Scotia.

162 Flast v. Cohen (1968) 392 U.S. 83. In areas outside the taxing and spending power the situation is much more complex: U.S. v. Richardson (1974) 418 U.S. 166; Warth v. Seldin (1975) 422 U.S. 490.

the area of environmental protection.[163]

3.31 It is interesting to note that the Oireachtas has inserted a very broad concept of standing into recent environmental protection legislation. Section 27 of the Local Government (Planning and Development) Act 1976 provides that any person, whether he has an interest in land or not, may seek an injunction to restrain unauthorised development. A similar provision is found in section 11 of the Local Government (Water Pollution) Act 1977.

3.32 It is possible that the courts, influenced by these legislative developments and by the pattern in other jurisdictions, will disavow the restrictive attitude in Weir's case in favour of the more liberal line argued in Martin v. Dublin Corporation. This could have the effect either of confining the relator action within a very narrow ambit or of rendering it altogether obsolete. Indeed it is a moot point how far the need for the Attorney General's intervention, as laid down in Weir's case, is compatible with the Constitution of 1937. Judicial decisions have established that the citizen has an implied constitutional right of access to the courts to defend or vindicate a legal right.[164] It would require only a slight development to bring about the result that, in a matter affecting the public at large, any citizen has a constitutional right of access to the courts to defend or vindicate the rule of law.

---

163 U.S. v. SCRAP (1973) 412 U.S. 669; Sierra Club v. Morton (1972); 405 U.S. 727. See too United Church of Christ v. F.C.C. (1966) 359 F. 2d 994; Scenic Hudson Preservation Conference v. F.P.C. (1965) 354 F. 2d 608 (Court of Appeals).

164 Buckley v. Attorney General /1950/ I.R. 67; Macauley v. Minister for Posts and Telegraphs /1966/ I.R. 345; O'Brien v. Keogh /1972/ I.R. 144, 155.

3.33 The question of standing to sue in "public interest suits" has recently been the subject of an exhaustive examination by the Law Reform Commission of Australia.[165] The present position is felt to be unsatisfactory because the rules as to locus standi are obscure, differ according to the remedy sought, and are too narrowly conceived, while the relator action is open to abuse and can cause unnecessary delays. The Australian Law Reform Commission has accordingly suggested that there should be an enlargment of standing rights, with one single rule applying irrespective of the remedy sought. This rule, the Australian Law Reform Commission has proposed, should be expressed in the negative - the court should be empowered to dismiss the proceedings if satisfied that the plaintiff had no "real concern" with the issues.

3.34 The Australian Working Paper does not share the fear expressed in Weir's case that to allow individuals to litigate questions affecting the public will result in a multiplicity of actions. Experience in Canada and in the state of Michigan suggests otherwise. Since 1908 Canadian courts have recognised the standing of a ratepayer to question the validity of municipal expenditure, but this has not spawned an inordinate number of actions. The Michigan Environmental Protection Act 1970 allows any person to seek the aid of the courts to enjoin any other person from action adverse to the environment. Three years' experience of the Act in operation showed that there had been seventy-four suits, all of which raised serious, socially useful issues. This number of actions was in no danger of swamping the Michigan courts.[166]

---

165 Access to Courts - 1: Standing: Public Interest Suits, Working Paper No. 7 (9 November 1977).

166 Op. cit. 55-6.

3.35 So far as Ireland is concerned, it has been accepted since 1894 that a ratepayer has locus standi to challenge decisions of the local government auditor.[167] There is no evidence whatever to suggest that this has given rise to a spate of unmeritorious or vexatious applications. Moreover, the Oireachtas has shown in its recent legislation on planning and water pollution that it is not impressed by the "floodgates" argument.

3.36 The Australian Working Paper regards the "real concern" formula as being the most suitable because of its flexibility. Since the object is to widen locus standi, it is necessary to employ a word that clearly signifies that intention. "Interest" will not do this because it may be given a traditional construction requiring a financial or property stake. "Concern" carries no such overtones. The addition of "real" indicates that the new rule of standing is not to be a charter for meddlers and busybodies. Flexibility is further built in because the courts will be able to determine, according to the circumstances of each case, whether the plaintiff has a "real concern". Thus where important public questions were involved the court could allow any individual citizen to proceed, whereas if the matter was of much more personal concern locus standi might be confined to the person directly affected.

---

[167] R. (Bridgeman) v. Drury [1894] 2 I.R. 489.

CHAPTER 4 ORDERS TO COMMAND

4.1 Disputes occasionally arise between administrative authorities and those affected by their decisions as to whether or not the authority is under a legal obligation to perform a certain duty. Persons affected may wish to test the matter in the courts by seeking an order commanding the administrative authority to perform the duty in question. The usual means of doing this is by applying for an order of mandamus. Although the mandatory injunction has been used for the purpose recently, its role in the public law field is not yet clear. It may come to supplant mandamus altogether - but it has not yet done so.

