



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

REPORT
ON
JUDICIAL REVIEW PROCEDURE

(LRC 71 - 2004)

IRELAND

The Law Reform Commission
35-39 Shelbourne Road, Ballsbridge, Dublin 4

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First Published

The Law Reform Commission 2004
February 2004

ISSN 1393 - 3132

An Taoiseach Bertie Ahern, TD.
Office of the Taoiseach
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12 February 2004

Dear Taoiseach

I enclose a copy of the Commission's **Report on Judicial Review Procedure** (LRC 71 – 2004) which will be published in the near future.

Yours sincerely,

Declan Budd
President

THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published 69 Reports containing proposals for reform of the law; 11 Working Papers; 28 Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and 24 Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in Appendix E to this Report.

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ACKNOWLEDGEMENTS

Prior to the publication of the Consultation Paper on Judicial Review Procedure in 2003 the Commission established an expert working group to assist and advise it on the aspects of judicial review procedure to be addressed in the Paper. The Commission would like once again to thank the members of the Working Group for the expertise and experience they brought to this project.

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The Commission would particularly like to thank those who sent in written submissions on the Consultation Paper, namely Noeline Blackwell, Kevin Costello, Áine Ryall, Garrett Simons and Rory Williams. A word of thanks also goes to others who assisted the Commission during the writing of this Report, including all those who attended the seminar on judicial review procedure held at the Commission in July 2003, the Courts Service, the Refugee Appeals Tribunal, the Repatriation Unit at the Department of Justice, Equality and Law Reform and the members of the judiciary who helped us with various queries. A particular debt of gratitude is owed to Professor David Gwynn Morgan whose insightful advice has, as always, proved invaluable. Full responsibility for this publication, however, lies with the Commission.

Table of Contents

ACKNOWLEDGEMENTS	IX
INTRODUCTION.....	1
CHAPTER 1 LEAVE STAGE	3
A Introduction.....	3
B Should the Leave Stage be Retained?	4
(1) Consultation Paper Recommendation	4
(2) Arguments For and Against	4
(3) Report Recommendation	10
C What Level of Notice Should be Given at the Leave Stage?	10
(1) Consultation Paper Recommendation	10
(2) Arguments.....	10
(3) Report Recommendation	13
D What is the Appropriate Standard to be Applied at the Leave Stage?	14
(1) Consultation Paper Recommendation	14
(2) Arguments.....	14
(3) Report Recommendation	20
E Alternative Remedies	20
(1) Consultation Paper Recommendations	20
(2) The Present Position	21
(3) Report Recommendation	22
F Amendments to the Grant of Leave	22
(1) Consultation Paper Recommendations	22
(2) The Present Position	23
(3) Report Recommendation	25
G Applications to Set Aside an Order Granting Leave	25
(1) Consultation Paper Recommendation	25
(2) The Present Position	25
(3) Report Recommendation	28
H Appeal Against Refusal to Grant Leave	28
(1) Consultation Paper Recommendation	28
(2) Time Limits	28
(3) Obtaining Leave to Appeal.....	29
(4) Report Recommendation	33
CHAPTER 2 TIME LIMITS.....	35
A Introduction.....	35
B Conventional Judicial Review.....	35
(1) Consultation Paper Recommendation	35
(2) Extension of Time	36
(3) Prejudice	38
(4) Report Recommendation	43
C Statutory Judicial Review.....	43
(1) Consultation Paper Recommendation	43
(2) The Present Position	44

	(3) Report Recommendation.....	49
D	<i>Certiorari</i> Time Limits.....	50
	(1) The Present Position.....	50
	(2) Problems.....	50
	(3) Solutions.....	51
	(4) Report Recommendation.....	52
CHAPTER 3 COSTS.....		53
A	Introduction.....	53
B	Costs at the Leave Stage.....	53
	(1) Consultation Paper Recommendation.....	53
	(2) The Present Position.....	54
	(3) Report Recommendation.....	55
C	Costs at the Substantive Hearing: Two Exceptional Categories.....	56
	(1) Consultation Paper Recommendation.....	56
	(2) Points of General Public Importance.....	56
	(3) Report Recommendation.....	57
	(4) Limited Judicial Immunity.....	57
	(5) Report Recommendation.....	58
D	Undesirability of Judges as Parties to Judicial Review Proceedings.....	58
	(1) The Problem.....	58
	(2) Proposed Solutions.....	60
	(3) Conclusion.....	64
E	Pre-emptive Costs Orders.....	64
	(1) Consultation Paper Recommendation.....	65
	(2) The Present Position.....	65
	(3) Report Recommendation.....	67
F	Security for Costs.....	67
	(1) Consultation Paper Recommendation.....	67
	(2) Introduction.....	67
	(3) Section 390 Companies Act 1963.....	68
	(4) ‘Straw Men’.....	69
	(5) Report Recommendation.....	72
G	Undertaking as to Damages.....	72
	(1) Consultation Paper Recommendation.....	72
	(2) The Present Position.....	72
	(3) Report Recommendation.....	74
CHAPTER 4 CASE ORGANISATION.....		75
A	Introduction.....	75
B	Early Settlement.....	76
	(1) Consultation Paper Recommendation.....	76
	(2) Pre-Action Protocol.....	76
	(3) Report Recommendation.....	77
C	High Court Specialisation.....	78
	(1) Consultation Paper Recommendation.....	78
	(2) Two Models.....	78
	(3) Duration of Appointment.....	79

	(4) Report Recommendation.....	79
D	Judicial Case Management in the Commercial Court	80
	(1) Introduction.....	80
	(2) New Case Management Procedure	81
	(3) Report Recommendation	83
E	Reading Time.....	83
	(1) Consultation Paper Recommendation	83
	(2) Arguments.....	84
	(3) Report Recommendation	85
F	Preparation of Judgments	85
G	Time Limits for Filing.....	86
	(1) Consultation Paper Recommendation	86
	(2) Arguments.....	86
	(3) Report Recommendation	87
H	Pro Forma Timetable.....	87
	(1) Consultation Paper Recommendation	87
	(2) Discussion	88
	(3) Report Recommendation	89
I	Procedural Exclusivity.....	90
	(1) Introduction.....	90
	(2) Procedural Conversion	91
	(3) Report Recommendation	92
	(4) Procedural Choice.....	92
J	Discovery	95
	(1) Consultation Paper Recommendation	95
	(2) Competing Interests.....	95
	(3) Testing the Link.....	97
	(4) Report Recommendation	99
CHAPTER 5 SINGLE ORDER.....		101
	(1) Introduction.....	101
	(2) Consultation Paper Recommendation	101
	(3) Consideration of Proposal for Reform	101
	(4) Recommendation	104
CHAPTER 6 SUMMARY OF RECOMMENDATIONS		107
APPENDIX A DRAFT RULES OF THE SUPERIOR COURTS 1986 AS AMENDED		115
APPENDIX B DRAFT SECTION 5(2), ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000 AS AMENDED.....		127
APPENDIX C MISCELLANEOUS DRAFT AMENDMENTS TO STATUTORY JUDICIAL REVIEW SCHEMES		129
APPENDIX D MATTERS SUITABLE FOR PRACTICE DIRECTION AND SUGGESTED PRACTICAL MEASURES.....		135

APPENDIX E	LIST OF LAW REFORM COMMISSION	
	PUBLICATIONS	137

INTRODUCTION

1. The genesis of this project lies in the increased profile and volume of judicial review applications in recent years. This has led to calls from both academics and practitioners in the field for a review of the procedural framework within which these applications are dealt. This Report thus deals specifically with issues of procedure without delving into the substantive aspects of judicial review.

2. In November 2001 the Law Reform Commission convened an expert group to assist and advise it on aspects of judicial review procedure. Their findings formed the basis of the *Consultation Paper on Judicial Review Procedure* published in January 2003. Since then the Commission has received a number of helpful submissions on this topic.

3. Procedurally, one of the most far-reaching proposals for reform involved the abolition of the leave stage in judicial review proceedings. This is considered in Chapter 1 along with other issues relating to the leave stage, namely the standard and degree of notice appropriate to the leave stage, alternative remedies, amendments to the grant of leave, applications to set aside an order granting leave and appeals against refusal to grant leave.

4. Chapter 2 deals with the role of time limits in judicial review proceedings. These differ as between standard limits in conventional judicial review and statute-specific limits relating to the various statutory schemes in operation. The chapter closes with a discussion of the special time limits afforded to applications for orders of *certiorari* under Order 84, rule 21(1) of the *Rules of the Superior Courts 1986*.

5. In Chapter 3, costs and how they operate within the judicial review context, are discussed. As a factor to the fore of the practicalities involved in any court proceedings, it was considered that the issue of costs could play a significant role in reform of judicial review procedure. The courts' approach to costs at the leave stage and at the substantive hearing is covered and recommendations

are made in relation to the specific areas of pre-emptive costs orders, security for costs and undertakings as to damages.

6. Chapter 4 covers a broad range of issues coming under the general title of ‘case organisation’. The drive towards dealing with cases in a more efficient manner seeks to divert from court applications which are best dealt with elsewhere and to manage those that do reach court in a more forthright way. The Report deals with particular issues of case organisation considered to be useful initiatives in the context of judicial review proceedings. Recommendations are made relating to early settlement of cases, High Court specialisation, case management structures in the Commercial Court, reading time, time limits for filing, *pro forma* timetables, procedural exclusivity and discovery.

7. In Chapter 5 the idea of a ‘single order’ is revisited. This concerns the question as to whether or not a single order of judicial review should replace the existing system of six separate orders which is regarded in certain quarters as somewhat anachronistic.

8. Finally, draft amendments, where appropriate, have been made to current legislation in line with the Report’s recommendations. Draft practice directions and suggested practical measures are also set out. These are to be found in the appendices at the back of the Report.

CHAPTER 1 LEAVE STAGE

A Introduction

1.01 Judicial review is divided into two main categories:

(i) Conventional judicial review. Procedure governing conventional judicial review is to be found in Order 84 of the *Rules of the Superior Courts 1986*.

(ii) Specialised statutory schemes of judicial review relating to specific areas of public decision-making which have been singled out by the Oireachtas as warranting specialised schemes because of the policy concerns involved.¹ Statutory schemes and the procedure involved are covered by legislation specific to that area.

1.02 There is a growing number of statutory schemes of judicial review. Typically such a scheme establishes significant modifications to the rules governing conventional judicial review in Order 84. Nonetheless, the rules of statutory schemes are modelled on those of conventional judicial review and these apply if nothing is provided to the contrary in the statutory scheme.

1.03 Both conventional and statutory judicial review involve a leave stage. This requires an applicant seeking judicial review to obtain leave from the High Court in order to proceed to a substantive hearing.

1.04 Many criticisms have been levelled at this procedure leading to calls for an overhaul of the current system and the abolition of the leave stage. On the other hand, defenders of the leave stage have pointed to the benefits which have flowed from the present two-tiered system that, it is claimed, justify its retention.

¹ This category of judicial review will hereafter be referred to as 'statutory judicial review'. Unless otherwise stated, the recommendations contained in this Report are intended to cover both conventional and statutory judicial review.

1.05 In this chapter the Commission revisits some of the arguments on both sides of the debate as set out in the *Consultation Paper on Judicial Review Procedure*.² A number of points will also be raised for the first time.

B Should the Leave Stage be Retained?

(1) Consultation Paper Recommendation

1.06 The Consultation Paper recommended the retention of the leave stage in both conventional³ and statutory⁴ judicial review proceedings.

(2) Arguments For and Against

(a) Abolitionist views

1.07 Many concerns have been voiced over the efficacy and usefulness of the leave stage as a filtering mechanism. These concerns were strongest in the area of statutory judicial review where it was felt that, as a result of the ‘substantial grounds’ standard, the leave stage led, in effect, to a ‘double hearing’. It has been argued that this threshold is so high that it necessitates a consideration at the leave stage which is more appropriate to, and which will in any event, need to be reproduced at the substantive hearing. This apparent duplication is exacerbated by the requirement in statutory schemes that the leave stage should be held on notice. Delay and waste of resources may ensue. There could then be an interval before the date for the hearing was obtained and listed. Rarely would a hearing be dealt with at both leave and substantive stages in one term. Respondents would sometimes waive their right to challenge at the leave stage of proceedings, so keen were they to avoid this delay.

1.08 At one level, the leave stage is part of the respondent’s armoury put in place to act as an obstacle in the path of the applicant. Other components of this armoury might include *inter partes* hearings as well as the imposition of a high standard on the applicant at the leave stage. The interests of society may justify such an unlevel playing field as the respondent is often a limb of the State ostensibly

² (LRC CP 20 – 2003), hereafter referred to as ‘the Consultation Paper’.

³ Consultation Paper paragraph 1.09.

⁴ Consultation Paper paragraph 2.03.

acting for the common good and with matters involving the public interest at stake.

1.09 However, those in favour of retaining the leave stage concede that it can, at times, lead to delay. We need to consider which (if either) party benefits from delay. The effect of judicial review proceedings while pending is almost invariably that the challenged decision is not implemented. This may suit applicants for, even if they have a good case, they may suffer no disadvantage while the proceedings are stalled; if the case is unsuccessful, they will have delayed the action in question and in some instances may even have rendered matters impractical by reason of the delay. On the other hand it is difficult to conceive of any delay which would work to the advantage of the respondent.

1.10 A further common complication stems from the fact that such delay may have a different impact on the third party from that on the respondent. Delay caused by the leave stage may prove felicitous for the applicant while the respondent basks in the additional protection offered by the leave stage hurdle. However, there may be a lurking notice party holding a legitimate interest. The third party's concern might be to have the case heard as quickly as possible; delay may be costly and in practical terms might force a notice party to abandon the project in question.⁵

1.11 Those advocating the demise of the leave stage point to the example of Order 84A, rule 4 of the *Rules of the Superior Courts 1986* (dealing with applications for review of decisions to award public contracts), in which no leave stage is necessary, to demonstrate the workability of their proposals. It is open to question whether Order 84A procedure, strictly speaking, comes within the ambit of judicial review. Order 84A may be regarded as a statutory (rather than conventional) form of judicial review. The Supreme Court in *Dekra Éireann Teoranta v Minister for the Environment and Local Government* considered that it fell within the category of 'specialist' judicial review, referring to immigration and planning as other

⁵ A classic example of such a scenario would be where planning permission has been granted for a project and proceedings have been instituted by a local environmental group challenging such permission. The developer in this case will often be joined as a notice party to the proceedings for whom the leave stage may act primarily as a disadvantage.

examples.⁶ At the same time it should be noted that Order 84A refers not to “judicial review”, but to “review” by the High Court. Its origins can be traced to European Community Directives⁷ and, as such, belong to a different order. This is reflected by the fact that in reviewing cases under Order 84A the criteria used by the courts must refer to the Directives on which it was founded. Thus in *SIAC Construction Ltd v Mayo County Council*,⁸ a case which was a combined Order 84 and special summons case, the Supreme Court held that the conventional *Wednesbury*⁹ principles of reasonableness must give way to a somewhat wider review mandated by the Directives involved. These Directives as interpreted by the European Court of Justice required the courts to go beyond the test of reasonableness. Indeed in *SIAC* the standard of review set down in the case of *Upjohn Ltd v Licensing Authority established by the Medicines Act 1968*¹⁰ was used and the court held that it could overturn a contract if there was “manifest error”, a test which “applies to the appreciation of facts by the decision-maker”¹¹ while allowing a wide margin of appreciation to the decision-maker. Although this wide margin of appreciation limits the extent to which the courts will examine issues of fact, the test is nonetheless much wider than traditional judicial review principles and certainly expands the range of matters which may be examined in such a case. In the light of this, and although in other procedural aspects it bears a striking resemblance to judicial review,¹² Order 84A is perhaps best regarded as a *sui generis* form of review.

⁶ [2003] 2 ILRM 401: see paragraphs 2.14 – 2.18 below.

⁷ *Public Services Contracts Directive*, 92/50/EEC; *Public Supply Contracts Directive*, 93/36/EEC; *Public Utilities Contracts Directive*, 93/38/EEC.

⁸ [2002] 2 ILRM 401.

⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

¹⁰ [1999] ECR I-223.

¹¹ [2002] 2 ILRM 401, 425, *per* Fennelly J (Keane CJ, Denham, Murray and Hardiman JJ concurring).

¹² This fact is reflected in the application of principles derived from *Dekra Éireann Teoranta v Minister for the Environment and Local Government* [2003] 2 ILRM 210 (an Order 84A review) to general judicial review applications; see paragraphs 2.14 – 2.18 below.

1.12 While it is accepted that moving directly to a substantive hearing would result in the occasional furtherance of unmeritorious cases to the substantive stage, abolitionists claim that such a danger may be adequately mitigated by recourse to the High Court's inherent jurisdiction to strike out frivolous claims. With regard to this point, those in favour of the retention of the leave stage argue that reliance on the court's inherent jurisdiction to strike out frivolous cases is too weak a protection. Order 19, rule 28 of the *Rules of the Superior Courts 1986* provides that a court may order a pleading to be struck out on the grounds that "it discloses no reasonable cause of action or answer" and that, in any case, where the action or defence is shown by the pleadings to be "frivolous or vexatious", the court may order that the action be stayed or dismissed or that judgment may be entered accordingly. While the wording of Order 19, rule 28 may appear to be broadly in line with the general objective of the leave stage, it is submitted that reliance on the court's inherent jurisdiction as a replacement for the leave stage would prove a much less effective filter. The courts have applied this inherent jurisdiction cautiously. The reasons for the reluctance of the courts to dismiss a claim out of hand has been emphasised. Thus McCarthy J in *Sun Fat Chan v Osseous Ltd* noted that "often times it may appear that the facts are clear and established but the trial itself will disclose a different picture".¹³ Further, it has been held that the jurisdiction under Order 19, rule 28 may be invoked only in circumstances where there is no dispute as to issues of fact. The Supreme Court in *Jodifern Ltd v Fitzgerald* held that:

"One thing is clear, disputed oral evidence of fact cannot be relied upon by a defendant to succeed in such an application. Again, while documentary evidence may well be sufficient for a defendant's purpose, it may well not be if the proper construction of the documentary evidence is disputed."¹⁴

1.13 Given the reasoning behind this restrictive approach, serious doubts must exist as to the merits of relying on the High Court's inherent jurisdiction to perform adequately the function of the current leave stage. Accordingly, the Commission does not agree that such

¹³ [1992] 1 IR 425, 428.