4.2 It is not possible to seek mandamus and a mandatory injunction in the alternative, but this gap need not give rise to the sort of problem caused by other overlapping remedies. Mandamus is flexible compared to certiorari; it will issue to a wider range of persons and bodies and the form of the order is capable of variation. (It may not, however, be sought in conjunction with damages.) Nonetheless, the very existence of two separate remedies may give rise to problems of demarcation, resulting in applications being dismissed because the more appropriate of the two remedies was not sought.

A MANDAMUS

(a) Scope

4.3 The order of mandamus is the classical means of compelling the performance by a public body[168] of a duty

---

[168] The order will not issue to a private body: see de Smith, op. cit. 482.

imposed on it by law. While the duty must be a public one,[169] it may be either of common law or statutory origin. In most of the reported cases, discussion turns on whether or not the duty has arisen in the circumstances of the case. The order has been sought in many different situations, e.g. to compel the performance of a statutory duty to repair courthouses;[170] to command local authorities to repair roads;[171] produce their books for audit;[172] strike a rate to pay for extra police;[173] enforce the law;[174] make appointments;[175] produce a planning scheme;[176] and grant planning permission.[177] An order for mandamus would be an appropriate step in the case of failure to implement a judicial decree for damages given against the State.[178]

---

169 Mandamus will not be granted to decide a private dispute, even where the respondent is a public authority: R. (Butler) v. Navan U.D.C. [1926] I.R. 466.

170 R. (Jackson) v. Sligo County Council (1900) 34 I.L.T.R. 49; State (King and Goff) v. Minister for Justice (unreported, Doyle J., 1975).

171 R. (Westropp) v. Clare County Council [1904] 2 I.R. 579.

172 R. (Drury) v. Dublin Corporation [1907] 41 I.L.T.R. 97.

173 R. (Byrne) v. Belfast Corporation [1919] 2 I.R. 143.

174 R. (I.U.D.W.C.) v. Rathmines U.D.C. [1928] I.R. 260.

175 State (Minister for Local Government) v. Sligo Corporation (1935) 69 I.L.T.R. 72; State (Minister for Local Government) v. Ennis District Hospital Board [1939] I.R. 258.

176 State (Modern Homes Ltd) v. Dublin Corporation [1953] I.R. 202.

177 State (Cogley) v. Dublin Corporation [1970] I.R. 244; State (Murphy) v. Dublin County Council [1970] I.R. 253; State (Alf - A - Bet Promotions Ltd) v. Bundoran U.D.C. (1978) 112 I.L.T.R. 9.

178 Byrne v. Ireland [1972] I.R. 241, 289 (per Walsh J.), 307 (per Budd J.).

4.4 Mandamus will also lie to review the exercise of discretion by administrative bodies, as where they determine questions of entitlement to benefit. If, in arriving at a decision, the authority takes irrelevant factors into account, it can be ordered to hear and determine according to law.[179] It seems, however, that if the decision-making function is one classifiable as judicial, mandamus will not issue to review errors of law within jurisdiction. In R. (Spain) v. Special Commissioners of Income Tax[180] it was contended that the respondents had misconstrued section 25 of the Income Tax Act 1918 in holding that the prosecutrix was not entitled to a refund of tax; that accordingly they had not heard and determined in accordance with law; and that mandamus should issue to compel them to do so. The High Court (Sullivan P. and O'Byrne J.) held that mandamus could not issue in these circumstances. O'Byrne J. said:

> "It is not alleged that the Commissioners have not heard and determined the case, and accordingly there is no object in issuing a mandamus to compel them to hear

---

179 Or to "consider and deal with the application according to law", as in State (Keller) v. Galway County Council [1958] I.R. 142. As to what factors may legitimately be taken into account in exercising a discretion see R. (Lismore Guardians) v. Local Government Board [1918] 2 I.R. 131 (could the Board, in deciding whether to approve a local authority's appointment to a medical post of a doctor under military age, take into account the wartime needs of the armed forces for medical services?)

180 Decided in 1927 but reported only as an appendix to State (Ryan) v. Revenue Commissioners [1934] I.R. 1, p. 27.

> and determine. What is alleged is that in their determination they have misconstrued the statute and gone wrong in point of law, and the only object of the mandamus would be to compel them to decide the case in a particular way. Such a mandamus is, in my opinion, unknown to the law."[181]

In this type of situation certiorari will normally lie;[182] and, if the prosecutor is uncertain whether or not the decision-making function is judicial, there is nothing to prevent him applying for certiorari and mandamus. The advantage of this is that mandamus, unlike certiorari, may issue to persons and bodies whose functions are in no sense judicial. Spain's case, however, shows that there may be risks in applying for mandamus alone in an area traditionally within the purview of certiorari.[183]

(b) Procedure

4.5 An application for mandamus is made by motion for a conditional order.[184] The matter may then proceed as on an application for certiorari; alternatively, when a return is made to the first order, the prosecutor may plead to it as if it were a statement of defence delivered in an

---

181 /1934/ I.R. 27 at 42-3.

182 O'Byrne J.'s view seems to have been influenced by the fact that section 202 of the 1918 Act provided that claims should be "finally determined" by the Special Commissioners. But on the modern authorities this would not immunise their decisions against review for error of law.

183 This contrasts with the position in California, where mandamus has ousted certiorari, and "certiorarified mandamus" has become the general means of securing judicial review. See Bernard Schwartz Administrative Law 544-6 (Boston 1976).

184 Rules of the Superior Courts 1962, Order 84, rule 25.

action, and all subsequent proceedings may be had and taken as in an action.[185] Contested issues of fact may be tried with or without a jury. (In State (Modern Homes Ltd) v. Dublin Corporation[186] the question whether the respondents had fulfilled their statutory duty to give effect "with all convenient speed" to their decision to make a planning scheme was tried with a jury.[187]) The prosecutor must be able to show that he has demanded the performance of the relevant duty and that this has been refused.[188]

(c) Time-limits

4.6 Like the other State Side orders, mandamus is a discretionary remedy, and, while there are no fixed time-limits for applying,[189] undue delay may result in refusal of the order.[190] In State (Conlon Construction Co.) v.

---

185 Id., Order 84, rule 26.

186 [1953] I.R. 202.

187 At 231.

188 R. (Hewson) v. Wicklow County Council [1908] 2 I.R. 101; State (Modern Homes Ltd) v. Dublin Corporation [1953] I.R. 202 at 227.

189 If mandamus is sought to direct a Circuit Court judge to enter continuances and hear an appeal, the application must normally be made within two months of the date on which the judge refused to hear the appeal: Order 84, rule 36.

190 Delay is not the only factor which may influence the court's exercise of discretion. If an alternative remedy exists the court may decline to grant mandamus (R. (O'Lehane) v. Dublin Town Clerk (1909) 43 I.L.T.R. 169; State (Cagney) v. District Justice McCarthy (1941) 75 I.L.T.R. 224). The same is true if the act sought to be commanded would be impossible to perform because it would involve a contravention of the law or because the respondents do not have the means to comply with it: Hewson's case (supra fn. 188); Modern Homes case (supra fn. 176).

Cork County Council[191] Butler J. put it thus:

> "The making of the order is within the discretion of the Court. The Court must consider all the circumstances of the case including the conduct of the parties and, unless coerced by the manifest requirements of justice to exercise the discretion to make the order, may refuse it on judicial grounds. Where mandamus is sought to secure a right the right must be promptly claimed and the claim pursued vigorously• without being abandoned. Among well recognised grounds for refusing the remedy is delay on the part of the applicant in pursuing the claim and the abandonment of the claim in favour of alternative remedies. Where such delay and abandonment was deliberate because the claimant may have thought such a course to be in his better interests he cannot repent his decision and ask for the discretion of the Court to be exercised in his favour by the making of the order."

(d) Locus standi

4.7 The applicant for mandamus must have an interest in the subject-matter, but the nature of the interest required is not entirely clear. In R. (I.U.D.W.C.) v. Rathmines U.D.C.[192] Hanna J. said:[193]

> "I am satisfied from a consideration of the authorities that the only interest or right that will enable a party to apply for mandamus is one having a legal character ..... This principle has been laid down in innumerable cases - sometimes using the word 'right', sometimes 'an interest', sometimes qualified with an adjective 'legal', and sometimes not; but in every case, so far as I can discover, it referred to a distinct right, having a legal origin, established either expressly or impliedly by statute, by an order having the force of statute, or being a matter of record in a recognised tribunal, or some other legal method".

---

191 Not yet reported, judgment delivered 31 July 1975.

192 [1928] I.R. 260.

193 At 276.

In the same case, however, O'Byrne J. took a less rigid line:[194]

> "It is undoubtedly a rule of law which is well established that a person applying for a writ of mandamus to compel the performance of a statutory duty must have a specific interest in the performance of that duty, and that an ordinary member of the public is not entitled to the writ. The nature of the interest, however, in my opinion, must necessarily vary according to circumstances, and to the nature of the particular duty, and, in particular, upon a consideration of the question for whose benefit was the particular duty imposed."