¹⁴ [2000] 3 IR 321, 332.

recourse offers a safeguard of comparable strength to the filter provided by the current leave stage.

(b) Retentionist views

1.14 The leave stage is commonly defended as a filtering mechanism. Denham J in *G v Director of Public Prosecutions*¹⁵ pointed to this function when she spoke of its aim as being “to prevent an abuse of the process, trivial or unstateable cases proceeding and thus impeding public authorities unnecessarily”. Public authorities are to be protected by this hurdle against delay brought about by whimsical actions being allowed to proceed unchecked.

1.15 In an effort to establish the veracity of this oft-quoted rationale behind the leave stage, the Commission carried out a statistical analysis based on the available data for judicial review cases. While these figures are not intended as a conclusive, unimpeachable statement of the current state of affairs and should be approached cautiously, they do provide some empirical evidence in an area of the law where statistics are difficult to come by.

1.16 In the two year period 1998-1999, information from 990 cases was available. This was the combined figure for both conventional and statutory judicial review. Of those cases, leave was granted in 603 cases, representing 61% of the total of applications for leave brought. This figure does not equate to a 39% refusal of leave because there are often other reasons for failure to proceed apart from refusal of leave, nevertheless it does suggest a significant filter effect.

1.17 Of the 990 cases analysed, conventional judicial review was involved in 898 cases. Of that number 64% were granted leave. While the same cautionary proviso as above is attached to this figure, it, nevertheless, indicates a fair degree of filtration at the leave stage in conventional judicial review.

1.18 The statistics reveal that in statutory review schemes only 36% of those cases taken were granted leave. Again this would seem to indicate that the leave stage is resulting in a considerable reduction in the number of cases proceeding to a substantive hearing.

¹⁵ [1994] 1 IR 374, 377-378.

1.19 The rationale of protecting public authorities from inordinate delay is of particular relevance in statutory schemes. These are areas where the legislature has taken the view that the public policy requires a system of efficient and speedy disposal of issues.

1.20 Given the degree of filtration that these figures indicate, the time saved as a result must be calculated in comparison to the situation were the leave stage to be abolished. The precise question concerning us is not whether the leave stage causes or reduces delay, but whether it causes additional or less delay than a single-tier system. This, by nature of the problem, is a hypothetical calculation.¹⁶

1.21 After consideration of dispensing with the leave stage the Consultation Paper concluded that the beneficial effects of this filter stage outweigh the problems involved. While it was accepted that the leave stage may in some circumstances lead to delay and frustration, the Commission was of the view that such problems could be alleviated through reconsidering the question of notice¹⁷ rather than through the wholesale abandonment of a generally useful procedure. The role of the judge in balancing the interests of all parties involved was considered to be of paramount importance in achieving a fair outcome.

1.22 The arguments proposed since the publication of the Consultation Paper, although illuminating in many respects, are not such as to justify a change in the initial recommendation.

¹⁶ The crux of the matter is whether the aggregate time saved by the leave stage outweighed the aggregate additional time caused by that stage. To elaborate, the time saved depends upon the number of cases filtered out at the leave stage and the average time saved in each case. This is the difference between the time taken at the leave stage compared to the time which would have been taken if the case weeded out at the leave stage had in fact gone to a substantive hearing. This aggregate time saved has then to be compared with the additional time taken at the leave stage, that is the total number of cases and the average time taken by each. The calculation is complicated by the fact that not just the court's time, but also the delay caused to the respondent, has to be taken into account.

¹⁷ Dealt with below at paragraphs 1.26 – 1.36.

(3) Report Recommendation

1.23 The Commission recommends the retention of the leave stage in both conventional and statutory judicial review proceedings.

C What Level of Notice Should be Given at the Leave Stage?

(1) Consultation Paper Recommendation

1.24 The Consultation Paper recommended retention of the judicial discretion to conduct *inter partes* applications for leave to apply for conventional judicial review in its present condition, namely that the leave stage be heard on notice “only in exceptional cases”.¹⁸

1.25 In statutory judicial review proceedings, the Consultation Paper recommended a change, namely that “conducting the application for leave on notice under the various schemes should be a discretionary matter only and that such discretion should be exercised only in exceptional circumstances”.¹⁹ Thus one consequence of the change would be to align statutory proceedings with conventional judicial review on this point.

(2) Arguments

1.26 Order 84, rule 20(2) of the *Rules of the Superior Courts 1986* provides that an application for leave in conventional judicial review shall be made *ex parte*. However, jurisdiction exists for the court to conduct an *inter partes* hearing at this stage if it is deemed necessary. While Kelly J in *Gorman v Minister for the Environment*²⁰ commented that the procedure of adjourning an *ex parte* application to an *inter partes* hearing is one which is used “in a small number of cases”, the Commission understands that it is happening with increasing frequency. Indeed, one example of where this would be particularly appropriate is where the conduct of a trial judge is at issue.²¹

¹⁸ Consultation Paper paragraph 1.25.

¹⁹ Consultation Paper paragraph 2.12.

²⁰ [2001] 1 IR 306, 307.

²¹ For discussion of this sensitive area see paragraphs 3.28 – 3.31 below.

1.27 The Consultation Paper's recommendation aimed at striking a balance between preserving the flexibility of this discretion while reducing the danger of duplication and increased costs at this stage of proceedings.²²

1.28 In contrast with conventional judicial review, statutory judicial review currently allows for no flexibility; a mandatory system of *inter partes* application at the leave stage prevails. This has been at the root of the claims of 'double hearing'. It has been argued that the *inter partes* application is often akin to a full dress rehearsal of the substantive hearing, sometimes lasting for several days. Anecdotal evidence would suggest that when combined with a listing system whereby the substantive hearing is unlikely to be heard in the same term, this has led to many respondents deciding not to oppose the application for leave in the hope that this would help expedite matters. Time often represents money in these circumstances.

1.29 With this in mind, the Consultation Paper's recommendation was to provide for the possibility of an *ex parte* application, thereby easing the problem of delay and helping to deal with the listings issue.²³

1.30 It seems likely that were the Consultation Paper's recommendations to be adopted, the number of *inter partes* applications necessary under statutory judicial review would be reduced from the present figure, though it would still be much greater than those under the conventional scheme. For public policy reasons it is sometimes appropriate for those making public decisions to be in a position to defend their actions at an early stage and the system of statutory schemes is designed with this point in mind. The possibility of an *ex parte* hearing would thus offer a compromise in that it would allow for a judge to exercise this discretion (even without the respondent's agreement) where there seems to him or her to be no need to hold a notice hearing.

1.31 A particular objection to this proposal which must be addressed here is the suggestion that rendering *inter partes* applications at the leave stage discretionary would conflict with the respondent's right to contest the applicant's standing. This claim is

²² See paragraph 1.24 above.

²³ See paragraph 1.25 above.

based on a reading of *Lancefort Ltd v An Bord Pleanála (No.2)*²⁴ and argues that the Supreme Court in *Lancefort* held that the question of *locus standi* should be determined conclusively at the leave stage. If the Consultation Paper's recommendation regarding discretionary *inter partes* hearings at the leave stage in statutory judicial review were to be adopted, many such cases would be held on an *ex parte* basis and therefore, if one adopts this interpretation of *Lancefort*, the respondent would be denied the opportunity to contest the applicant's standing.

1.32 However, the Commission does not agree with this reading of the Supreme Court's ruling in *Lancefort*. In his judgment, Keane J refers to the case of *Reg. v IRC; Ex p. Fed. of Self Employed*²⁵ where the House of Lords held that as a rule the question of *locus standi* should not be dealt with until the substantive hearing as "the question should not be considered in the abstract, but rather in a particular legal and factual context".²⁶ The Supreme Court then goes on, not to disagree with this principle, but to refine its scope:

"Those considerations do not apply, however, to applications seeking judicial review of decisions by planning authorities or the first respondent since in such cases the application must be made on notice to the authority concerned and the applicant must at that stage show that there are substantial grounds for contending that the decision in question was invalid. As a general rule there should be sufficient evidence before the court ... to enable the judge to determine the question of standing: to require the court *in every case* to reserve the question until the substantive application would be inconsistent with the general statutory scheme."²⁷

Although the judgment recommends the determination of *locus standi* at leave stage in an *inter partes* application, it does not follow that this is the only stage at which the issue of standing may ever be addressed. The judgment was made against the backdrop of an *inter partes* application at the leave stage. By contrast, the possibility of an

²⁴ [1999] 2 IR 270.

²⁵ [1982] AC 617.

²⁶ [1999] 2 IR 270, 311.

²⁷ *Ibid* (emphasis added).

ex parte application as under the Consultation Paper's recommendation would not lead to the conflict suggested. Where the leave stage is being heard *ex parte* Keane J's requirement that the judge has at his disposal "sufficient evidence" is unlikely to be met; in such circumstances the issue of standing will have to be dealt with at the substantive hearing so as to facilitate the respondent.

1.33 Indeed it is almost certain that any suggestion of the issue of standing being conclusively decided at an *ex parte* application would fall foul of the principles of constitutional justice. The principle of *audi alteram partem* dictates that "a person affected by, or with an interest in the outcome of, an administrative decision has the right to have adequate notice of this decision to be given an adequate opportunity to make his case before that administrative body".²⁸ Yet, if the suggested contention drawn from *Lancefort* were correct, it would mean that a significant issue – that applicant's *locus standi* – could be decided against the respondent, in the respondent's absence. It is submitted that this principle would bar any possibility of the issue of *locus standi* being determined conclusively at a leave stage held *ex parte*.

1.34 Further, even in the case of an *inter partes* application at the leave stage there is a good argument for claiming that the matter could be reopened at the substantive stage, on the basis that at this later stage the onus on the applicant is heavier. Whilst, at the leave stage the applicant need only establish 'substantial grounds', at the substantive hearing this will not be sufficient. Accordingly, although the applicant may establish standing at the leave stage, the respondent should arguably be entitled to use the heavier onus to challenge that standing at the final hearing.

(3) Report Recommendation

1.35 *The Commission recommends the retention of the judicial discretion to conduct the leave stage in conventional judicial review proceedings on an inter partes basis; such discretion should be exercised on an exceptional basis only.*

1.36 *With regard to the leave stage in statutory judicial review, the Commission recommends the creation of judicial discretion whether to hear proceedings on an ex parte or inter partes basis.*

²⁸ Hogan and Whyte, *Kelly: The Irish Constitution* (3rd ed Butterworths 1994) at 350.

D What is the Appropriate Standard to be Applied at the Leave Stage?

(1) Consultation Paper Recommendation

1.37 With regard to conventional judicial review proceedings the Consultation Paper recommended:

(i) The retention of the current ‘arguable case’ standard at both *ex parte*²⁹ and *inter partes*³⁰ hearings.

(ii) The copper-fastening of this by the express statement of the ‘arguable case’ standard in Order 84, rule 20(4).³¹

1.38 With regard to statutory judicial review proceedings the Consultation Paper recommended:

(i) The retention of the current ‘substantial grounds’ standard.³²

(2) Arguments

(a) A Common Standard at the Leave Stage?

1.39 While the idea of a common standard across the board was considered, retention of the distinction was preferred. Statutory schemes are by their very nature of a different ilk to conventional judicial review. The areas covered by statutory judicial review are particularly likely to involve public policy interests affecting the State. There is a community interest in facilitating efficient decision-making by public authorities in these areas while also providing for a reasonable possibility of challenge. A high level of filtration (though without unduly impinging on the individual’s constitutional right of access to the courts or right to fair procedures) is therefore appropriate. The constitutionality of the ‘substantial grounds’ standard has been upheld by the Supreme Court in *In re the Illegal Immigrants (Trafficking) Bill 1999*.³³

²⁹ Consultation Paper paragraph 1.14.

³⁰ Consultation Paper paragraph 1.25.

³¹ Consultation Paper paragraph 1.14.

³² Consultation Paper paragraph 2.09.

³³ [2000] 2 IR 360.

1.40 By contrast, matters of conventional judicial review generally do not involve broad questions of public policy. Hence there is less call for a high threshold to be imposed on the applicant to assist the respondent; a lower standard is appropriate to reflect this difference in balance.

(b) *Conventional Judicial Review*

1.41 The accepted understanding of the standard of ‘arguable case’ is set out in the judgment of Finlay CJ in *G v Director of Public Prosecutions*:

“An applicant must satisfy the court in a *prima facie* manner by the facts set out in his affidavit and submissions made in support of his application: ...

(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.

(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.”³⁴

Denham J in the same case described the burden of proof for an applicant under Order 84 as “light”:

“The applicant is required to establish that he has made out a stateable case, an arguable case in law.”³⁵

1.42 It may perhaps be argued that the threshold of arguable case is set on such a low rung as to present no more than a formality of passage to the substantive hearing and that as the test constitutes an insufficient obstacle to vexatious claims it undermines the initial rationale for the retention of the leave stage. While the possibility of *ex parte* hearings accommodates the imperative of speed, the filtering rationale behind the leave stage is lost because the standard is so low. Further, it has been observed that the arguable case standard has on occasion been applied in such an inconsistent manner as to result in arbitrary and unfair results.

1.43 In response, it may be said that the standard of the threshold at the leave stage in conventional judicial review is a difficult one to

³⁴ [1994] 1 IR 374, 377-378.

³⁵ *Ibid* at 381.

pitch. It requires striking a balance between, on the one hand, filtering out hopeless claims, and on the other, safeguarding access to the courts and the possibility of a substantive hearing for the applicant. While the standard of arguable case is a vague concept, the Commission believes that any alternative form of words would be likely to fall foul of semantic problems, since lawyers are, at least, used to working with the present formulation. While variants of the test have been used in the past³⁶ in an attempt either to elucidate the concept or to effect a shift, this has led less to a refined version of the test and more to a state of general confusion. Moreover, the statistics compiled by the Commission indicate that the current test is serving its intended function as a filter.³⁷

1.44 At present the standard is not stated in the *Rules of the Superior Courts 1986*. It is submitted that the standard should be incorporated into Order 84, rule 20(4). This is intended to effect an improvement in the certainty and consistency of application.

(c) *Statutory Judicial Review*

1.45 ‘Substantial grounds’ is the legislative standard set for the leave stage in statutory schemes.³⁸ One of the most commonly cited explications of this standard was given by Carroll J in *McNamara v An Bord Pleanála*:

³⁶ See “*prima facie*” test advocated by Lord Donaldson MR in *R v Legal Aid Board, ex parte Hughes* (1992) 24 HLR 698, 702-703; see “serious issue to be determined” test advocated by the Law Commission of England and Wales in its *Report on Administrative Law: Judicial Review and Statutory Appeals* (No 226 1994) at paragraph 5.15; see “realistic prospect of success” test advocated by Lord Woolf in his *Access to Justice Report (Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales 1995)*.

³⁷ See paragraph 1.17 above.

³⁸ See, for example, section 82 (3B)(a)(ii) of the *Local Government (Planning and Development) Act 1963*, as amended; section 50 (4)(b) of the *Planning and Development Act 2000*; section 43 (5)(b)(ii) of the *Waste Management Act 1996*; and section 5 (2)(b) of the *Illegal Immigrants Act 2000*. See also section 55A (2)(b) of the *Roads Act 1993* (as amended by the *Roads (Amendment) Act 1998*); section 12 (2)(b) of the *Transport (Dublin Light Rail) Act 1996*; section 13 (3)(b) of the *Irish Takeover Panel Act 1997*; section 73 (2)(b) of the *Fisheries (Amendment) Act 1997*; section 85 (8) of the *Environment Protection Agency Act 1992*; and section 78 of the *Housing Act 1966*.

“In order for a ground to be substantial, it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous ...”³⁹

1.46 The principal objection to the substantial grounds test again revolves around the issue of duplication. If leave applications are to be held *inter partes* with a requisite standard of substantial grounds, the application would arguably proceed at such a level as to vitiate the need for a final hearing since the nature of the leave stage would have already required an in-depth analysis of the issues.

1.47 While the Consultation Paper recognised that the issue of ‘double hearings’ could present challenges in the area, the Commission took the view that these challenges were not best met through abandoning the test and with it any benefits accruing. The rationale behind a higher standard in areas of statutory judicial review remains relevant. The filtration role played by the leave stage has justifiably been placed on a stronger footing by dint of the policy requirement to protect public bodies when subjected to challenge in respect of certain functions.

1.48 To help counter the risk of duplication, it was recommended that the requirement that statutory leave be conducted on notice be altered. If the possibility of an *ex parte* leave stage existed, the application would lose much of its substantive nature. This recommendation should go a long way towards meeting the objection.

(d) *Correlation between Notice and Standard?*

1.49 Were this recommendation to be implemented it may be asked whether the same test of arguable case would be appropriate for both *ex parte* and *inter partes* applications at the leave stage in conventional judicial review. The same question could be asked about statutory schemes. The idea of a correlation as between the level of notice and the standard to be applied may, at first glance, seem appealing. Where the proceedings are held *inter partes* the reality of the adversarial nature of the application will often be more in line with the substantial grounds test.

1.50 The case law in the area is somewhat inconclusive. Considering an application under conventional judicial review, Kelly

³⁹ [1995] 2 ILRM 125, 130; this formulation was approved by the Supreme Court in *In re the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360.