In State (Modern Homes Ltd) v. Dublin Corporation[195] the respondents had resolved in January 1936, in accordance with section 26 of the Town and Regional Planning Act 1934, to make a planning scheme. Section 29 of the Act provided that when such a decision had been made "such authority shall with all convenient speed give effect to such decision and make a planning scheme ...." By October 1951 no such scheme had been made, the respondents preferring to exercise the interim powers of control provided by the Act. The prosecutors - a property development company - claimed that they had been injured by the failure to make a planning scheme and sought mandamus to compel the respondents to produce one. On the question of locus standi the former Supreme Court[196] said:

> "All owners of property are in theory affected by the decision of the Council to prepare and submit a planning scheme. It is clear, however, that an individual owner would not be entitled to apply for mandamus. The prosecutors, however .... have shown that they have in fact been affected by action taken by the Corporation in exercise of their powers of interim control and that

---

194 At 291.

195 [1953] I.R. 202.

196 Maguire C.J., Murnaghan, O'Byrne, Lavery and Kingsmill Moore JJ.

> they have suffered by the failure of the Council to make and submit a planning scheme. It is not necessary to attempt a precise definition of the nature and extent of the right or interest with which an applicant for mandamus must be clothed before he is entitled to apply to the Court for relief. This Court does not accept the contention that an applicant must have a right to recover damages in an action. If this contention were correct it could mean that an alternative remedy would exist in every case, and the Court would in general in the exercise of its discretion refuse an order of mandamus. The prosecutors have shown that they are prejudiced to an extent greater than the other property owners in the planning district. In the view of this Court it has been shown that they have a sufficient interest to entitle them to apply for an order of mandamus ...."[197]

This approach, while less restrictive than that of Hanna J., is not so broad as that of O'Byrne J. On the face of it, the duty would appear to have been owed to all persons in the planning district, and it is not easy to see why the Supreme Court concluded that an individual owner could not apply for mandamus. Perhaps the Court had in mind an application by an individual owner who had not been in any way affected and who might therefore be regarded as raising a hypothetical issue. But an applicant has not always been required to show prejudice to his interests - let alone a prejudice peculiar to himself. In R. (Bradshaw) v. Commissioner for Valuation[198] the prosecutor, a Dublin ratepayer, wished to have the Commissioner ordered to carry out a revaluation as required by statute. The Court[199] held that he had a sufficient interest. It was immaterial whether his new valuation might be greater or less than his current one; he had a right to have his lands revalued.

---

197 /1953/ I.R. 202, 228-9 per Maguire C.J.

198 (1906) 40 I.L.T.R. 174.

199 Palles C.B., Johnson and Gibson JJ.

4.8 It would seem, therefore, that the notion of "interest" is a highly flexible one and that, subject to one qualification, the dictum of O'Byrne J. in R. (I.U.D.W.C.) v. Rathmines U.D.C.[200] is an accurate statement of the law. The qualification relates to his observation that an ordinary member of the public is not entitled to the order. If the duty is owed to the public at large so that no one person suffers a greater prejudice from its non-performance than another, why should not any individual be entitled to seek mandamus? If, in such a situation, the court insists on a prosecutor with an interest personal to himself, the result may be that the law goes unenforced. That this is no hypothetical danger is shown by a recent English case - R. v. Commissioners of Customs and Excise, ex p. Cooke.[201] Here the Finance Act 1969 had imposed a new and heavy duty on bookmakers that they much resented. Entitlement to a betting premises licence was conditional upon payment of this duty either fully in advance, or half in advance and half on 1 March following. After much pressure the Chancellor of the Exchequer sanctioned a scheme for payment by monthly instalments. This - as the Divisional Court emphasised - was quite wrong; the word of the Minister was outweighing the law of the land. Accordingly, two bookmakers - who had paid the duty in the manner required by the Act - moved for an order of mandamus directing the Commissioners of Customs and Excise to carry out their functions in accordance with law. The Divisional Court was clear that the law had been violated, so the only real issue was as to the applicants' locus standi. Lord Parker C.J. pointed out that they were not seeking to enforce any specific duty owed to them;

---

200 [1928] I.R. 260, 291. See pp. 64-5 ante.
201 [1970] 1 All E.R. 1068.

consequently, they had to show "some interest, although not a direct personal interest, but some interest over and above the interests of the community as a whole".[202] Counsel for the applicants argued that they could do this. The unlawful arrangement had enabled many bookmakers, who would otherwise have been forced out, to remain in business, and consequently the applicants faced greater competition than would have been the case had the law been observed. But this, said Lord Parker C.J., would not do:

> ".... the interest, or the motive, which is moving this application is what I would term an ulterior motive, a motive of putting people out of business and nothing more".[203]

The Court reached its conclusion with reluctance, and Lord Parker C.J. said that had this hurdle been surmounted he would have striven to enable mandamus 'in some form to go'. But how could this hurdle have been surmounted? The duty was owed to the public at large, and no one other than a bookmaker could have a special interest in its fulfilment. However, the Court's requirement of a special interest would have precluded intervention by an ordinary member of the public, while the "ulterior motives" of bookmakers ruled them out as applicants. The Court's decision therefore made it impossible to secure observance of the law.

B MANDATORY INJUNCTION

4.9 A mandatory injunction requires the defendant to do a particular act (as opposed to the prohibitory form which restrains him from doing something). It has not played a very conspicuous role in public law, partly no doubt because

---

202 At 1073.

203 Ibid.

mandamus has been available in most of the situations where it might have been sought. Reported Irish cases seeking the remedy are few, and the proceedings have usually been instituted by the Attorney General.[204]

(a) Scope

4.10 It follows that the scope of the mandatory injunction in public law is uncertain; as the late Professor S.A. de Smith said, "it is not at all clear what classes of public duties can be enforced by this means".[205] He suggested that the remedy was available only to someone who was entitled to bring an action for damages for breach of the duty in question;[206] this would mean that locus standi requirements here would be much stricter than those for mandamus, so that the two remedies could hardly be interchangeable. This is supported by some dicta of Gavan Duffy J. in O'Doherty v. Attorney General and O'Donnell.[207] There, as has been observed, the learned Judge took the view that mandamus was the appropriate remedy, but that he could not grant it because it had not been sought. He added:[208]

> "The statement of claim does ask for a mandatory injunction, but the claim was virtually abandoned, for that is a different and quite inappropriate remedy, given only in lieu of damages, where there is no other way to do justice."

---

204 Attorney General v. Mayo County Council [1902] 1 I.R. 13; Attorney General for Northern Ireland v. Eastwood [1949] N.I. 41.

205 Op. cit. 394-5.

206 Ibid. 394.

207 [1941] I.R. 569.

208 [1941] I.R. 569, 584.

(b) Recent Irish cases

4.11 Two recent High Court cases, however, suggest that this type of injunction may come to play a more significant role than heretofore. The first is Phelan v. Laois Vocational Education Committee and Parsons.[209] A dispute had arisen over the appointment of a principal at Portlaoise Vocational School. The plaintiff was one of a number of persons who had applied for the post, following upon its advertisement. A selection board had recommended the appointment of the second defendant, Mr Parsons, making the plaintiff their second choice. The Minister for Education refused to sanction the appointment of Mr Parsons on the ground that he was not eligible for the post. The Committee eventually appointed Mr Parsons as Acting Principal but the Minister equally declined to sanction this, pointing out that no such post existed and stating that the candidate placed next by the selection board should be appointed. The plaintiff sought a declaration that Mr Parsons was not Acting Principal of the school, and a mandatory injunction directing the committee to appoint him (Mr Phelan) to the post. McWilliam J. granted the declaration sought but he could discover no statutory obligation on the committee to appoint the plaintiff in these circumstances. Consequently he refused to grant the mandatory injunction.

4.12 Why these proceedings took the form they did is not clear. The duty to appoint a principal might have been enforced by an application for mandamus to compel the committee to proceed to a selection in accordance with law. But it would seem excessively technical to insist that mandamus should be the sole and exclusive means of achieving

---

[209] Not yet reported, High Court, 28 February 1977.

such an end; and this case suggests that in some situations at least the declaration and mandatory injunction will be available as an alternative to mandamus. It also indicates that the mandatory injunction is not confined to the narrow function that Gavan Duffy J. envisaged for it, as an alternative to damages; for it is doubtful that in the circumstances of this case the plaintiff could have obtained damages. (See para. 4.10 supra.)

4.13 The second case is Crowley v. Ireland, Minister for Education, Attorney General and Irish National Teachers' Organisation.[210] The facts were that the Irish National Teachers' Organisation were in dispute with the board of management of Drimoleague school, County Cork, over the appointment of a principal. The organisation withdrew the services of its members from this school and from two others whose boards had the same chairman. In consequence the children of the district were without free primary education. The plaintiff, mother of one of the children, sued as next friend on behalf of six of them. She claimed (a) a mandatory injunction against the Minister, requiring him to provide free primary education in accordance with Article 40.4 of the Constitution, (b) an injunction against the organisation requiring it to withdraw a directive to members not to enrol children from the strike-bound schools at other schools[211] and (c) damages for conspiracy to infringe the constitutional rights of the children. The award of the injunctions on an interim basis was sought. McWilliam J. granted a mandatory injunction requiring the Minister to provide transport for the children to such neighbouring school or schools as should be found most convenient under the circumstances.

---

[210] Not yet reported, High Court, 1 December 1977.

[211] It appears that this directive was withdrawn before the matter came before the court and so it was unnecessary to make any order.

4.14 No doubt the Constitutional duty of the State and the Minister to provide free primary education could have been enforced by mandamus;[212] but it is easy to see why the plaintiff did not pursue this course. Had she done so she would have had to bring separate proceedings for an injunction against the INTO and for damages, since, as was pointed out supra, it is not possible to claim an injunction or damages together with mandamus. The claim as framed enabled the plaintiff to obtain all the relief she required in a single set of proceedings. This demonstrates that the mandatory injunction has a greater flexibility than mandamus, which makes it a most useful weapon in the public law arsenal. (See para. 1.8 and para. 3.16 supra.)