J in *Gorman v Minister for the Environment*⁴⁰ reluctantly applied the arguable case standard as set out in *G v Director of Public Prosecutions*,⁴¹ but expressed serious misgivings about the application of such a low standard to an *inter partes* hearing:

“... I must proceed to decide the issue in this case on the standard of proof set forth in *G v DPP* ... I am, however, by no means convinced that this low standard is appropriate on an *inter partes* hearing ...”⁴²

To his mind there was a lot to be said for the test set out by Glidewell LJ in *Mass Energy Ltd v Birmingham City Council*⁴³ namely that the applicant’s case should be not merely arguable, but “strong, that is to say, likely to succeed”:

“That approach appears to me to make a great deal of sense and to make for a more economical use of court time than the application of the substantially lower standard of arguable case to a hearing of this sort.”⁴⁴

Subsequently the High Court in *Halpin v Wicklow County Council*⁴⁵ and *Gilligan v Governor of Portlaoise Prison*⁴⁶ continued to use the *G v Director of Public Prosecutions*⁴⁷ standard albeit with reservation. While Smyth J in *P v Minister for Justice, Equality and Law Reform*⁴⁸ followed Kelly J’s preferred approach in *Gorman*, the case was concerned with section 5(2) of the *Illegal Immigrants (Trafficking) Act 2000* and thus fell under the statutory schemes. Moreover, on appeal, Hardiman J speaking for the Supreme Court did not express a view as to the findings of the High Court on this question.

⁴⁰ [2001] 1 IR 306.

⁴¹ [1994] 1 IR 374.

⁴² [2001] 1 IR 306, 309.

⁴³ [1994] Env LR 298.

⁴⁴ [2001] 1 IR 306, 310.

⁴⁵ High Court (O’Sullivan J) 15 March 2001.

⁴⁶ High Court (McKechnie J) 12 April 2001.

⁴⁷ [1994] 1 IR 374.

⁴⁸ [2002] 1 ILRM 16.

1.51 The approach of the English courts was also analysed in the Consultation Paper. It was argued that *Mass Energy*,⁴⁹ far from typifying the approach of the English courts, was better regarded as the exception rather than the rule. Thus, in *R v Secretary of State for the Home Department, ex parte Begum*,⁵⁰ the Court of Appeal sanctioned the growing practice of allowing the court to adjourn the leave application to facilitate the attendance by the respondent, with a view to the respondent making submissions on whether the applicant has established an arguable case only. This has also been the approach adopted by Kerr J in relation to *inter partes* applications for leave to apply for judicial review in Northern Ireland.⁵¹ As in this jurisdiction, the lower threshold of arguable case is the norm in both England and Northern Ireland.

1.52 Indeed, the idea of linking *inter partes* applications with a higher threshold, as Kelly J suggested in *Gorman* might, on closer inspection, seem rather odd. Why should the fact that the application is open to challenge logically imply a more stringent test for the applicant? Surely such a system would smack of an applicant-oppressive double blow. Not only is everything the applicant alleges open to challenge from the respondent, but there is also an additional burden to satisfy. Kelly J's concern for "economical use of court time"⁵² perhaps outweighed solicitude for this alteration in the position of the applicant. Whilst at one level it might seem appropriate to have correlations as between:

- (i) arguable case and *ex parte* hearings, and
- (ii) substantial grounds and *inter partes* hearings,

this is not a *necessary* relationship.

⁴⁹ [1994] Env LR 298.

⁵⁰ [1990] Imm AR 1.

⁵¹ See Mr Justice Kerr "Commercial Actions: an Example of Case-Management in Northern Ireland", a paper presented to the Working Group on a Courts Commission's 1996 conference on case management, published as chapter 8 of *Conference on Case Management: Working Paper* (Working Group on a Courts Commission, 1997), available on the Courts Service website: www.courts.ie.

⁵² [2001] 1 IR 306, 310.

1.53 Indeed, one might consider that the fact that the application is heard *inter partes* should lead to a lowering of the test. Though the logic of this argument flows neatly from the above points and might appear to lead one to advocate a lower standard at *inter partes* than at *ex parte* applications there are other considerations to be taken into account. Specifically, the overriding purpose of the filter system favours the proposed retention of uniform standards in each class of judicial review. A more appropriate link is to be found, not as between *inter partes* and substantial grounds, and *ex parte* and arguable case, but as between statutory judicial review and substantial grounds, and conventional judicial review and arguable case. In this way, the same standard is appropriate in both *inter partes* and *ex parte* applications in each of the two categories of case: substantial grounds for statutory judicial review and arguable case for conventional judicial review. Rationally speaking, the choices in this area follow on from the basic policy decision as to which public functions are to be allocated the higher form of protection offered by the substantial grounds test. In the same way, the proposed application of the substantial grounds test to conventional judicial review cases was found by the Commission to fail to strike the correct balance between the need to protect public bodies and the rights of applicants to challenge the decisions of such bodies.⁵³

(3) Report Recommendation

1.54 *The Commission recommends the retention of the tests of arguable case for conventional judicial review and substantial grounds for statutory judicial review regardless of whether the application is conducted on an ex parte or inter partes basis.*

E Alternative Remedies

(1) Consultation Paper Recommendations

1.55 The Consultation Paper advocated an approach based on the judgment of O’Higgins CJ in *State (Abenglen Properties Ltd) v Dublin Corporation*⁵⁴ as representing a fair middle ground in this area.⁵⁵ In reaching its decision, the court should take into account not

⁵³ Consultation Paper paragraph 1.13.

⁵⁴ [1984] IR 381, 393.

⁵⁵ Consultation Paper paragraph 1.70.

only the availability of, but also the appropriateness of the alternative remedy available to the applicant.⁵⁶

(2) The Present Position

1.56 Recent cases involving questions of alternative remedies have taken their cue from the judgment of O’Higgins CJ in *Abenglen* where he held that:

“The question immediately arises of the existence of a right of appeal or an alternative remedy on the exercise of the Court’s discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which *certiorari* has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant.”⁵⁷

O’Higgins CJ went on to list some of the circumstances in which recourse to judicial review proceedings would be particularly appropriate:

“If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief.”⁵⁸

1.57 Thus in *Gordon v DPP*⁵⁹ Fennelly J, quoting with approval the *dicta* of O’Higgins CJ in *Abenglen*, held that the existence of an alternative remedy should not preclude the possibility of a court granting relief by way of judicial review.

1.58 In the Consultation Paper the Commission favoured this approach. The nature of the case will indicate the appropriateness of the remedy:

⁵⁶ [1984] IR 381, 393.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ [2003] 1 ILRM 81, 86-87.

“The real question to be determined where an appeal lies is the relative merits of an appeal as against granting relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense ...”⁶⁰

For example, if the appeal does not enjoy the scope to look to the jurisdiction or the point of law under which the initial decision was made, judicial review will often be a more suitable remedy to seek despite the fact that an alternative (as opposed to adequate) remedy already exists. This can often be the scenario in planning cases.⁶¹ Equally, as O’Higgins CJ pointed out in *Abenglen*, “there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint”.⁶²

(3) Report Recommendation

1.59 *In recognition of the fact that different remedies will be appropriate for different complaints, the Commission commends the measured approach taken by O’Higgins CJ in State (Abenglen Properties Ltd) v Dublin Corporation and recommends its continued use as the touchstone in deciding the appropriateness of judicial review proceedings where alternative remedies are available.*

F Amendments to the Grant of Leave

(1) Consultation Paper Recommendations

1.60 The Consultation Paper recommended that amendments should be permitted to the grant of leave, in both conventional judicial review proceedings and specialised statutory schemes, where the material on which it is based was not or could not have been discovered with reasonable diligence at the time, provided that there is no unacceptable delay in making the application to amend.⁶³

⁶⁰ *McGoldrick v An Bord Pleanála* [1997] 1 IR 497, 509.

⁶¹ See, for example, *McGoldrick v An Bord Pleanála* [1997] 1 IR 497.

⁶² *State (Abenglen Properties Ltd) v Dublin Corporation* [1984] IR 381, 393.

⁶³ Consultation Paper paragraph 2.41.

(2) The Present Position

1.61 The rules regulating amendments to the grant of leave are designed to act as a compromise between two competing forces. On the one hand the situation must be flexible enough to allow unforeseen events and circumstances to be taken into account; on the other hand, the applicant must not be allowed to circumvent the filters intended to weed out unmeritorious and delayed applications. The rights of the respondent and of third parties must also not be prejudiced by an over-indulgent system of amendment.

1.62 Order 84, rule 23(1) of the *Rules of the Superior Courts 1986* states that no grounds shall be relied on or any relief sought at the hearing except grounds and relief set out in the leave itself. This provision is subject to a discretion as set out in rule 23(2) which enables the court to allow such amendment “as it thinks fit”. This discretion has been invoked quite restrictively. In *McCormack v Garda Síochána Complaints Board* Costello P stressed the limited circumstances in which amendments would be allowed:

“It seems to me that only in exceptional circumstances would liberty to amend a grounding statement be made because the court’s jurisdiction to entertain the application is based on and limited by the order granting leave. But when facts come to light which could not be known at the time leave was obtained and when the amendment would not prejudice the respondents, then it seems a proper exercise of the court’s power of amendment to permit the amendment rather than require that the new ‘grounds’ be litigated in fresh proceedings.”⁶⁴

1.63 The issue of time limits is a decisive factor in the application of the court’s discretion. With regard to conventional judicial review it seems clear that the courts are willing to adopt a flexible approach to the time limit within which any amendment may be made.⁶⁵ This is in line with Order 84, rule 21 which permits an extension of time where “good reason” is demonstrated.

⁶⁴ [1997] 2 IR 489.

⁶⁵ See, for example, *Aquatechnologie Ltd v National Standards Authority of Ireland* Supreme Court 10 July 2000.

1.64 Applications to amend a grant of leave when made in relation to a statutory scheme are more problematic. Statutory schemes, apart from a few notable exceptions,⁶⁶ do not allow for an extension. Where an extension is provided for, the courts are open to granting it so as to allow for amendments, but only where the applicant establishes good and sufficient reason.⁶⁷

1.65 Where no such extension mechanism exists within the statutory framework, amendments will be more difficult to obtain. Thus in *McNamara v An Bord Pleanála*⁶⁸ Barr J rejected the submission put forward by the applicant that additional grounds of challenge not previously notified might be introduced after the statutory time limit had expired.⁶⁹ However, more recently, Keane CJ in *Ó Síodhacháin v Ireland*⁷⁰ has demonstrated a more flexible approach in holding that although the application to amend the grant of leave had been made outside the specified time limit, there was not such a period of delay “which would be sufficient to exclude an amendment of the grounds, which if it is necessary to do justice between the parties, in my view, should be granted, and should have been granted in the High Court”.⁷¹

1.66 The Consultation Paper favoured this more flexible approach based on the imperative of doing justice within the law. In so doing it pointed to the potential for injustice arising from an absolutist standpoint to the time limit with regard to applications for amendments to the grant of leave.⁷² The Commission believes that this is the fair and appropriate approach. However, this must not be

⁶⁶ See section 50(4) of the *Planning and Development Act 2000* and section 5(2) of the *Illegal Immigrants (Trafficking) Act 2000*.

⁶⁷ See, for example, *Muresan v Minister for Justice, Equality and Law Reform*, High Court (Finlay Geoghegan J) 8 October 2003, at 9. Whilst this case concerned the amendment of an application for leave (as opposed to the grant of leave), which is covered by Order 84, rule 20(3) of the *Rules of the Superior Courts 1986*, the situations are closely related and may be regarded as analogous.

⁶⁸ [1996] 2 ILRM 339, 351.

⁶⁹ See also *Ní Eili v Environmental Protection Agency* [1997] 2 ILRM 458.

⁷⁰ Supreme Court (*ex tempore*) 12 February 2002.

⁷¹ *Ibid* at 4.

⁷² Consultation Paper paragraph 2.40.

used as a mechanism to avoid the constraints of the requirements which are applied to all applications for leave and should instead be limited to genuine freshly discovered grounds.

(3) Report Recommendation

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

G Applications to Set Aside an Order Granting Leave

(1) Consultation Paper Recommendation

1.68 The Consultation Paper recommended that the court's jurisdiction to set aside an order granting leave should be invoked only in exceptional cases and in cases where the application for leave is conducted *inter partes* only where there is a change in circumstances such as to render the substantive hearing nugatory. It was further recommended that these tests be explicitly set out in the *Rules of the Superior Courts 1986*.⁷³

(2) The Present Position

1.69 The High Court clearly has jurisdiction to set aside an order granting leave to bring judicial review which was obtained on an *ex parte* basis.⁷⁴ Where a grant of leave has been given against a party without notice, it would be unfair for there to be no mechanism by which to have the order for leave vacated and the leave withdrawn. It would have been open to the respondent at the substantive hearing to make the defence, but by this stage great expense and inconvenience may have been inflicted on the respondent party. The interests of

⁷³ Consultation Paper paragraphs 1.36 – 1.37.

⁷⁴ Order 52, rule 4 of the *Rules of the Superior Courts 1986* provides:

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

justice require that, in order to avoid this, the court should have jurisdiction to set aside an order granting leave. As McCracken J held in *Voluntary Purchasing Expert Groups Inc v Insurco Ltd*:

“...in the interests of justice it is essential that an *ex parte* order may be reviewed and an opportunity given to the parties affected by it to present their side of the case or to correct errors in the original evidence or submissions before the court. It would be quite unjust that an order could be made against a party in its absence and without notice to it which could not be reviewed on the application of the party affected.”⁷⁵

1.70 On the other hand were this jurisdiction to be invoked on a frequent basis, it would add a further layer to an often inexpedient and time-consuming process. There would, in effect, be two hearings at the leave stage followed by the substantive hearing. These concerns were outlined by the McGuinness J in *Adam v Minister for Justice, Equality and Law Reform*:

“One could envisage the growth of a new list of applications to discharge leave to be added to the already lengthy list of applications for leave. Each application would probably require considerable argument – perhaps with further affidavits and/or discovery. Where leave was discharged, an appeal would lie to this Court. If that appeal succeeded, the matter would return to the High Court for full hearing followed, in all probability, by a further appeal to this Court. Such a procedure would result in a wasteful expenditure of court time and unnecessary expenditure in legal costs; it could be hardly said to serve the interests of justice.”⁷⁶

1.71 Given this tension, the courts have protected jealously their jurisdiction in this area but have invoked it very sparingly. Thus in *Adam* McGuinness J was of the opinion that: “The exercise of the court’s inherent jurisdiction to discharge orders giving leave should ... be used only in exceptional cases”.⁷⁷ These sentiments were

⁷⁵ [1995] 2 ILRM 145, 147

⁷⁶ [2001] 2 ILRM 452, 469 *per* McGuinness J with whom Murray J and Geoghegan J concurred.

⁷⁷ *Ibid* at 469.

approved of more recently by Fennelly J in *Gordon v Director of Public Prosecutions* where the Supreme Court highlighted the high burden that would need to be satisfied before any grant of leave could be set aside:

“It follows that the applicant for the order to set aside carries a heavier burden than the original applicant for leave. The latter has to show that he has an arguable case. The former has to establish that leave should not have been granted, a negative proposition. It is both logical and convenient to the administration of justice that this should be so.”⁷⁸

Moreover, given that the standard to be satisfied for leave is low, it will be only in rather unusual circumstances that a motion to set aside will succeed.

1.72 Thus far we have dealt only with cases where the initial application for leave was heard on an *ex parte* basis. There is an obvious distinction to be drawn between these applications for leave and those heard *inter partes*. Where the respondent has already had the opportunity to be heard and the application for leave has been granted, it is difficult to envisage circumstances where the respondent should be entitled to apply to set aside the grant of leave. In such cases it seems much more appropriate to move directly to the substantive hearing. It seems fair that there should be an exception to this general principle, if, but only if, in the interim period between the *inter partes* leave stage and the anticipated substantive hearing, there come to light such facts as would render any substantive hearing nugatory or redundant. Just such a situation arose before the English courts in *R v Secretary of State for the Home Department, ex parte Vafi* where Harrison J suggested that “there could be new circumstances arising after the grant of leave which may show that it is appropriate for leave to be set aside”.⁷⁹ But it is submitted that such circumstances would arise very rarely which would cause the full hearing to be inappropriate and worthless.

⁷⁸ [2003] 1 ILRM 81, 85 – 86.

⁷⁹ [1996] Imm AR 169, 172.

(3) Report Recommendation

1.73 *In conclusion, the Commission accepts that the possibility of setting aside leave is a necessary procedural safeguard and its total abolition is therefore unwarranted.*

1.74 *The Commission is satisfied that the dicta of McGuinness J in Adam v Minister for Justice, Equality and Law Reform suggesting that “the exercise of the court’s inherent jurisdiction to discharge orders giving leave should, therefore, be used only in exceptional cases” is the sensible approach. But where the application for leave is conducted inter partes, the respondent should not be permitted to seek to have the grant of leave set aside unless there is a change in circumstances such as to render the substantive hearing nugatory. The Commission recommends that these tests be explicitly set out in the Rules of the Superior Courts 1986.*

H Appeal Against Refusal to Grant Leave

(1) Consultation Paper Recommendation

1.75 The Consultation Paper recommended that the system in many schemes of statutory judicial review requiring the obtainment in certain circumstances of a High Court certificate to appeal to the Supreme Court against a refusal of a grant of leave should be retained. However, in an effort to safeguard consistency and preclude injustice, to secure the grounds on which a certificate is granted by the High Court and to temper the onerous burden currently in place for applicants, two recommendations for reform were made:

- (i) High Court judges specifying the grounds upon which any certificate to appeal is granted;
- (ii) a system whereby a single judge of the Supreme Court could review a High Court refusal to grant such a certificate.⁸⁰

(2) Time Limits

1.76 Order 58, rule 13 of the *Rules of the Superior Courts 1986* states that any appeal against a refusal of an *ex parte* application for leave should be made within four days of such refusal with the

⁸⁰ Consultation Paper paragraph 2.53.

possibility of a time extension subject to the discretion of the Supreme Court.

1.77 This time limit has been imported into the courts' interpretation of the corresponding provisions in statutory judicial review schemes. The importance of the time limit has been emphasised recently in *Ní Ghrúagáin v An Bord Pleanála*.⁸¹ Murphy J in the High Court pointed out that the fact that the application is made *inter partes* will not work to the applicant's advantage with regard to the issue of time.⁸² Where the application is not made within the four day period and no explanation is offered to justify the delay, it would seem unlikely that the High Court will accede to a request for an appeal to the Supreme Court.⁸³

(3) Obtaining Leave to Appeal

1.78 Under certain statutory schemes the applicant who has been refused leave to apply for judicial review must apply to the High Court for a certificate to appeal the decision to the Supreme Court.⁸⁴

1.79 Two interrelated issues arise here:

- (i) before granting such a certificate, the court must be satisfied that the matter is of exceptional public importance and that it is desirable in the public interest that such an appeal should taken;
- (ii) the High Court is the body charged with making such a judgment and issuing the certificate.

⁸¹ High Court (Murphy J) 19 June 2003.

⁸² *Ibid* at 9.

⁸³ See *Ní Ghrúagáin v An Bord Pleanála* High Court (Murphy J) 19 June 2003, at 9.

⁸⁴ See, for example, section 82 (3B)(b)(i) of the *Local Government (Planning and Development) Act 1963*; section 50(4)(f) of the *Planning and Development Act 2000*; section 5(3)(a) of the *Illegal Immigrants (Trafficking) Act 2000* (dealing with applications for judicial review in respect of orders made regarding non-nationals pursuant to, *inter alia*, the *Refugee Act 1996* and the *Immigration Act 1999*). See also section 55A (4)(a) of the *Roads Act 1993*; section 43 (5)(c)(i) of the *Waste Management Act 1996*; section 12(4)(a) of the *Transport (Dublin Light Rail) Act 1996*; section 13(6) of the *Irish Takeover Panel Act 1997*; and section 73(3) of the *Fisheries (Amendment) Act 1997*.

1.80 The case law in this area has clarified somewhat the above two points. Thus it is clear that the requirements in point one are cumulative.⁸⁵ This would become highly relevant were a situation to arise where the requirements came into conflict. Public importance and the public interest are not necessarily synonymous. Indeed one could envisage a situation where there existed an issue of objective public importance which it would not be in the public interest to pursue.

1.81 When seeking to establish criteria for the notion of exceptional importance, case law has not provided much in the way of guidance. However, we can glean from *Raiu v The Refugee Appeals Tribunal*⁸⁶ that the onus on the applicant is very high. Thus Finlay Geoghegan J rejected the definition of an issue of exceptional public importance as one which “transcends well beyond the individual facts of the case” as being definitive.⁸⁷ That definition was given in the Supreme Court judgment in *Irish Press plc v Ingersoll Irish Publications Ltd*,⁸⁸ a case concerning an issue of “public importance” under the *Courts of Justice Act 1924*. As Finlay Geoghegan J pointed out in *Raiu*, this test did not take account of the “exceptional” element to the section at hand.

1.82 A further characteristic evident from the case law relates to the question of what exactly should constitute the issue of exceptional public importance and desirability in the public interest. In *Ní Ghruagáin*, counsel for the notice party argued that it was the judgment of the High Court in refusing to grant leave and not the subject matter which must give rise to the matter of exceptional importance.⁸⁹ Although this point was not raised by Murphy J in his judgment, Finlay Geoghegan J in *Raiu* rejected this line of argument holding that it is the point of law and not the High Court decision which must be of exceptional public importance.⁹⁰

⁸⁵ See *Kenny v An Bord Pleanála* [2001] 1 IR 704, 714; *Raiu v The Refugee Appeals Tribunal Ireland* High Court (Finlay Geoghegan J) 26 February 2003, at 5.

⁸⁶ High Court (Finlay Geoghegan J) 26 February 2003.

⁸⁷ *Ibid* at 5-6.

⁸⁸ [1995] 1 ILRM 117.

⁸⁹ High Court (Murphy J) 19 June 2003, at 7.

⁹⁰ High Court (Finlay Geoghegan J) 26 February 2003, at 6.

1.83 It is also apparent that the High Court enjoys exclusive jurisdiction in this area. The Supreme Court has made clear in *Irish Asphalt Ltd v An Bord Pleanála*⁹¹ and subsequently in *Irish Hardware Ltd v An Bord Pleanála*⁹² that it will not usurp the role of the High Court in granting appeal certificates. This, according to Barrington J in *Irish Asphalt Ltd*, represented an exception to the Supreme Court's appellate jurisdiction within the meaning of Article 34.4.3° of the Constitution.⁹³ Such a decision by the High Court is not open to appeal to the Supreme Court.

1.84 The two interrelated issues mentioned in paragraph 1.79 above when combined give rise to a curious state of affairs. The High Court after refusing an application for a grant of leave to apply for judicial review on the basis of substantial grounds is then asked to accede to the argument that the same set of facts gives rise to a matter of exceptional public importance. This issue was referred to by McKechnie J in *Kenny v An Bord Pleanála (No. 2)*:

“...how logically can it be said that within the same decision, one can have, on the one hand, a failure to establish substantial grounds and yet, on the other, on the same material, whether this be fact, inference or law, have a point of exceptional public importance? If such a point exists, surely the ground thereof must meet the required threshold and therefore leave should be granted. If the court is not so satisfied how can such a point emerge? No matter what standard is applied to the existence of ‘substantial grounds’, it cannot be less than that applicable to

⁹¹ [1996] 2 IR 179.

⁹² [2001] 2 ILRM 291.

⁹³ [1996] 2 IR 179, 185:

“The correct interpretation appears to me to be that the first portion of the provision under discussion is a statutory provision and does exclude all appeals from the High Court to the Supreme Court in questions of judicial review ... The sub-section, having excepted those cases from the appellate jurisdiction of the Supreme Court then goes on to create what Mr Collins, for the respondent, called an “exception to the exception”. As Mr Collins puts it, it is the sub-section which excludes the appeals but there is provision whereby the High Court may, as an exception to this exception, allow an appeal if the case involves a point of law of exceptional public importance and it is in the public interest that an appeal should be taken to the Supreme Court.”

establishing a point of law of exceptional public importance
..... I have in the circumstance some trouble in seeing how
at the same time, leave can be refused and yet certification
follow.”⁹⁴

1.85 Are we logically bound to concede McKechnie J’s point here? Is the standard of substantial grounds subsumed within the notion of exceptional public importance? While it is clear that it is possible to have an issue of substantial grounds which is not an issue of exceptional public importance,⁹⁵ is it not possible for a point of exceptional public importance to fail because of a finding of insubstantial grounds? If this were not the case no certificate of leave to appeal to the Supreme Court should ever be issued by the High Court.

1.86 To a large extent the argument is founded on comparing apples with oranges. The issue of substantial grounds goes to the facts of the case, the evidence submitted and the final judgment of the court. The applicant could very well fall short of this standard (this being limited to the evidence in the case), and yet the same scenario could still revolve around a point of law of exceptional public importance (this being a wider issue than that of substantial grounds which is not *necessarily* dependent upon the facts and judgment in the individual case). There is nothing *necessarily* contradictory in the notion of an insubstantial issue constituting an issue of exceptional public importance.

1.87 That said, in most cases there will be a large degree of coincidence. Most cases do not involve points of exceptional public importance and therefore if the standard of substantial grounds is not met they will not be certified by the High Court to go forward on appeal to the Supreme Court. The exclusivity of the group of cases which will survive this strong filter is compounded by the additional requirement that the issue be one which it is desirable in the public interest to appeal and reflects the policy driven rationale behind the heavy onus resting on the applicant. The legislature has decided to design a procedure, as reflected in the statutory schemes, which will facilitate the expeditious conclusion of decisions affecting the public

⁹⁴ [2001] 1 IR 704, 715.

⁹⁵ *Village Residents Association v An Bord Pleanála (No 2)* [2000] 4 IR 321, 333-334.

interest. The criteria based on the exceptional public importance and desirability of the appeal constitute an exception to this general policy of exclusion and are intended to restrict such appeals to a very small class of cases.

1.88 Where a problem may arise is in relation to the double role of the High Court. Not only will the presiding judge decide the issue of leave at the initial stage, but then will also make an unimpeachable ruling as to whether the judgment can be sent on appeal to the Supreme Court. While the standards involved in coming to the two judgments will be distinct, the Janus-like nature of the judge's role does expose the High Court to the peril of criticisms of contradictory decision-making. The appointment of a single Supreme Court judge to review a refusal of a certificate of appeal would guard against these concerns and insulate the process so as to negate criticisms arising from the embarrassingly contradictory position imposed on the High Court.

1.89 In the event of gaining a certificate from the High Court, the possibility of circumscribing the prescribed procedure could arise in the following way: an applicant makes an initial application for leave to apply for judicial review on five grounds. Upon being refused leave by the High Court, the applicant seeks a certificate to appeal the High Court decision to the Supreme Court. This certificate is granted on three grounds, the remaining two being considered not to have met the criterial threshold necessary. Nonetheless on appeal the applicant reopens all five grounds from the initial hearing thus circumventing the criteria. The Consultation Paper pointed out that this might lead to a reluctance on the part of High Court judges to grant the certificate. The situation would in this way rebound to the detriment of the applicant who was already shouldering a very heavy burden in the pursuit of a certificate to appeal. In response to this issue the Consultation Paper recommended that the grounds of appeal should be attached to the High Court certificate.⁹⁶ This aimed at limiting the proceedings at the appeal stage to the issues on which the High Court had granted the certificate of appeal.

(4) Report Recommendation

1.90 *The Commission recommends that the requirement in certain schemes of statutory judicial review of obtaining a certificate*

⁹⁶ Consultation Paper paragraph 2.53.

of appeal from the High Court should be retained, but subject to modification in that the specific grounds of appeal should also be certified by the High Court when granting the certificate.

1.91 *It is also recommended that where an applicant has been refused leave in the High Court and also refused a certificate of appeal, that a facility be available to such applicant whereby a single judge of the Supreme Court can review the matter so as to preclude any potential for injustice.*

CHAPTER 2 TIME LIMITS

A Introduction

2.01 Time limits are an important aspect of judicial review procedure. They ensure a degree of certainty by placing a temporal ceiling on an applicant's power to challenge the decisions of public bodies. Without such certainty, any decision of a public body could be held hostage to an interminable threat of legal challenge. On the other hand, a draconian system of time limits would rule out the possibility of a reasonable opportunity for applicants to call into question public decisions through judicial review. These forces, pulling in opposite directions, require a subtle compromise in any attempt to formulate rules in this area. This has been achieved in judicial review procedure through the offsetting of concrete time limits against judicial discretion to extend such limits.

2.02 This chapter will discuss the appropriateness of the current time limits and the factors taken into account by the courts in deciding whether to grant an extension.

B Conventional Judicial Review

(1) *Consultation Paper Recommendation*

2.03 The Consultation Paper recommendation stressed the importance of considering the issue of prejudice as only one of a number of factors to be weighed up in deciding the issue of an extension of time under Order 84, rule 21(1).¹ The courts' approach in emphasising that the onus lies on the applicant both to explain and excuse the delay was also commended.²

¹ Consultation Paper paragraph 1.50.

² Consultation Paper paragraph 1.52.

(2) *Extension of Time*

2.04 Order 84, rule 21(1) of the *Rules of the Superior Courts 1986* lays down the requirements in relation to time limits in conventional judicial review proceedings. It provides that an application for leave to apply for judicial review shall be made “promptly, and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*, unless the court considers that there is good reason for extending the period within which the application shall be made”.

2.05 While there have been very few examples of cases in which judicial review has been refused on grounds of lack of promptness even within the three or six month time periods specified in the rules, this may happen. In *Dekra Éireann Teoranta v Minister for the Environment and Local Government* Denham J emphasised the primacy of the requirement of promptness:

“Thus, under Order 84, rule 21(1) a judicial review application must be brought promptly and within a specified number of months. Whilst there is a discretion in the court to extend this time, there is also a discretion to refuse the application even within the months specified in the Rules of the Superior Courts. This is because judicial review is a process which must be brought promptly. If it is not so brought the court may determine that the justice of the case requires that the application be refused.”³

This approach was adopted by the High Court in *Hogan v Waterford County Manager* where Herbert J reiterated the importance of the promptness requirement in Order 84, rule 21(1):

“Whether or not an application has been held to have been made ‘*promptly*’ must to a very substantial degree depend on the facts of the individual case, but the fact that the application is made within the appropriate three month or six month period, while relevant, is by no means conclusive of the matter.”⁴

³ [2003] 2 ILRM 210, 222.

⁴ High Court (Herbert J) 30 April 2003, at 31.

On the facts of the case it was held that the applications, even where made within the time limits, had not been made promptly.⁵

2.06 The case law in this area tends to revolve around the issue of the court's discretion to extend the time limits where it considers that there is "good reason" for so doing.

2.07 The exact nature of the good reason requirement is unclear although it appears that it is for the applicant to establish an objective reason for the delay. As Costello J stated in *O'Donnell v Dun Laoghaire Corporation*:

"The phrase 'good reasons' is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending that time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under Order 84, rule 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay."⁶

2.08 The factors taken into account by the court in the exercise of this discretion were usefully set out by Denham J in *de Róiste v Minister for Defence*, although she stressed that the list was not exclusive. The factors set out by Denham J were:

- "(i) the nature of the order or actions the subject of the application;
- (ii) the conduct of the applicant;
- (iii) the conduct of the respondent;

⁵ A similar concern with the issue of promptness can be found in *Director of Public Prosecutions v Macklin* [1989] ILRM 113 and *Director of Public Prosecutions v Kelly* [1997] 1 IR 405. Whilst it should be borne in mind that in both of these cases judicial review was being sought by the Director of Public Prosecutions and not by an accused person, the decisions nevertheless show that a failure to act promptly, even within the time periods laid down in the Rules, may sometimes be fatal to an application for judicial review.

⁶ [1991] ILRM 301, 315.

(iv) the effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order being reviewed;

(v) any effect which may have taken place on third parties by the order to be reviewed;

(vi) public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished.”⁷

2.09 In *Phelan v Minister for Justice, Equality and Law Reform* the High Court indicated that in deciding the issue of good reason, the court would look to the effect of any extension on society at large:

“No important issue is raised on this application which transcends the purely immediate and personal interests and rights of the parties to the application and the resolution of which might materially affect the interests of citizens generally, or a significant portion of them.”⁸

2.10 In its analysis as to whether good reason for an extension of time exists, the courts have recently made clear that they will look to the merits of the case at hand. In *GK v Minister for Justice, Equality and Law Reform* the Supreme Court expressly stated that “if a claim is manifestly unarguable there can normally be no good or sufficient reason for permitting it to be brought, however slight the delay requiring the exercise of the court’s discretion”.⁹ This approach has subsequently been cited with approval by the Supreme Court in *S v Minister for Justice, Equality and Law Reform*¹⁰ and has also been invoked by the High Court in *Phelan*.

(3) Prejudice

2.11 The central issue which has provoked most controversy in relation to time limits is that of prejudice to a third party. To what extent does prejudice caused to third parties by an applicant’s delay in bringing an action under Order 84, rule 21 inform the discretion of the court to grant an extension of time? This has resulted in a group of

⁷ [2001] 1 IR 190, 208.

⁸ High Court (Herbert J) 7 October 2003, at 19.

⁹ [2002] 1 ILRM 402, 405.

¹⁰ [2002] 2 IR 163.

cases which locate themselves at different points along the spectrum mapped out around the issue of prejudice. This alleged inconsistency has resulted in what the Consultation Paper described as a “far from satisfactory” state of affairs.¹¹

2.12 At one end of this spectrum one finds the approach of McCarthy J in *O’Flynn v Mid-Western Health Board* where it was held that:

“There is ample ground for saying that both in principle and in precedent an application for judicial review should not fail merely because it is out of time: *The State (Furey) v Minister for Defence* [1988] ILRM 89. In principle it is right to relieve against delay in challenging an administrative decision where the delay has not prejudiced third parties.”¹²

This approach was adopted by O’Neill J in the High Court in *Dekra Éireann Teoranta v Minister for the Environment and Local Government*.¹³ O’Neill J, citing McCarthy J’s judgment in *O’Flynn*,¹⁴ concluded that a lack of prejudice to third parties resulted in “tilting the balance”¹⁵ in favour of extension. While such language might suggest the need for additional factors to tip the same balance, no such factors were mentioned by O’Neill J. Thus, given the decision to extend time, it is arguable that the High Court considered the lack of prejudice to third parties flowing from the delay to suffice, in and of itself, to discharge the onus of objective explanation and justification which lies with the applicant.

2.13 A different approach was taken by the High Court in *Hogan v Waterford County Manager*.¹⁶ An order of *certiorari* was sought to quash the decision of the respondent to continue the site selection process for a waste disposal landfill site. Although leave to seek judicial review had already been granted, Herbert J considered that, at

¹¹ Consultation Paper paragraph 1.48.

¹² [1991] 2 IR 223.

¹³ [2002] 2 ILRM 30.

¹⁴ [1991] 2 IR 223.

¹⁵ [2002] 2 ILRM 30, 54.