---

212 On appeal, the Supreme Court decided that in the circumstances of the case, there had been no breach of the Constitutional duty imposed on the State. So held by Kenny, Henchy and Griffin JJ., O'Higgins C.J. and Parke J. dissenting: Crowley v. Ireland and Others (judgments delivered 1 October 1979).

CHAPTER 5 MISCELLANEOUS MATTERS

A PROCEDURE BY WAY OF QUO WARRANTO

5.1 Order 84 of the Rules of the Superior Courts 1962 makes provision for procedure by way of quo warranto. This 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:[213]

> "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."

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.[214]

5.2 However, no application for such an order has been made for many years, and it would appear to be obsolescent, if not indeed obsolete. Anyone wishing to raise the kind of issue determinable in such proceedings would probably now do so by seeking a declaration that the office had not been lawfully filled, and an injunction to restrain the holder from acting therein. This being so, it seems unnecessary - and a possible source of confusion - to retain the separate procedure by way of quo warranto. It may be noted that, in England, this form of procedure was

---

213 Not yet reported, Supreme Court, 9 March 1979.

214 See, for example, R. (Moore) v. Moriarty [1915] 2 I.R. 375.

abolished by section 9 of the Administration of Justice (Miscellaneous Provisions) Act 1938, which instead empowered the High Court to grant an injunction to restrain the purported office holder from acting and, if necessary, to declare the office vacant. The Law Reform Commission recommends that procedure by way of quo warranto be abolished.

B TITLE OF PROCEEDINGS

5.3 Before Independence, certiorari, mandamus and prohibition, together with habeas corpus, were collectively known as "prerogative writs". The reason for this is not entirely clear,[215] but it is notable that proceedings for these writs were traditionally instituted in the name of the monarch, ex parte the real applicant.[216] Hence the title of such cases, for example R. (Martin) v. Mahony.[217] Following Independence, there seems to have been initial uncertainty as to how such cases should be entitled, and there are examples of the old practice being continued.[218] From 1930 onwards,[219], however, the modern practice - whereby

---

215 See further de Smith, op. cit. 507-19.

216 In Ireland the applicant is traditionally - if somewhat confusingly - called "the prosecutor".

217 [1910] 2 I.R. 695.

218 e.g. R. (Butler) v. Navan U.D.C. [1926] I.R. 92; R. (I.U.D.W.C.) v. Rathmines U.D.C. [1928] 2 I.R. 260.

219 There are isolated earlier examples - e.g. State (Darcy) v. District Justice Collins (1925) 59 I.L.T.R. 140 and State (O'Connell) v. District Justice Collins (1928) 62 I.L.T.R. 14 (both applications for mandamus). But a regular practice is seen to emerge in the Irish Reports for 1931, one of the cases - State (Kennedy) v. Little [1931] I.R. 39 - having been decided in 1930.

such proceedings are instituted in the name of the State[220] ex parte the real prosecutor - was adopted. Hence the title of cases such as State (Crowley) v. Irish Land Commission[221] or State (Gleeson) v. Minister for Defence.[222]

5.4 As regards actions for declarations and injunctions, a different practice is adopted. These have always been entitled in the same way as other civil proceedings - that is simply by the names of the plaintiff and defendant. This is also the style used in proceedings for certiorari, mandamus and prohibition in other parts of the Common Law world - for example India[223] and certain jurisdictions in the United States.[224]

5.5 The current practice described in paragraph 5.3 supra appears to have no sounder basis than an assumed continuity with pre-Independence forms. But these forms seem to have been influenced by theories of the royal prerogative in relation to the administration of justice,

---

220 Before 1930 "The State" seems to have been used only in prosecutions on indictment, and then interchangeably with "Attorney General" (e.g. The State v. M'Mullen [1925] 2 I.R. 9; Attorney General v. O'Leary [1926] I.R. 445 - both decisions of the Court of Criminal Appeal).

It may be noted that Order 84 of the Rules of the Superior Courts 1967 - though it refers to "State Side orders" - does not specify the mode of entitling such proceedings.

221 [1951] I.R. 250.

222 [1976] I.R. 280.

223 See H.M. Seervai, Constitutional Law of India Vol. II 858-990 (2nd ed. 1976).

224 See Bernard Schwartz, Administrative Law 538-48.

and they are therefore quite inappropriate in the context of the Constitution.[225] In Chapter 6 the creation of a new "Application for Review" is suggested, and under this a unified procedure for seeking any of the remedies previously discussed would be instituted. The question therefore arises as to how the new proceedings should be entitled. In the light of the preceding discussion, it would be inappropriate for such applications to be styled State (X) v. Y. The Law Reform Commission recommends that such applications be entitled, in the ordinary manner, by the names of the parties, who would be known as the plaintiff and the defendant in every case.