¹⁶ High Court (Herbert J) 30 April 2003.

the substantive hearing, the court still had jurisdiction to consider the issue of delay. In refusing to extend the time limits because of the presence of prejudice Herbert J held that “lack of prejudice to the respondent and the third parties is an essential precondition of the applicant obtaining an extension of time ... However, in my judgment the applicant must show some good reason ... why in the interest of justice the time for bringing a judicial review application should be extended”.¹⁷ This view has been reiterated more recently again by Herbert J in *Phelan v Minister for Justice, Equality and Law Reform*.¹⁸ Thus when compared with McCarthy J’s approach in *O’Flynn*¹⁹ and that of O’Neill J in the High Court decision in *Dekra*,²⁰ Herbert J’s *dicta* suggest a relegation in the role played by prejudice. At this point in the spectrum, although prejudice would automatically foreclose the possibility of a time extension, its absence would not alone require such an extension. Lack of prejudice would have to be accompanied by other factors to justify an extension of time.

2.14 The least deferential approach to the issue of prejudice is to be found in the judgment of the Supreme Court on appeal from O’Neill J’s judgment in *Dekra*.²¹ The judgments of the Supreme Court judges have clarified to a great extent the current status of this issue. The *dicta* from *O’Flynn*²² upon which O’Neill J in the High Court had relied, could, in the words of Fennelly J, “no longer be regarded as good law”.²³

“The precedent upon which it was based, *State (Furey) v Minister for Defence*, was disapproved by this Court in *De Róiste v. Minister for Defence* [2001] 1 IR 190. In his judgment, on page 197, Keane CJ stated that the passage from *Furey*’s case, upon which the later *dictum* of McCarthy J was founded was clearly *obiter*.”²⁴

¹⁷ High Court (Herbert J) 30 April 2003, at 29.

¹⁸ High Court (Herbert J) 7 October 2003, at 18.

¹⁹ [1992] 2 IR 223.

²⁰ [2002] 2 ILRM 30.

²¹ [2003] 2 ILRM 210.

²² [1992] 2 IR 223.

²³ [2003] 2 ILRM 210, 238.

²⁴ *Ibid.*

Fennelly J drew upon the “legislative tendency towards the imposition of stricter time limits”²⁵ to justify a parallel development in the judicial arena:

“An applicant who is unable to furnish good reason for his own failure to issue proceedings for judicial review ‘at the earliest opportunity and in any event within three months from the date when grounds for the application first arose’ will not normally be able to show good reason for an extension of time. In particular, he cannot, without more, invoke the absence of any prejudice to the opposing party as the sole basis for the suggested good reason.”²⁶

2.15 Thus the judgment of the Supreme Court in *Dekra* makes it clear that the primacy of lack of prejudice as a factor has come to an end. No longer can it alone be regarded as the determining factor in the judicial discretion to extend time.

2.16 This conclusion would seem to be in line with the plain words of Order 84, rule 21: insofar as the onus lies with the applicant seeking an extension to provide objective justification for the delay, it would seem odd to find such objective justification solely in the lack of prejudice caused to either the respondent or to third parties by such delay. Order 84, rule 21(1) speaks of “good reason” and not of “prejudice”. Why should the fact that delay has not caused prejudice to another party go any way towards discharging (never mind satisfying) the onus on the applicant to establish good reason? While this question remains unanswered, the Supreme Court’s approach whereby the issue of delay is a factor to be taken into account, flows more logically from the requirement of objective justification.

2.17 However, a number of uncertainties continue to plague this area of the law. The Supreme Court in *Dekra* did not address the issue as to what extent the lack of prejudice is a necessary (as opposed to sufficient) element in a grant of extension. Following *Dekra* is it possible to be granted an extension where the delay at issue has caused prejudice to another party? Herbert J in *Hogan* has answered this question in the negative.²⁷ Lack of prejudice, in his

²⁵ [2003] 2 ILRM 210, 239.

²⁶ *Ibid* at 239 – 240.

²⁷ High Court (Herbert J) 30 April 2003.

view, constituted an “essential precondition” to a grant of time extension.²⁸ The same conclusion is, however, not obvious from the Supreme Court ruling in *Dekra*. Instead the language of *Dekra* is reminiscent of the Supreme Court’s approach in *de Róiste*.²⁹ There Denham J set out a list of factors which could be taken into account by a court deciding on the issue of extension under Order 84, rule 21.³⁰ While factors (iv) and (v) in Denham J’s list relate to the issue of prejudice they are but two issues to be weighed against possible countervailing factors. There is no indication that factors (iv) and (v) should trump other relevant concerns in the court’s analysis:

“There are no absolutes in the exercise of a discretion. An absolute is the antithesis of discretion. The exercise of a discretion is a balancing of factors – a judgment.”³¹

The language of Denham J in *Dekra* maintains this permissive tone:

“However, in all circumstances of a case a court *may* determine *in its discretion* that the prejudice to the public or a party *could* be such that ... the application should be refused.”³²

If this is the current position, as would seem to be the case, the *dicta* of Herbert J in *Hogan* (a case decided after the Supreme Court ruling in *Dekra*) may over-emphasise lack of prejudice as an essential precondition in circumstances where there are strong countervailing factors to be weighed in the balance.

2.18 A further doubt regarding the Supreme Court judgment in *Dekra* relates to the scope of the ruling. The case arose from the failure of the applicant company to be awarded a public contract to test the road-worthiness of motor vehicles and their trailers. As such, the application for judicial review of the decision was made under Order 84(A), rule 4 of the *Rules of the Superior Courts 1986* and not under Order 84, rule 21. While, on the one hand, the Court appeared eager not to stress unduly the significance of any differences in the

²⁸ High Court (Herbert J) 30 April 2003, at 29.

²⁹ [2001] 1 IR 190.

³⁰ See paragraph 2.08 above.

³¹ [2001] 1 IR 190, 208.

³² [2003] 2 ILRM 210, 223 (emphasis added).

wording of the two provisions,³³ Fennelly J's judgment did draw attention to the character of the case at hand:

“However, public procurement decisions are peculiarly appropriate subject-matter for a comparatively strict approach to time limits. They relate to decisions in a commercial field, where there should be very little excuse for delay.”³⁴

This emphasis on the particular appropriateness of a strict interpretation of time limits in cases such as *Dekra* could involve delimiting of the scope of the decision. The focus of Fennelly J on matters of a commercial nature might provide the opportunity to distinguish *Dekra* on its facts and thus lead to further fragmentation in this area of the law.

(4) Report Recommendation

2.19 *The Commission recommends that it is important to stress that the onus lies on the applicant to establish good reason to extend time and in order to ensure consistency the courts must not lose sight of this in determining applications of this nature.*

2.20 *Lack of prejudice should not, in and of itself, be sufficient to satisfy this onus. Instead, the issue of prejudice should be regarded as one of a number of factors to be weighed up in deciding the question of an extension of time.*

2.21 *Further, prejudice should not, in itself, foreclose the possibility of a time extension.*

C Statutory Judicial Review

(1) Consultation Paper Recommendation

2.22 The Consultation Paper recommended no change to the present statutory regime of time limits for applications for leave to apply for judicial review.³⁵ Because it is so short, particular attention

³³ Fennelly J at 236: “the obligation to move at the earliest opportunity reinforces the obligation to act quickly. I do not find it possible to attach any great importance to the choice of this expression rather than the word ‘promptly’. At most, there is a slight difference of degree ...”.

³⁴ [2003] 2 ILRM 210, 240.

³⁵ Consultation Paper paragraph 2.28.

was paid to the 14 day time limit prescribed by section 5(2)(a) of the *Illegal Immigrants (Trafficking) Act 2000*. However, it was accepted that this period achieved the necessary balance between the rights of the applicant and the policy concerns of the legislature.

(2) The Present Position

2.23 Statutory schemes provide, in contrast to the general rules set out in Order 84, rule 21(1) of the *Rules of the Superior Courts 1986*, for specific time limits to govern applications for leave to apply for judicial review,³⁶ in their respective fields. There is, however, usually an equitable discretion to cater for exceptional circumstances by extending the time limits.³⁷

2.24 These special time limits again reflect the policy decisions taken by the legislature to single out areas of particular public interest and apply a time frame within which to work.³⁸ The time limits imposed through these statutory schemes are almost invariably shorter than those provided for in Order 84, rule 21(1).³⁹ While this is in line with the rationale underlying the concept of statutory schemes it must not be such as to impede unreasonably the right of individuals to challenge the manner of making decisions by public bodies. This is of particular relevance given the nature of some of the areas currently covered by statutory schemes. Whereas the State may have an interest in bringing finality to decisions of a certain kind expeditiously, it should be borne in mind that these decisions may also affect the lives of individuals at a most profound level. From this perspective, the impact of these decisions on the lives of individuals

³⁶ See, for example, section 85(8) of the *Environmental Protection Agency Act 1992* (two months); section 55A(2)(b) of the *Roads Act 1993* as amended (two months); section 43(5)(b) of the *Waste Management Act 1996* (two months); section 12(2)(a) of the *Transport (Dublin Light Railway) Act 1996* (two months); section 13(3)(a) of the *Irish Takeover Panel Act 1997* (seven days); section 73(2)(a) of the *Fisheries (Amendment) Act 1997* (three months).

³⁷ See, for example, section 12(2)(a) of the *Transport (Dublin Light Railway) Act 1996*; section 13(5) of the *Irish Takeover Panel Act 1997*; section 50(4)(a)(iii) of the *Planning and Development Act 2000*; section 5(2)(a) of the *Illegal Immigrants (Trafficking) Act 2000*.

³⁸ See *Brady v Donegal County Council* [1989] ILRM 282, 289; *In re the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, 392.

³⁹ See paragraph 2.04 above.

militates against an overly rigorous system of time limits. Both sides here have cogent interests and neither can be regarded in isolation. Thus the time limits applicable under the statutory schemes must reflect this potential conflict and should not be such as to exclude in effect the individual from court protection at a time when there may be urgent need for recourse to the courts.

2.25 The judicial review mechanisms included in these schemes are, for the most part, infrequently used. Communications with the relevant bodies indicate that, where they are invoked, the time limits stipulated in most of the statutory schemes are operating satisfactorily in practice. The most frequently invoked of these provisions relate to decisions in planning matters⁴⁰ and immigration.⁴¹

2.26 Again, with regard to judicial review of planning decisions, anecdotal evidence suggests that section 50(4) of the *Planning and Development Act 2000* which provides for an eight week time limit is working well on the ground. In contrast to its precursor, the *Local Government (Planning and Development) Act 1963*,⁴² the 2000 Act allows for an extension of the prescribed period, although this power shall not be invoked by the High Court “unless it considers that there is good and sufficient reason for doing so.”⁴³

⁴⁰ Section 50(4) of the *Planning and Development Act 2000* (eight weeks).

⁴¹ Section 5(2)(a) of the *Illegal Immigrants (Trafficking) Act 2000* (14 days).

⁴² The 1963 Act imposes a two month time limit but does not provide for any possibility of an extension. The absolute nature of this time limit was held to be unconstitutional in *White v Dublin Corporation* High Court (Ó Caoimh J) 21 June 2002. Whilst the significance of this decision has been somewhat diluted in light of the provision for such extension in the *Planning and Development Act 2000*, the 2000 Act is not of universal application to all planning matters; there are also other statutory schemes in operation which impose an absolute time limit such as section 78 of the *Housing Act 1966*, section 85(8) of the *Environmental Agency Protection Act 1992*, section 43(5) of the *Waste Management Act 1996* and section 73 of the *Fisheries (Amendment) Act 1997*.

⁴³ It should be noted that whereas the possibility of an extension in conventional judicial review contained in Order 84, rule 21(1) of the *Rules of the Superior Courts 1986* is phrased positively (see paragraph 2.04 above), here the wording of the provision is negative. It is considered unlikely that this would result in any meaningful difference in the court’s interpretation of the two phrases (see, for example, the Supreme Court’s interpretation of the extension provision in *In re the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, 390). However, in the interests of consistency and clarity,

2.27 The time limit imposed regarding immigration matters is much more onerous. The provision in section 5 of the *Illegal Immigrants (Trafficking) Act 2000* of only 14 days within which to lodge an application for leave to apply for judicial review was considered by the Supreme Court in *In re the Illegal Immigrants (Trafficking) Bill 1999*.⁴⁴ The Court held that, given the judicial discretion contained in section 5 of what was then the 1999 Bill to extend the 14 day period “where there is ‘good and sufficient’ reason for doing so”, the time limit did protect the policy interests of the State while not causing injustice to the applicant, and stated:

“The Court is satisfied that the discretion of the High Court to extend the fourteen day period is sufficiently wide to enable persons who, having regard to all the circumstances of the case ... have shown reasonable diligence, to have sufficient access to the Courts for the purpose of seeking judicial review in accordance with their constitutional rights. The Court does not therefore consider the limitation period to be unreasonable as such and its repugnancy to the Constitution has not been established.”⁴⁵

2.28 While the Consultation Paper considered whether the 14 day period was too short, its final recommendation was heavily influenced by statistical evidence which suggested that the 14 day limit, when accompanied by the judicial discretion to extend, was working well in practice and was not, in the majority of cases, acting as a barrier to the applicant.⁴⁶ A pledge was made in the Consultation Paper to seek to update this statistical evidence. Unfortunately comprehensive and directly applicable statistics are still unavailable from the relevant bodies. However, more recent informal sample evidence would appear to conflict with that which formed the basis of the recommendation in the Consultation Paper. Although the vast majority of applications for leave are not falling at the time limit hurdle, this is mainly because of a liberal application by the courts of

it is submitted that were the relevant legislation ever to be revisited by the legislature in the future for any other reason, a formula common to both conventional and statutory schemes should be adopted.

⁴⁴ [2000] 2 IR 360.

⁴⁵ *Ibid* at 394.

⁴⁶ Consultation Paper paragraph 2.27.

their power to extend the 14 day period. When viewed as a fixed period, the 14 day limit is not being met in the majority of cases. An unusual situation therefore arises whereby the exception governs the rule. In other words, it is the exception which is more often applied and has become the usual norm.

2.29 Besides this peculiarity, the current system also gives rise to concerns regarding consistency and certainty. The issue of the rights of applicants is obviously of relevance here. The fact that the extension is being applied in such a way as to compensate for the difficulties flowing from the short fixed period serves as no guarantee that the same will continue into the future. The extension is grounded on a purely discretionary basis, to account for exceptional cases, and ought to be shored up with a reasonable fixed period.

2.30 While the European Court of Human Rights has accepted that judicial review can constitute an effective remedy for the purposes of Article 13,⁴⁷ it has also held that an unduly short limitation period can, in certain circumstances, give rise to a violation of Article 6.⁴⁸

2.31 The wider circumstances within which the 14 day fixed time limit operates serve only to accentuate concerns. Applicants for judicial review in immigration cases are in a particularly vulnerable

⁴⁷ *Soering v UK* (1989) 11 EHRR 439. Article 13 of the European Convention of Human Rights deals with the right to an effective remedy and provides:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by a person acting in an official capacity”.

⁴⁸ *Stubbings v UK* (1997) 23 EHRR 213. Article 6 of the European Convention of Human Rights deals with the right to a fair trial; the relevant section of the Article is to be found in Article 6(1) which provides:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time and by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

position. As they are likely to be going through a certain degree of trauma and will be unfamiliar with the legal system (and perhaps even the language) of the country, the time limit should be more reflective of their circumstances. The Commission has received anecdotal evidence regarding the practical implementation of section 5. It would appear that potential applicants who have received a negative decision from the immigration authorities are not informed at the outset of their right to seek judicial review of that decision. The 14 day period will, of course, begin to run whether or not the individuals are aware of their rights. While this is not peculiar to cases involving immigration decisions, it does highlight the difficulties faced by the individuals as foreign nationals, particularly in light of the very short time frame with which they must apply.

2.32 A further highly relevant aspect of the workings of section 5 which has been drawn to the attention of the Commission relates to the lack of reciprocity in the operation of the time limits. Whereas the would-be applicant is given a fixed period of 14 days, no time limit is imposed on the respondent side. In this way, proceedings may be delayed for months even where the applicant has complied with the 14 day limit. Whilst the lack of time limits on the respondent and the ensuing delays are undoubtedly linked to the practicalities of the caseload and resources available to the authorities, its effect does somewhat undermine the overarching rationale which seeks to justify the stringency of section 5. The desire to conclude immigration decisions speedily must be regarded in light of the aggregate delay from both the applicant and respondent sides.⁴⁹

2.33 Yet in order to have any understanding of this area it is important to keep in mind the policy issues at work here. Public policy impacts on this area of judicial review perhaps more so than any other. A time limit should not be such as to constitute a mechanism whereby a failed immigration applicant might use judicial review proceedings, and the time limits pertaining, as a means to delay unreasonably the workings of the immigration process. It should be in the interests of both the applicant and the respondent to

⁴⁹ Section 5(4) of the *Illegal Immigrants (Trafficking) Act 2000* could be invoked in order to rectify this lack of reciprocity. The Commission would view the drafting of any rule to this effect, pursuant to sections 5(4) and 5(5) of the 2000 Act, as a welcome development in line with the general tenor of chapter 4 of this Report.

have immigration decisions completed as quickly as the imperatives of justice allow. Counsel for the Attorney General referred to these concerns before the Supreme Court in *In re the Illegal Immigrants (Trafficking) Bill 1999*:

“... there are public policy objectives in ensuring that illegal immigrants challenging deportation orders do so as quickly as possible, as otherwise they may tend to become enmeshed further in Irish society only thereafter to be forced to leave.

In any case, any effective deportation system must be able to function efficiently and distinguish quickly between genuine refugees and other migrants not entitled to enter or remain in the State. It was also submitted that an inefficient system for processing such asylum applications and implementing deportation in the case of illegal immigrants would act as a ‘magnet’ attracting illegal immigrants from elsewhere and would further undermine the functioning of the system.”⁵⁰

2.34 Taking into account all of these issues, the Commission considers that a fixed period of 28 days for leave to apply for judicial review provides a more appropriate balance. Such a fixed time limit, although still much shorter than that prescribed by most other statutory schemes would provide a more sensitive approach to immigration cases whilst recognising the policy concerns of the legislature in this area. This 28 day fixed period would be accompanied by a judicial discretion to extend where “good and sufficient” reason were established with a view to reinstating the discretionary extension mechanism to its rightful, exceptional role.

(3) Report Recommendation

2.35 *The Commission recommends that section 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000 be amended so as to increase the fixed time limit on applications to apply for judicial review to 28 days; this is to be accompanied by a judicial discretion to extend where good and sufficient reason is established.*

⁵⁰ [2000] 2 IR 360, 379.

D *Certiorari* Time Limits

(1) *The Present Position*

2.36 Currently, in matters of conventional judicial review, the time limits applicable to an application for leave to apply for judicial review depend on the order sought. Order 84, rule 21(1) provides that in cases where an order of *certiorari* is sought the application should be made promptly, and in any event within six months unless the court considers that there is good reason to extend the time limit. In relation to all other orders a three month limit is set down subject to the same requirement of promptness and to the possibility of an extension.

(2) *Problems*

2.37 An order of *certiorari* “lies to quash a decision of a public body which has been arrived at in excess of jurisdiction or where the error appears on the face of the record”.⁵¹ *Certiorari* is one of six traditional remedies in judicial review, yet is the only one afforded special status with regard to time limits. The anomalies arising from this differentiation have been pointed out in submissions to the Commission. The essential point is that a declaration is often interchangeable with the other orders and *certiorari* may easily be sought in its place. However, despite the similarities as between the orders, *certiorari* offers the applicant twice the time limit under Order 84. Moreover, given the blurred distinctions between the orders, there is a feeling that the courts have been willing to apply the six month time limit to applications which have been fashioned by the applicant as *certiorari* in order to take advantage of the additional time.

2.38 It is therefore submitted that the current distinctions are not based on principle and lack rationality. Accordingly, it is felt that there should be the same fixed time period for each remedy.

2.39 One possible exception involves instances of *certiorari* which cover challenges to criminal convictions. This is one area where it is arguable that an extended time limit is justifiable. The grave nature of a criminal conviction may be such as to justify exceptional treatment with regard to the time limits applicable to an

⁵¹ Hogan and Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet and Maxwell 1998) at 698.

applicant's recourse to judicial review. If one were to follow this line of argument one might conclude that the six month period should be retained for criminal cases, but reduced for all other cases, even those for which *certiorari* was appropriate. However, for reasons given below, this line has not been adopted.

(3) Solutions

2.40 As far as a standard fixed period is concerned, the Commission considered three possibilities for reform of the current Order 84, rule 21(1):

- (i) three months as is currently the limit for all remedies other than *certiorari*;
- (ii) some intermediate period;
- (iii) six months as for *certiorari* at present.

2.41 The Commission is alert to the potential effect of the recent judicial decisions of *Hogan v Waterford County Manager*⁵² and *Dekra Éireann Teoranta v Minister for the Environment and Local Government*,⁵³ and accordingly of recommendations contained in this report, on the position of the applicant insofar as these relate to the other element of the time limit, dealing with the issue of an extension under rule 21(1).⁵⁴ The Commission stands by these recommendations, and yet it is not oblivious to the effect that they might have on an applicant seeking to extend a time limit under rule 21(1). The implementation of these recommendations would potentially limit the scope of arguments available to the applicant seeking to establish good reason. To impose a further restriction on the applicant by reducing a *de facto* six month time limit to a standard three month period, would be tantamount to a double blow. To turn the screw twice would, in the view of the Commission, amount to unfair treatment of the applicant. Both a three month period and an intermediate solution (whether for all remedies or with the exception of criminal cases) would fall foul of this objection.

2.42 Given the courts' emphasis on the primacy of the requirement of promptness, it remains open to the court to refuse an

⁵² High Court (Herbert J) 30 April 2003.

⁵³ [2003] 2 ILRM 210.

⁵⁴ See paragraphs 2.19 – 2.21 above.

application brought within any fixed period where such application is not lodged promptly⁵⁵ though in practice this appears not to happen very often. Therefore, what may, at first glance, appear to be a very applicant-friendly option of a standard fixed period of six months is still flexible enough to take account of public policy concerns where promptness is not shown.

2.43 In light of these factors, the Commission has decided to plump for a standard six month period.

(4) Report Recommendation

2.44 *The Commission recommends that reference to certiorari be erased from Order 84, rule 21(1) of the Rules of the Superior Courts 1986.*

2.45 *It is recommended that the three month time limit in Order 84, rule 21(1) of the Rules of the Superior Courts 1986 be abolished in favour of a standard limit of six months which would be subject to the requirement of promptness and open to the possibility of an extension where the court considers that there is good reason.*

⁵⁵ See *Hogan v Waterford County Manager* High Court (Herbert J) 30 April 2003, at 31; *State (Cussen) v Brennan* [1981] IR 181, 196; *Dekra Éireann Teoranta v Minister for the Environment* [2003] 2 ILRM 210, 222; see also paragraph 2.05 above.

CHAPTER 3 COSTS

A Introduction

3.01 The issue of costs – essentially who pays and for what – is characterised by a lack of hard and fast rules. The discretion enjoyed by the courts in this area reflects the number of conflicting interests at work.

3.02 At first glance it may seem to stand to reason that the unsuccessful party should pay the costs incurred by the other side. Indeed traditionally this is the dominant approach and costs follow the event. However, a public interest may also exist in encouraging applicants to bring certain classes of action. The possibility of being saddled with a crippling legal bill would in many instances act as a substantial disincentive to recourse to the legal system. Seen in this light, the neatness of a ‘winner takes all’ solution is bought at too high a price and requires to be offset by a mechanism through which the courts can look to the individual circumstances of the case. At an extreme level, this could justify an award of costs against a successful party; alternatively (and more frequently) circumstances may dictate that the costs lie where they fall. Attempts to reach a compromise where a conflict occurs have also led to efforts by the courts to divide the costs of the parties according to the number of grounds successfully pleaded, although, as we shall see below, there is a further divergence of opinion as to how this is best implemented. Orders of security for costs, orders of pre-emptive costs and undertakings as to damages are particular costs issues which will also be dealt with in this chapter.

B Costs at the Leave Stage

(1) *Consultation Paper Recommendation*

3.03 The Consultation Paper recommended that in appropriate cases, the courts should make greater use of their discretion in relation to the issue of costs at the leave stage. Specifically, the

Commission suggested that greater use should be made of the possibility of apportioning the costs of the leave stage to allow recovery of costs only in relation to those grounds successfully pleaded or challenged.¹

(2) The Present Position

3.04 The costs of the leave stage will typically be decided in conjunction with those arising out of the substantive hearing. Thus costs will usually be awarded in their entirety in favour of the successful party.

3.05 However, the court is empowered to deviate from this line. Wide judicial discretion in relation to costs is contained in Order 99, rule 1(1) of the *Rules of the Superior Courts 1986*:

“The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.”

In the event of the court granting leave, Order 84, rule 20(6) provides that “it may impose such terms as to costs as it thinks fit”.

3.06 Perhaps the most pressing question in this regard is whether an applicant who has been successful at the leave stage, but later unsuccessful at the substantive hearing, should be obliged to pay the costs relating to what was decided in its favour (the former stage) as well as what was not (the latter).

3.07 Faced with these circumstances, the courts have used their discretion to make an award of costs for the leave stage in two principal ways, the latter of which is partially sub-divided. Firstly, the courts may simply toe the traditional line and apply the approach outlined in paragraph 3.04 above. This may seem unjust to the applicant as it will deny any credit for initial success at the leave stage. Secondly, the courts have, on occasion, been willing to look to the individual grounds pleaded in an effort to reach a more equitable solution. Under this approach, so far as the leave stage is concerned, the applicant will only be liable for the costs of those grounds unsuccessfully pleaded. The sub-division referred to earlier applies in relation to the question of who should pick up the costs incurred on foot of those grounds successfully pleaded by the applicant. In *Keane*

¹ Consultation Paper paragraph 3.09.

*v An Bord Pleanála*² the applicant, although successful at the leave stage, was ultimately unsuccessful at the final hearing. The costs of the grounds unsuccessfully pleaded by the applicant at the leave stage were awarded to the respondent, while no order was made in relation to the costs attaching to those grounds which the applicant had successfully argued. A different approach was adopted in *McNamara v An Bord Pleanála*³ where, again, an ultimately unsuccessful applicant had been granted leave. Here Barr J also awarded costs against the applicant in relation only to the grounds unsuccessfully pleaded. With regard to the costs of those grounds on which the applicant was successful at the leave stage, an order was made against the respondent.

3.08 The method of dealing with the issue adopted in *Keane* has been approved of by certain academic commentators⁴ as the most principled option in that it avoids the harshness of an ‘all or nothing’ solution⁵ while not penalising an ultimately successful respondent for points lost at a provisional stage of proceedings.

3.09 The Consultation Paper recommended an approach more akin to that of Barr J in *McNamara*. While recognising the criticisms lodged against this approach, the Paper pointed to the positive practical results such an approach to costs might bring, in line with the general aim of a more efficient system of judicial review, in this case at the leave stage.⁶ The *McNamara* approach would encourage respondents to concede strong arguments at an early stage. It also acts to mitigate further the potentially huge financial gamble that applicants often must take in order to mount a challenge to a decision of a public body.

(3) Report Recommendation

3.10 *The Commission recommends that in appropriate cases, the courts should make greater use of their discretion in relation to the issue of costs at the leave stage. Specifically, the Commission*

² [1997] 1 IR 184.

³ [1996] 2 ILRM 339.

⁴ See, for example, Costello “Costs Principles and Environmental Judicial Review” (2000) 35 Ir Jur 121, 121-124.

⁵ See paragraph 3.04 above.

⁶ Consultation Paper paragraph 3.08.

suggests that greater use should be made of the possibility of apportioning the costs of the leave stage to allow recovery of costs only in relation to those grounds successfully argued or challenged.

C Costs at the Substantive Hearing: Two Exceptional Categories

3.11 Costs usually follow the event. That is to say, the costs of the successful party will usually be met by the unsuccessful one. However, the discretion contained in Order 99, rule 1 clearly envisages the possibility of deviations from the norm. The two most recognised exceptions to the general rule are:

- (i) cases where it is considered that a point of general public importance arises; and
- (ii) cases where limited immunity is conferred on the judiciary.

(1) Consultation Paper Recommendation

3.12 The Commission considered and discussed costs in relation to cases which involve a point of general public importance; there was no recommendation for change from the current position.⁷

3.13 The Commission accepted that it is not appropriate for the Director of Public Prosecutions to be joined in judicial review proceedings solely for the purposes of being made liable for an award of costs. It was recommended that a central fund be established from which costs, appropriately taxed, could be awarded in judicial review proceedings involving respondent judges where the error was made *bona fide* and the application was unopposed.⁸

(2) Points of General Public Importance

3.14 Where cases involve a point of general public importance, the courts have invoked the discretion regarding costs in recognition of the fact that certain cases might bring to the fore new principles of general importance. The importance of this jurisdiction arises from the limits imposed on the court to consider only issues which flow directly from a case taken. That being so, these points of general

⁷ Consultation Paper paragraphs 3.10, 3.14 – 3.16.

⁸ Consultation Paper paragraph 3.25.

public importance depend for their resolution on the existence of an applicant. The public interest in ensuring that these cases are initiated is reflected in the power of the court to order an unconventional award of costs.

3.15 These factors may result in no order as regards costs being made or even in an award of costs against a successful respondent. It is even theoretically possible that a successful applicant might be unable to recover the costs.

(3) Report Recommendation

3.16 *The Commission recognises the importance of the courts' discretion in relation to cases where points of general public importance are raised and recommends no change to the current law.*

(4) Limited Judicial Immunity

3.17 The Supreme Court in *The State (Prendergast) v Rochford*⁹ confirmed that where an error was made *bona fide* and the application was unopposed, no order as to costs may be made against a respondent who is a member of the judiciary in judicial review proceedings. The Supreme Court reaffirmed this rule in *McIlwraith v Fawsitt*.¹⁰ This limited immunity safeguards the role of the trial judge in the performance of the functions of his or her office. Without such a guarantee the independence of the judge could be compromised through the omnipresent threat of being liable for costs at a later judicial review hearing. It also reflects the potential injustice arising from the undesirability of respondent judges filing affidavits.¹¹ Thus, the limits imposed¹² on the immunity inject an element of *quid pro quo* into the proceedings.

3.18 In practice this has led applicants, when seeking review of a judicial decision, to join the Director of Public Prosecutions or the Attorney General to the proceedings in an effort to secure an award of costs in the event of a successful outcome. This practice has been

⁹ Supreme Court 1 July 1952.

¹⁰ [1990] 1 IR 343.

¹¹ See paragraphs 3.21 – 3.32 below.

¹² These limits dictate that the error must have been made *bona fide* and that the application must have been unopposed.

widely criticised.¹³ The Director of Public Prosecutions is often a party to judicial review of prosecutions, but, on occasion, may not wish to oppose the case. In these circumstances, it would appear unfair to fix the Office of the Director of Public Prosecutions with an order of costs. Of course, the alternative scenario under the current system, whereby a successful applicant would have no prospect of being granted an order of costs, is particularly unjust.

3.19 To remedy the problems with the current situation, the Consultation Paper drew on the English model of a central fund¹⁴ from which costs could be met in these circumstances.¹⁵ It is submitted that such a fund provides the most appropriate means of striking a balance between the problems with the current situation and the policy driven conferral of limited judicial immunity.

(5) Report Recommendation

3.20 *The Commission recommends the establishment of a central fund from which costs, appropriately taxed, if necessary in default of agreement, could be awarded in judicial review proceedings involving respondent judges where the error was made bona fide and the application was unopposed.*

D Undesirability of Judges as Parties to Judicial Review Proceedings

(1) The Problem

3.21 The courts have on occasion referred to the undesirability of judges filing affidavits in contentious proceedings. The Supreme Court in *Feeney v Clifford* put the point bluntly by stating:

“In proceedings *inter partes* it is ... undesirable that a district justice should take an active role in proceedings by way of judicial review where, as is the case here, all

¹³ See, for example, de Blacam *Judicial Review* (Butterworths 2001) at 324 – 326.

¹⁴ Law Commission of England and Wales *Administrative Law: Judicial Review and Statutory Appeals* (No 226 1994) at 84 – 88; see Consultation Paper paragraph 3.15.

¹⁵ Consultation Paper paragraphs 3.13 – 3.16.

relevant material may be placed before the High Court by or on behalf of the prosecuting authority.”¹⁶

3.22 The concerns expressed by the Supreme Court are understandable. The deponent of an affidavit is liable to cross-examination. Were a deponent judge to be faced with such questioning, it could be undesirable not only for the individual concerned, but for the judicial body as a whole in the light of their role in the administration of justice.

3.23 However, from the point of view of the judge involved, the prospect of having to maintain silence in the face of what might be considered a misrepresentation of the propriety of what took place in previous court proceedings is far from attractive. This problem will be particularly acute where there is no *legitimus contradictor* to the judicial review proceedings to represent the views of the trial judge. This may arise where the concerns of the *contradictor* do not coincide with those of the trial judge. On other occasions the nature of the proceedings may rule out the existence of a representative of the State being present to act as *legitimus contradictor*, as will be the case in family law or often in civil law matters. Where this is the case, a glaring lacuna in the system is exposed which may, at times, permit an applicant’s affidavit to prevail, even when it may be inaccurate or partial. Murphy J in *Director of Public Prosecutions v Judge James Paul McDonnell and Paul Smith* set out this problem:

“I fully appreciate (the respondent’s) concern about the procedure by which decisions of Judges of the District Court are reviewed in the Superior Courts. Whilst all Judges of subordinate Courts – including the High Court – must accept that their decisions may be reviewed, reversed and even criticised, the procedure of Judicial Review under which a Judge is named as a Respondent and may be liable for costs and is, for practical reasons, debarred from providing evidence to controvert that given by an Applicant, seems irrational, unjust and undignified. Even if the procedure is to be perceived as a formality for the purpose of bringing a real issue before the Court, it is clear that the purpose is not served in a case such as the present.

¹⁶ [1989] IR 668, 677 *per* McCarthy J with whom Finlay CJ and Hederman J agreed.

Certainly the naming of the trial Judge as Respondent does not provide an appropriate *legitimus contradictor*.”¹⁷

3.24 This problem is bound up with the issue of limited judicial immunity from costs in judicial review actions. The State has an interest in deterring members of the judiciary from becoming embroiled in an adversarial role in proceedings of this nature. This is reflected in the fact that a judge may only take advantage of this immunity where the judge does not become an active participant in the proceedings.¹⁸

(2) Proposed Solutions

3.25 The Consultation Paper broached this challenging issue, but declined to offer a recommendation in resolving the impasse.¹⁹ This undoubtedly reflects the minefield of potential problems encountered in any attempt to formulate a definitive solution. A number of ways of tackling the problem have been put forward for consideration:

(a) Comprehensive system of courtroom recording devices

3.26 A recording device should be set up in every courtroom throughout the jurisdiction which would record all audible proceedings, the transcripts of which could be presented to the High Court in the judicial review proceedings as at least a partial factual account of what was said. Moreover, in-house recording devices could be of use in other cases and circumstances. Any restored or new courthouses should be appropriately equipped.²⁰ In Australia, New Zealand and Canada not only are court proceedings recorded but many courthouses have facilities for witnesses to give evidence by video link. Such facilities have potential for considerable economic savings; for example, in respect of bail or certain *habeas corpus* or judicial review applications from prisons. Digital recordings

¹⁷ High Court (Murphy J) 13 May 1994, at 4 – 5.