---

225 See Byrne v. Ireland [1972] I.R. 241, per Walsh J. (in whose judgment Ó Dálaigh C.J. and Budd J. concurred) at 274-5.

CHAPTER 6 PROPOSALS FOR REFORM

6.1 The present system of remedies has two outstanding merits - comprehensiveness and effectiveness. It is comprehensive in that it is difficult to envisage any justiciable grievance which would not come within the purview of one or other of the present remedies. It is effective because, as experience in France shows,[226] it is essential for the courts to have power to compel or to restrain action by the administration. But there is also a major defect - the line of demarcation between overlapping remedies is uncertain and there is no machinery for claiming such remedies in the alternative.

6.2 Experience in other Common Law jurisdictions shows that the necessary reforms may be simply and speedily effected, preserving the undoubted merits of the present remedies while eliminating their defects. Such reform has already been undertaken in Australia,[227] England,[228] New Zealand,[229] Northern Ireland[230] and Ontario.[231] Essentially it consists in unifying the procedure for seeking certiorari, mandamus and prohibition, and providing for the award of a declaration, an injunction and/or damages in addition to - or in substitution for - those State Side orders.

---

226 See Carol Harlow "Remedies in French Administrative Law" /1977/ Public Law 227.

227 Administrative Decisions (Judicial Review) Act 1977.

228 Rules of the Supreme Court (Amendment No. 3) 1977 (S.I. No. 1955 of 1977).

229 Judicature Amendment Act 1972.

230 Judicature (Northern Ireland) Act 1978 (ss. 18-20).

231 Judicial Review Procedure Act 1971.

6.3 Reform on these lines is preferable to any attempt to abandon the present remedies and start afresh. Such a course might well necessitate setting out, not merely the design of a new remedy, but also the grounds of review. There are two objections to this. Legislation for such a purpose might well prove very difficult to draft. Moreover, a statutory statement of the grounds of review could well restrict the development of the law in response to society's needs. The limited reform envisaged involves no such dangers. It preserves the existing flexible grounds of review and the familiar pattern of remedies. Consequently it appears to offer the maximum advantage.

6.4 Save in one important respect, the reforms enacted in Ontario and New Zealand afford the most suitable model for the proposed legislation. The key provision of both, here given in its New Zealand form, is as follows:

> "On an application by motion which may be called an application for review, the Supreme Court may, notwithstanding any right of appeal .... grant, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, any relief that the applicant would be entitled to, in any one or more of the proceedings for .... mandamus, prohibition or certiorari or for a declaration or injunction."

The Act goes on to empower the court, where proceedings are instituted for, say, certiorari, to treat them as an application for review. Thus should the case not be a suitable one for certiorari, the applicant is not sent away empty-handed; he can be awarded whichever other remedy is most appropriate.

6.5 Unfortunately the reference in the Ontario and New Zealand legislation to "a statutory power" has given rise to difficulties. In the New Zealand Act the term is defined to cover, inter alia, any decision made under any Act as to

the rights, powers, privileges, immunities, duties or liabilities of any person. Wide though this is it would not cover decisions of bodies such as our Criminal Injuries Compensation Tribunal, which does not operate under statutory authority. Moreover, the New Zealand courts have held that it does not cover mere reports or recommendations.[232] Under the New Zealand scheme cases such as those mentioned would still be reviewable in proceedings for certiorari or a declaration, since these continue to exist as distinct and independent remedies. But this would seem to perpetuate that risk of abortive proceedings which a comprehensive reform would seek to eliminate.

6.6 The Law Reform Commission recommends that legislation be introduced to provide that, on an application for review, the High Court should have power to grant any relief which the plaintiff might be given in proceedings for mandamus, prohibition or certiorari or for a declaration or injunction. The Court should also be empowered to treat an application for any one of those forms of relief as an application for review. It should further be provided that a claim for damages may be joined with an application for review.

6.7 As regards the locus standi required on an application for review, it was suggested in paragraph 3.36 supra that the court should be empowered to dismiss the application if it was satisfied that the plaintiff had no real concern with

---

232 Thames Jockey Club Inc. v. New Zealand Racing Authority /1975/ 2 N.Z.L.R. 768. The problems which have arisen in Ontario are discussed in J.M. Evans' article "Judicial Review in Ontario - Recent Developments in the Remedies" (1977) 55 Canadian Bar Review 148.

the subject matter. It may be objected that this would leave untouched the present locus standi requirements of each individual remedy. While this is true, it is anticipated that, when the new procedure becomes widely known, applications for the individual remedies would cease to be made and would be replaced by the comprehensive application for review. A uniform and broad requirement of locus standi for the latter, such as that recommended, should help to accelerate this process. The Law Reform Commission recommends that the proposed Act should empower the Court to dismiss an application for review if satisfied that the plaintiff has no real concern with the subject matter.