¹⁸ See paragraphs 3.17 – 3.20 above.

¹⁹ Consultation Paper paragraphs 3.17 – 3.24.

²⁰ The Commission notes that the courtroom in which cases from the Commercial List of the High Court (which began operation in 2004) are heard, has facilities for digital recording of proceedings: see *Courts Service Newsletter* December 2003, www.courts.ie. It should also be noted that the Courts Service is currently considering an extension of this programme with a view to covering all courthouses in the jurisdiction.

transmitted to a central office could be stored on CD ROM and then typed up if and when required for the purpose of judicial review applications or in the event of any introduction of inquiries in respect of judicial conduct. The recording device should be under the control of the registrar or court clerk or their staff. This solution is obvious in this era of technological capability and the capital cost will be repaid in savings of time and improvement in the quality of justice and accuracy in the courts.

(b) *Unsworn factual report from the judge*

3.27 The suggestion was made that the High Court should, if necessary, request a factual report of what had transpired from the trial judge together with any written notes or orders made by the judge to be exhibited in the affidavit from the registrar or court clerk together with copies of any pertinent document adduced in evidence. This would facilitate the trial judge in having some input into the production of material in the subsequent judicial review proceedings. No cross-examination would ensue as the report from the judge would be unsworn and the judicial immunity from costs would remain intact. However, the applicant in the judicial review proceedings would be at a distinct disadvantage in the event that the contents of the report were in conflict with the affidavit sworn by or on behalf of the applicant. The affidavits and their contents and the report could be served on any notice party (who may be a *legitimus contradictor*) by order of the court. To ensure representation for a spouse in family law matters, for example, it would be necessary for the High Court to have power to order that legal aid, if available in the District or Circuit Court, should also be available in the judicial review case, with residual discretion on this aspect of costs residing with the High Court. Faced with a factual report claiming to outline what had happened in court, the applicant might still be at a disadvantage in being unable to call upon the author of the report to be subjected to cross-examination so as to test the correctness and veracity of the content of the report requested. From an evidential and a constitutional justice point of view the standing of the report would be of a dubious nature but at least the process might produce an agreed version of the facts; although in the heel of the hunt, in a very contentious case, the report might have to be disregarded if challenged on grounds of being inadmissible as evidence, if strict proof of admissibility is invoked.

(c) *Affidavits sworn by the court clerk or registrar*

3.28 It was proposed that the problems envisaged regarding a deponent judge might be circumvented were the court clerk or the registrar to swear an affidavit as to what had occurred in court. The court official would then be liable to be cross-examined without the objections referred to in paragraph 3.22 above. The courts have referred to this approach as a possible means of tackling this thorny issue. Thus Henchy J in *State (Sharkey) v McArdle* stated that:

“This court has pointed out on a number of occasions that it is undesirable in a case such as this for a person exercising judicial function to rely on an affidavit made by himself. Such an affidavit leaves him open to the risk of being cross-examined by the dissatisfied litigant. It would be more judicious if the affidavit were made by the court clerk or registrar, and it should contain an averment that it is made from information within the deponent’s own knowledge and/or from information supplied by a named person.”²¹

3.29 The above passage was quoted with approval by Barr J in *State (Freeman) v Connellan*.²² Similar sentiments have been expressed more recently by Barron J in the Supreme Court in *O’Connor v Carroll*:

“While it should be open to him or her [the judge] to ensure through the court clerk or registrar as the case may be that the basic facts are not distorted, there is no need for him or her to be a party particularly where it is inappropriate that he or she should enter the arena by swearing an affidavit.”²³

The general tone of Barron J’s statement is noteworthy. The purpose of any affidavit sworn on the judge’s behalf would be to prevent a distortion of the facts. Where there is no dispute as to the facts, such an affidavit would not be necessary. However, where a dispute arises and an affidavit is sworn by the court official, the court would at least have access to both versions of events. Where the deponent court

²¹ Supreme Court 4 June 1981, at 8.

²² [1986] IR 433, 440.

²³ [1999] 2 IR 160, 170.

official recalls the case in question, he or she can aver from personal knowledge and be cross-examined as to their recollection.²⁴

3.30 On a practical level, where this approach is followed, it would seem appropriate, given the sensitivity of the matter, that an individual other than the respondent judge be given responsibility for gathering the information from the court official. Moreover, from the point of view of recollection of events, the Commission notes that were the leave stage to be held on notice in these exceptional circumstances, this would minimise the delay between the original trial and the preparation and swearing of an affidavit and thus increase the possibility of accurate recollection.²⁵ At present an application for judicial review in a criminal matter will be directed to the Chief Prosecution Solicitor in the DPP's office.²⁶ In most cases, the DPP will contest the application and the Chief Prosecution Solicitor's Office, acting for the DPP, will often seek an affidavit from the relevant court official. Where, however, the DPP does not wish to contest the issue, or where the application arises in a civil context, if the trial judge seeks representation, the matter will usually be referred to the Chief State Solicitor's Office. In order to obtain an affidavit from the court official in these most sensitive circumstances, it would seem appropriate for the Chief State Solicitor's Office, or where the DPP is involved the Chief Prosecution Solicitor's Office, to gather information, consider and assess the situation and to put evidence before the High Court in the judicial review application on the basis of either a transcript²⁷ or an affidavit of a court official. In this way, there is more likelihood that evidence as to the history and actual facts of the matter in contention will be before the High Court so that the arguments and adjudication of the matter will be as informed as is possible and practical. Indeed, it appears that this is

²⁴ See Collins & O'Reilly *Civil Proceedings and the State* (2nd ed Thomson Round Hall 2004) at 140.

²⁵ See paragraphs 1.24 – 1.36 above.

²⁶ The (Nally) *Report of the Public Prosecution System Study Group* (1999) recommended that the function of the Chief State Solicitor's Office in criminal matters be transferred to the DPP's office. This was effected by the creation of the office of the Chief Prosecution Solicitor in the DPP's office. See also the *Rules of the Superior Courts (No. 4) (Chief Prosecution Solicitor) 2001* (SI No. 535 of 2001).

²⁷ See paragraph 3.26 above.

broadly reflective of the current procedure, which the Commission commends. Otherwise, the High Court could be left in the position of deciding the case on an incorrect or false affidavit (in the absence of a transcript of the District Court proceedings).

3.31 At this stage the vast majority of this small but troublesome category of judicial review applications will have been facilitated without the drawbacks of a judge having to become directly involved in proceedings. However, the nature of the issue here does not lend itself to watertight solutions. Where an affidavit is effectively beyond the reach of cross-examination because the deponent cannot personally vouch for its content, the judge hearing the application may have to disallow its admission. To hold otherwise may expose the proceedings to one of two possibilities: the undesirability of a judge being called as a witness in these circumstances, or, alternatively, a challenge being mounted on the basis of the evidential and constitutional justice hurdles regarding the proposal for the admissibility of unsworn factual reports or notes of proceedings written by the judge. Were this unlikely scenario to arise, it would be important that limited judicial immunity from costs would still apply provided that the trial judge does not enter the arena by personally swearing an affidavit or giving evidence except under order of the High Court.

(3) Conclusion

3.32 It is apparent that of the three proposed solutions to the problem discussed above, the provision of recording devices is clearly preferable. In the absence of a system of recording devices the suggestion could be considered of court officials being able to swear an affidavit to put matters before the High Court. This might have useful features although this stratagem could find itself open to challenge in contentious cases. If none of the three propositions are acceptable, then there appears to be an obvious gap in the system. However, a pragmatic and sensitive use of the proposed solutions may alleviate the problem and reduce the potential for injustice to any party.

E Pre-emptive Costs Orders

3.33 A pre-emptive costs order is made in advance of litigation, and requires that, regardless of the outcome, an order of costs will not be made against the applicant.

(1) Consultation Paper Recommendation

3.34 The Consultation Paper recommended that, as at present, the jurisdiction of the courts in relation to pre-emptive costs should be exercised only in exceptional circumstances and that where any doubt exists, the court should instead simply indicate the approach to be taken in relation to costs at the conclusion of the judicial review proceedings.²⁸

(2) The Present Position

3.35 The concept of a pre-emptive costs order was first recognised by Dyson J in *R v Lord Chancellor, ex parte Child Poverty Action Group* where he held:

“I conclude ... that the necessary conditions for the making of a pre-emptive costs order in public interest challenge cases are that the court is satisfied that the issues raised are truly ones of general public importance, and that it has a sufficient appreciation of the merits of the claim that it can conclude that it is in the public interest to make the order ... The court must also have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue. It will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in doing so.”²⁹

3.36 Relying on Order 99, rule 5 of the *Rules of the Superior Courts 1986*,³⁰ Laffoy J accepted the existence of pre-emptive costs orders as a principle of Irish law in *Village Residents Association Ltd v An Bord Pleanála (No 2)*, while pointing to the limitations highlighted by Dyson J in his judgment quoted above and stressing that this was an exceptional jurisdiction:

“While I am satisfied that the Court has jurisdiction in an appropriate case to deal with costs at an interlocutory stage

²⁸ Consultation Paper paragraph 3.30.

²⁹ [1998] 2 All ER 755, 766.

³⁰ Order 99, rule 5 reads: “Costs may be dealt with by the Court at any stage of the proceedings”.

in a manner which ensures that a particular party will not be faced with an order for costs against him at the conclusion of the proceedings, it is difficult in the abstract to identify the type or types of cases in which the interests of justice would require the Court to deal with the costs issue in such a manner and it would be unwise to do so. As a broad proposition the principles enunciated by Dyson J – confining the possibility of making such orders to cases involving public interest challenges, as Dyson J explained the concept of a public interest challenge, and requiring that the issues raised on the challenge be of general public importance and that at the stage at which it is asked to make the order the Court should have a sufficient appreciation of the merits of the claim to conclude that it is in the public interest to make the order – would seem to meet the fundamental rubric that the interests of justice should require that the order be made.”³¹

3.37 Pre-emptive costs orders have been greeted rather cautiously in some quarters.³² By their nature they pre-date the determination of fact at the trial and are accordingly open to claims of placing the cart some distance before the horse, potentially leading to

³¹ [2000] 4 IR 321, 330. The facts of the case can be summarised as follows: the applicant was an incorporated association having no share capital, with the primary object of representing the views of the local community, particularly in relation to planning and development matters. The applicants instituted judicial review proceedings seeking an order of *certiorari* quashing a decision of An Bord Pleanála to grant planning permission in respect of a development in the city of Kilkenny. The respondent sought an undertaking as to security for costs from the applicant; no such undertaking was given. There were two applications at issue in the *Village Residents* case: an application by the respondent for security for costs pursuant to section 390 of the *Companies Act 1963* and an application by the applicant seeking a pre-emptive costs order. However, it should be noted that on the facts of the *Village Residents* case, Laffoy J declined to make such an order on the basis that the challenge had not been brought by a public interest litigant in the strict sense, that any issues of public importance arising were not sufficient to justify the making of such an order, and finally that the court did not have a sufficient appreciation of the merits of the application at this interlocutory stage to conclude that it would be in the public interest to make a protective costs order.

³² See, for example, Costello “Costs Principles and Environmental Judicial Review” (2000) 35 Ir Jur 121, 136.

inappropriate orders. However, as was noted in the Consultation Paper,³³ where some element of doubt as to the appropriateness of a pre-emptive costs order lingers, it is open to the court, as a compromise, to indicate at an initial stage of proceedings the likely outcome in relation to costs while not committing itself absolutely on the issue.³⁴ Such a compromise would, in these circumstances, work to marry flexibility on the part of the court at a later stage in proceedings with a degree of security for the applicant.

(3) Report Recommendation

3.38 *The Commission recommends that the jurisdiction of the courts in relation to pre-emptive costs should be exercised only in exceptional circumstances and that where any doubt exists, the court should instead simply indicate the approach to be taken in relation to costs at the conclusion of the judicial review proceedings.*

F Security for Costs

(1) Consultation Paper Recommendation

3.39 The Commission, in the Consultation Paper, was satisfied that the present system in relation to security for costs in the context of judicial review proceedings operates satisfactorily and is sufficiently flexible to allow the court to make an order which is fair in the circumstances of each individual case.³⁵

(2) Introduction

3.40 Buttimore, in describing security for costs, writes:

“The jurisdiction of a court to grant security for costs against a plaintiff, in favour of a defendant ... is aimed at preventing a plaintiff from prosecuting an action in which he ultimately fails against the defendant, while leaving no realistic prospect for the defendant to recover any, or all, of the costs incurred in defending the successful action.”³⁶

³³ Consultation Paper paragraph 3.29.

³⁴ This could be achieved through invoking the court’s general discretion with regard to costs in Order 99, rule 1, and, in particular, the jurisdiction granted to the court in Order 99, rule 5 – see fn 30 above.

³⁵ Consultation Paper paragraph 3.37.

³⁶ Buttimore *Security for Costs* (Blackhall Publishing 1999) at 1.

3.41 Such an order recognises the predicament faced by defendants who, after being drawn unwillingly into proceedings, successfully defend themselves, yet are presented with a hefty legal bill due to the inability of the unsuccessful applicant party to pay the costs.

3.42 This power is invoked by the courts most frequently in relation to foreign applicants (from whom costs might, at a later stage, be difficult to extract for jurisdictional reasons) and companies under section 390 of the *Companies Act 1963*. The latter of these categories is most pertinent in relation to judicial review.

(3) Section 390 Companies Act 1963

3.43 Section 390 of the 1963 Act provides that:

“Where a limited company is plaintiff in any action or other legal proceeding, any judge, having jurisdiction over the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given.”

In *Lancefort Ltd v An Bord Pleanála*³⁷ Morris J in the High Court held that judicial review proceedings constitute “other legal proceedings” for the purpose of section 390.

3.44 The focus on limited companies with regard to security for costs orders stems from the insulating effect of limited liability. Were an applicant limited company unable to pay costs in the event of an unfavourable finding, it would be unlikely that a court could fix the individual members of the same company with costs. An order for security for costs will thus guard against potential abuse of limited liability in these circumstances.³⁸

3.45 However, room has been carved out in this regard for an element of judicial discretion. An applicant limited company will not automatically be expected to provide an order for security for costs, but the exceptions are restrictively defined. Laffoy J in *Village*

³⁷ [1998] 2 IR 511.

³⁸ See *Village Residents Association Ltd v An Bord Pleanála (No 2)* [2000] 4 IR 321, 332-333.

*Residents Association Ltd v An Bord Pleanála (No. 2)*³⁹ dealt with this possibility of “special circumstances” justifying a deviation from the norm. Whilst the onus remains firmly on the applicant company to establish the existence of such circumstances, Laffoy J did point to a number of factors which might prove capable of constituting “special circumstances”.⁴⁰ These include

- (i) where the applicant’s case involves an issue of genuine public importance;⁴¹
- (ii) lack of *bona fides* on the part of the respondent;⁴²
- (iii) the issue of delay.⁴³

(4) ‘Straw Men’

3.46 It has been suggested to the Commission that the court’s jurisdiction to grant orders of security for costs should be extended so as to cover individuals as well as limited companies. The limited liability of companies can be used as a shield for company members to protect them against an award of costs. Equally the threat of an order of security for costs may encourage the company to put forward an impecunious individual (a ‘straw man’) as an applicant, thus avoiding an order of security for costs. Supposing that the individual applicant has sufficient interest in the proceedings to be granted *locus standi* and is ultimately successful, the company will be in a position to ‘piggy-back’ on the judgment and achieve the desired outcome.

³⁹ *Village Residents Association Ltd v An Bord Pleanála (No 2)* [2000] 4 IR 321, 332 - 333.

⁴⁰ *Village Residents Association Ltd v An Bord Pleanála (No 2)* [2000] 4 IR 321, 331.

⁴¹ *Ibid* at 333. See, for example, *Fallon v An Bord Pleanála* [1992] 2 IR 380.

⁴² *Ibid* at 333. Although on the facts of the case in *Village Residents Association Ltd v An Bord Pleanála (No 2)*, Laffoy J was satisfied that it would not be appropriate to draw any such inference in relation to the respondent’s conduct from the affidavits filed in the matter.

⁴³ *Ibid* at 334. The test formulated in relation to the issue of delay on this context was set out by Morris J in *Beauross Ltd v Kennedy* High Court 18 October 1995 as whether “the party seeking security has delayed to such an extent as to commit the other party to an amount and a level of costs which it would never have become committed to had it known that it was to be required to provide security for costs and thereby altered its position, to its detriment”.

3.47 This is not a novel idea. The jurisdiction of the courts to make orders of security for costs against individuals in these circumstances was invoked in *Rice v Dublin and Wicklow Railway Company*⁴⁴ in 1858, where the court found that the applicant had been put forward by the Wayside Committee, an organisation which worked to lower the fares on the railways. The applicant, Mr Rice would, in the event of an unfavourable finding, have been unable to foot the bill for the proceedings. Monahan CJ held:

“...this [is] an action brought by others in Rice’s name, who would not have stirred in the case without the suggestion and advice of his attorney; and we therefore think that this motion must be granted, that the plaintiff should give security for costs, and that proceedings in the meantime be stayed.”⁴⁵

3.48 Indeed it remains open to the courts to make an order of security for costs against a plaintiff in these circumstances. In *Fallon v An Bord Pleanála*⁴⁶ Finlay CJ granted an order of security for costs against the plaintiff. An affidavit provided by the respondents read:

“The choice of plaintiff arose out of a public meeting on 11 August 1988 in Scout’s Den, Rosses Point. A Mrs Raman offered to put her name forward as the plaintiff but when it was pointed out to her that she would have to pay the legal costs if defeated, it was proposed by the committee that somebody who had nothing to lose might go forward. The plaintiff then stepped forward and stated he was happy to put his name to this case ...”⁴⁷

The Supreme Court accepted the probability that the plaintiff had been chosen as a man of straw by a number of other people many of whom might have been a mark for costs had they been plaintiffs and that the plaintiff had no special material interest in the result of the action.