6.8 Under the present law the award of any of the remedies discussed above is in the discretion of the court. There is no indication that this causes any problems, and it builds into the system a useful degree of flexibility. The Law Reform Commission recommends that the proposed legislation should provide that the granting of any of the remedies available on an application for review should be in the discretion of the Court.

6.9 In some instances statute has laid down specific time-limits for the institution of review proceedings. Thus, under section 78(2) of the Housing Act 1966, an application to quash a compulsory purchase order must be made within three weeks of the publication of the notice of confirmation. This period of limitation will not be affected by the present proposals. . No special provision in the proposed Act seems necessary to achieve this result, since section 78(4) of the Housing Act provides that, subject to section 78(2), a person shall not question a compulsory purchase order "by prohibition or certiorari or in any legal proceedings

whatsoever". The same would apply to the two months' limitation period under section 82(3A) of the Local Government (Planning and Development) Act 1963.[233]

6.10 With some minor exceptions the present law imposes no strict time-limits on proceedings for certiorari, mandamus, prohibition, declarations or injunctions. As noted above, these remedies lie in the discretion of the court and undue delay may be a factor in deciding how that discretion should be exercised. This seems the most flexible, and hence the most satisfactory, way of dealing with delayed applications. If it should be thought desirable to lay down specific time-limits analogous to those which exist at present - in relation to certiorari and mandamus directed to the lower courts - this could be done by rule of court. The Law Reform Commission recommends that the proposed legislation should not impose any time-limits on the presentation of an application for review, but that the doctrine of laches (i.e. acquiescence, negligence or undue delay) should continue to apply. (See paras 2.17, 2.30, 3.14, 3.23, and 4.6 supra.)

6.11 It is further recommended that the proposed legislation should provide that, for the avoidance of doubt, the Court may, on an application for review, grant such interim relief as it considers appropriate pending final determination of the application.

6.12 It will obviously be necessary to make provision for such matters as discovery, interrogatories, cross-examination, the title of proceedings, the form and statement of grounds, etc. The Law Reform Commission recommends that the proposed legislation should authorise the making of rules of court to govern matters of procedure upon an application for review.

---

[233] Inserted by section 42 of the Local Government (Planning and Development) Act 1976.

CHAPTER 7 SUMMARY OF RECOMMENDATIONS

1. Procedure by way of quo warranto should be abolished. (Paragraph 5.3)

2. An application for review should be entitled by the names of the plaintiff and defendant. (Paragraphs 5.3 to 5.5)

3. Legislation should provide that on an application for review the High Court should have power to grant any relief that the plaintiff might be given in proceedings for mandamus, prohibition or certiorari or for a declaration or injunction. (Paragraph 6.6)

4. The High Court should be empowered to treat an application for any of the above-named remedies as an application for review. (Paragraph 6.6)

5. It should further be provided that a claim for damages may be joined with an application for review. (Paragraph 6.6)

6. The High Court should be empowered to dismiss an application for review where it is satisfied that the applicant has no real concern with the subject matter. (Paragraph 6.7)

7. The award of any of the remedies available on an application for review should be in the discretion of the High Court. (Paragraph 6.8)

8. There should be no general time-limit for the presentation of an application for review, but the doctrine of laches (i.e. acquiescence, negligence or undue delay) should continue to apply. (Paragraph 6.10)

9. It should be provided that on an application for review the Court may grant such interim relief as it considers appropriate. (Paragraph 6.11)

10. Legislation should authorise the making of rules of court to govern matters of procedure upon an application for review. (Paragraph 6.12)

CHAPTER 8 GENERAL SCHEME OF A BILL TO AMEND THE PROCEDURE FOR JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

1. Provide that on an application by motion, to be called an application for review, the High Court may grant any relief that the plaintiff might be given in any one or more of the proceedings for mandamus, prohibition or certiorari or for a declaration or an injunction.

2. Provide that the Court may treat an application for any one of the above-named forms of relief as an application for review.

3. Provide that on an application for review the Court may grant such interim relief as it considers appropriate pending final determination of the application.

4. Provide that in proceedings on an application for review the Court may award damages to the plaintiff, if he has, in accordance with rules of court, joined with his application a claim for damages arising from any matter to which the application relates.

5. Provide that the Court may dismiss an application for review if satisfied that the plaintiff has no real concern with the subject matter of the application.

6. Provide that the granting of any of the remedies mentioned above shall be in the discretion of the Court.

7. Provide that rules of court shall be made to govern practice and procedure upon an application for review.

8. Provide that the procedure by way of quo warranto shall be abolished.