3.49 The Commission recognises the potential anomaly which would be involved were the court’s jurisdiction to fail to cover orders

⁴⁴ (1858) 8 Ir CLR 155.

⁴⁵ *Ibid* at 159.

⁴⁶ [1991] ILRM 799, 800.

⁴⁷ See *Fallon v An Bord Pleanála* [1991] ILRM 799, 807.

of security for costs to individuals. While conscious that any widespread increase in such orders might have the effect of discouraging individual applicants from initiating proceedings in valid cases and alert to the constitutional issues flowing therefrom,⁴⁸ it is submitted that these obstacles could be overcome were the extension to be accompanied by careful application of the principles safeguarding the individual's access to the courts.

3.50 While the courts have made clear that an order of security for costs does not *per se* constitute a breach of an individual plaintiff's constitutional rights,⁴⁹ they have, in coming to their decisions, remained mindful of the issues surrounding access to the courts. Thus when *Fallon v An Bord Pleanála*⁵⁰ was returned to the Supreme Court in an effort by the respondents to increase the level of security ordered by the Master of the High Court, a majority of the Supreme Court refused to deviate from the general practice of requiring only one third of the estimated costs to be lodged as security.⁵¹ The majority⁵² was eager to ensure that the court "should not ... shut out any litigant solely because of poverty".⁵³ It behoved the court to look to the individual circumstances of the case in coming to a balanced decision, and in so doing the court could, at its

⁴⁸ Article 40.3 of the Constitution has been held to protect the individual's right of access to the courts. See *Macauley v Minister for Posts and Telegraphs* [1966] IR 345.

⁴⁹ *Salih v General Accident* [1987] IR 628.

⁵⁰ [1991] ILRM 799.

⁵¹ See *Thalle v Soares* [1957] IR 182: here "the plaintiff against whom the order for security for costs was granted was resident in the United States of America. The estimated bill of costs of the defendant was £3,226.19. The Master of the High Court in that case fixed security for costs at a sum of £2,500 which amount was affirmed in the High Court. On appeal to the former Supreme Court the amount was varied to £1,000 ... Both prior to and subsequent to the decision in *Thalle's* case the customary order when fixing the amount for security for costs was one third of the costs to be incurred by the party against whom the order for security had been obtained. No case has been brought to the attention of the court where a sum greater than one third was in fact ordered by the courts" (*Fallon v An Bord Pleanála* [1991] ILRM 799, 806 *per* Hederman J).

⁵² Hederman and McCarthy JJ concurring, Finlay CJ dissenting.

⁵³ [1991] ILRM 799, 808 *per* Hederman J.

discretion, order security for costs at a higher level, or, of course, order no security at all:⁵⁴

“The plaintiff is ordered to give security because, amongst other reasons, he is without the means of paying – he is a man of straw. Now it is said that the amount should be such as to be an indemnity to the defendant in the event of success – the reality is that the rule would be used as a weapon, not of deterrence but of defeat.”⁵⁵

3.51 The Commission is of the view that this approach of applying the competing principles set out in the case law coupled with judicial discretion forms an appropriate response to the vying exigencies involved in making orders for security for costs.

(5) Report Recommendation

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

G Undertaking as to Damages

(1) Consultation Paper Recommendation

3.53 The Commission, in its Consultation Paper, recommended that the judgment of Laffoy J in *Broadnet Ireland Ltd v Office of the Director of Telecommunications Regulation*⁵⁶ provided a suitable approach to the circumstances in which the courts should issue a requirement of an undertaking as to damages. This jurisdiction is of particular importance with regard to ‘commercial judicial review’.⁵⁷

(2) The Present Position

3.54 The court when dealing with an application for judicial review will be aware of the far-reaching effects, not only of the ultimate decision, but of the proceedings themselves. The initial

⁵⁴ [1991] ILRM 799, 806 *per* Hederman J.

⁵⁵ *Ibid* at 812 *per* McCarthy J.

⁵⁶ [2000] 3 IR 281.

⁵⁷ Consultation Paper paragraph 3.41.

decision which is being impugned will often have spawned various financial agreements down the line. Third parties will have become involved. The stalling effect of the proceedings may jeopardise these interests and may render projects impractical, even before the court reaches a final decision. Such third parties will often be joined to proceedings as notice parties, but the courts will, in any event, have regard to these wider pecuniary interests at stake. While an unsuccessful applicant might ultimately be held liable in damages, the security of an undertaking will go some way to assuage the anxieties of third parties by guaranteeing the existence of funds. However, seen from the opposite perspective, any obstacles placed in the way of applicants will militate against their right to challenge the decisions of public bodies.

3.55 Steering a path through these two conflicting interests, the courts have adopted a suitably cautious approach to requiring applicants to provide an undertaking as to damages in judicial review proceedings.

3.56 The jurisdiction of the courts in this regard derives from Order 84, rule 20(6) of the *Rules of the Superior Courts 1986* which provides:

“If the Court grants leave, it may impose such terms as it thinks fit and may require an undertaking as to damages.”

While the wording of the rule is rather open-ended, the judgment of Laffoy J in *Broadnet Ireland Ltd v Office of the Director of Telecommunications Regulation* has given some guidance as to how the courts will broach this difficult subject:

“... the essential test is whether such requirement is necessary in the interests of justice or, to put it another way, whether it is necessary to mitigate injustice to parties directly affected by the existence of the pending application.”⁵⁸

3.57 The Commission, recognising the potential conflict involved, approves of Laffoy J’s “interests of justice” test in providing guidance as to the circumstances in which undertakings as to damages may be required.

⁵⁸ [2000] 3 IR 281, 300.

(3) Report Recommendation

3.58 *The Commission recommends the “interests of justice test” as expounded by Laffoy J in Broadnet Ireland Ltd v Office of the Director of Telecommunications Regulation as this provides a useful and measured approach to the court’s jurisdiction to require undertakings as to damages in judicial review proceedings.*

CHAPTER 4 CASE ORGANISATION

A Introduction

4.01 There is a public interest in ensuring the swift resolution of challenges to decisions made by public bodies. In fact, as we have seen, there may be substantial delay both before the leave stage and between the leave stage and the full hearing. Few cases reach an early settlement and, indeed, the very idea of early settlement remains under-facilitated. All of this results in a system which serves inadequately both the interests of individuals and organisations involved in the process and those of the wider community in the administration of justice. The courts in recent years have been very active in their efforts to introduce case management structures to tackle this problem.¹ In a further effort to alleviate this situation, the Consultation Paper recommended a number of measures with a view to facilitating an end to the current impasse.

¹ See, for example, Keane CJ in *Orange Communications Ltd v Director of Telecommunications Regulation (No.2)* [2000] 4 IR 159, 202, where he stated, referring to the case at hand:

“This case has occupied a wholly inordinate degree of court time, both in the High Court and in this court. It took 51 days in the High Court and 17 days in this court. This was due in part at least to the absence of appropriate case management structures in the High Court at the time of the hearing. The Working Group on a Courts Commission in their Sixth Report, having reviewed their previous work on administrative case management, concluded that it should now be regarded as being within the remit of the Courts Service. This case demonstrates that the problem can be indeed acute.”

B Early Settlement

(1) Consultation Paper Recommendation

4.02 The Consultation Paper recommended a pre-action protocol procedure to encourage settlement which whilst not mandatory in nature, could be taken into account in determining costs, except where failure to comply resulted from the urgency of the proceedings.²

(2) Pre-Action Protocol

4.03 An ideal procedural means of resolving the practical problems in the current judicial review system involves the parties to the dispute coming to an agreement (or even a partial agreement) before they reach the steps of the courthouse. This might have the effect of reducing the number of cases (or, more likely, the number of grounds within a particular case) thereby reducing delays. Such early agreement does, however, require preliminary communication. As Lord Woolf observed in his *Access to Justice Report*:

“What is needed is a system which enables the parties to the dispute to embark on meaningful negotiation as soon as the possibility of litigation is identified, and ensures that as early as possible they have the relevant information to define their claims and make realistic offers to settle.”³

Each party needs to inform the other of certain details of their case so that balanced decisions can be taken on each side as to whether to proceed with the action or with individual grounds within the action. The option of dropping a ground which is doomed to failure will, although it may prove a bitter pill to swallow, prevail over pursuing that same ground with all the waste of resources potentially involved.

² Consultation Paper paragraph 4.07. This pre-action protocol would be broadly analogous to a ‘Calderbank Letter’: see *Calderbank v Calderbank* [1976] Fam 93, [1975] 3 All ER 333 where Scarman LJ suggested that a letter could be written on a without prejudice basis but with a reservation on the part of the writer of the right to refer to it on the issue of costs; for further consideration see Delany and McGrath *Civil Procedure in the Superior Courts* (Round Hall Sweet & Maxwell 2001) at 297 – 298.

³ Lord Woolf *Access to Justice*, Chapter 10 paragraph 4.

4.04 At the moment a small proportion of judicial review cases are settled without the matter going to court.⁴ The idea of a device akin to a ‘Calderbank Letter’ was suggested as a means of increasing this percentage.

4.05 This letter would be issued by the would-be applicant informing the opposite side of an intention to commence proceedings unless an intention not to contest the matter is indicated within ten days. In the context of judicial review proceedings this would grant the would-be respondent the opportunity to concede certain grounds prior to the leave stage.

4.06 The Consultation Paper recognised the inappropriateness of making such a pre-action procedure mandatory.⁵ However, in an effort to provide an element of incentive to the parties involved, it was recommended that the question of whether or not such pre-action correspondence had been entered into should be relevant to the court’s deliberations regarding the issues of delay and costs.

4.07 Of course, many judicial review proceedings are too urgent for the luxury of time necessary for the parties to partake in an exchange of letters. In such circumstances it would be manifestly unfair to penalise a party. Thus the Commission was of the view that where extenuating circumstances are established, the courts should not penalise non-compliance by an applicant who had acted reasonably.⁶

(3) Report Recommendation

4.08 *The Commission recommends that prior to the application for leave to apply for judicial review, the would-be applicant should send a letter to the opposing side informing them that failure to concede the claim within ten days will result in leave being sought to apply for judicial review. While this procedure should not be mandatory, failure to issue such a letter may be taken into account when determining costs, save where the failure to comply with this*

⁴ For the period 1998-1999 the total number of applications granted leave to seek judicial review was 631. The number of cases recorded as “settled” was 35, representing a settlement rate of 5.5%.

⁵ Consultation Paper paragraph 4.06.

⁶ Consultation Paper paragraph 4.06.

procedure is attributable to the fact that the making of the application for leave was a matter of justifiable or demonstrable urgency.

C High Court Specialisation

(1) Consultation Paper Recommendation

4.09 The Consultation Paper recommended that at least three High Court judges be nominated to deal with the judicial review list.⁷

(2) Two Models

4.10 The Commission tentatively considered two models of High Court specialisation aimed at removing judicial review proceedings from the general pool of cases coming before the High Court in order to facilitate the passage of these cases through the court process. These two models may be summarised as follows:

- (i) the establishment of a specialised division of the High Court to deal with judicial review and certain categories of administrative appeal;
- (ii) the nomination of particular judges by the President of the High Court to hear such matters thereby dealing with the matter by ‘listing’.

(a) Specialised Division

4.11 This is the more extreme of the two proposed models of specialisation. Its adoption would encourage a concentrated cadre of experience and expertise thus providing for a more consistent, expeditious system. On the other hand, it has been argued that such further fragmentation of the High Court would constitute an unnecessarily radical step in the effort to improve the system. Instead, similar results could be achieved through the more modest means afforded by the alternative model.

(b) Nomination of Judges (‘List’)

4.12 This arrangement – which is, in fact, currently in operation – entails the nomination of a specialised High Court judge to administer the list for a fixed period of time, with the assistance as required of other specified High Court judges. Such a listing practice combines a result similar to that of option (i) above with a need for less drastic

⁷ Consultation Paper paragraph 4.20.

upheaval and the dire problems which could be caused by specialist judges not being able to meet demands in other areas under pressure of urgent cases or potential backlogs.

4.13 The Consultation Paper pointed to Order 72 of the *Rules of the Superior Courts (Northern Ireland) 1980* as a working example of how such a system might operate.⁸ Order 72 was introduced at the behest of the commercial community of Northern Ireland eager to improve the then cumbersome procedure involved in commercial action in that jurisdiction. Order 72, rule 2(3) provides that once a matter is entered into the commercial list it comes under the direct control of the judge administering that list. The case-management of the list is largely governed by the practice of the administering judge.

(3) Duration of Appointment

4.14 The Commission's recommendation envisaged the 'lead judge' of the judicial review list holding the post for a period of one year. With regard to the number of further judges necessary to administer the list, it would appear that, besides the lead judge, a further two judges should be made available to hear cases from the list. This system is dependent upon sufficient resources being available to allow it to function. The shortage of High Court judges in this jurisdiction is well-documented⁹ and may well impact on the operation of any recommendation in this area.

(4) Report Recommendation

4.15 *The Commission recommends that a minimum of three judges from the High Court be nominated by the President of the High Court to administer the judicial review list, with one judge to act as 'lead judge' with overall responsibility for the list and a minimum of two other judges available to hear cases from the judicial review list. If sufficient judges are not available to meet this recommendation, then the Commission suggests that consideration be given to the appointment of sufficient judges to fulfil this recommendation.*

⁸ Consultation Paper paragraphs 4.13 – 4.16.

⁹ See, for example, Murphy "Secondment of judges to tribunals disrupts justice system, causes delay" *The Irish Times* 15 February 2002; "Shortage of High Court judges delaying start of criminal trials" *The Irish Times* 26 April 2002.

D Judicial Case Management in the Commercial Court

(1) Introduction

4.16 Order 63A of the *Rules of the Superior Courts 1986*, inserted in 2004,¹⁰ sets down detailed and innovative procedures, including judicial case management, for commercial proceedings in the High Court. Order 63A applies to commercial proceedings where the value is not less than €1,000,000 and extends not merely to claims for breach of contract but also to:

“any appeal from, or application for judicial review of, a decision or determination made or a direction given by a person or body authorised by statute to make such decision or determination or give such direction, where the Judge of the Commercial List considers that the appeal or application is, having regard to the commercial or any other aspect thereof, appropriate for entry in the Commercial List.”¹¹

4.17 Order 63A provides, in effect, for the establishment of a streamlined Commercial Court within the High Court. The general concept of a Commercial Court procedure was recommended in 1996 by the Working Group on a Courts Commission, which argued that this would facilitate speedier litigation with consequent benefits to business as well as the State through the generation of court fees.¹² More detailed recommendations were made in 2002 by the Committee on Court Practice and Procedure.¹³

¹⁰ Inserted by the *Rules of the Superior Courts (Commercial Proceedings) 2004* (SI No.2 of 2004). The new rules came into effect on 5 January 2004.

¹¹ Order 63A, rule 1(g).

¹² See Working Group on a Courts Commission, *First Report: Management and Financing of the Courts* (1996), at 34, available on the Courts Service website, www.courts.ie. The Working Group was chaired by Denham J.

¹³ Committee on Court Practice and Procedure, 27th Interim Report, *The Courts of e Government - Meeting the e Commerce Challenge* (2002), available on the Courts Service website, www.courts.ie. The Committee is currently chaired by Denham J.

4.18 The elements of Order 63A concerning judicial case management are greatly influenced by the reforms recommended in the United Kingdom in two Reports on civil procedure in the mid-1990s by Lord Woolf.¹⁴ The Woolf Reports led to the enactment of the UK *Civil Procedure Act 1997* and the *Civil Procedure Rules 1998* (CPR). The general intention behind the CPR is to improve access to justice and reduce the cost of litigation, including the use of judicial case management. The essential principle underlying judicial case management is active judicial involvement in progressing litigation to encourage appropriate resolution as quickly as possible, whether by way of settlement or a hearing before a court. This principle was accepted by the Working Group on a Courts Commission¹⁵ and the Committee on Court Practice and Procedure recommended in 2003 that any future Rules of Court should enable the development of case management.¹⁶ The Order 63A procedure can be seen as the first example of enabling case management.

(2) New Case Management Procedure

4.19 Case management structures form one of the central tenets of Order 63A. Provision is made for a case management conference which may be convened on the order of the judge or on the application of either of the parties.¹⁷ The aim of this would be “to ensure that the proceedings are prepared for trial in a manner which is just, expeditious and likely to minimise the cost of the proceedings”.¹⁸ The conference would be chaired and regulated by a judge. In

¹⁴ See Lord Woolf, *Access to Justice, Interim Report* (1995) and Lord Woolf, *Access to Justice, Final Report* (1996). Both reports are available on the website of the United Kingdom’s Department of Constitutional Affairs (until 2003, the Lord Chancellor’s Department): www.dca.gov.uk.

¹⁵ See Working Group on a Courts Commission, *Second Report: Case Management and Court Management* (1996), its *Working Paper: Conference on Case Management* (1997) and its *Sixth Report: Conclusion with Summary* (1998). The Working Paper, which contains the papers delivered at the Working Group’s 1996 conference on case management, and the Sixth Report, are available on the Courts Service website, www.courts.ie.

¹⁶ Committee on Court Practice and Procedure, 28th Interim Report, *The Court Rules Committees* (2003) at 51, available on the Courts Service website, www.courts.ie.

¹⁷ Order 63A rule 14(1); Order 63A, rule 14(8).

¹⁸ Order 63A, rule 14(7).

preparation for the conference a case booklet containing a case summary should be compiled by the plaintiff or applicant.¹⁹ This is to be lodged with the Registrar and served on the other party or parties no less than four days prior to the conference.²⁰ With a view to moving the proceedings along speedily and taking account of any agreement between the parties, the judge chairing the conference may fix a timetable for the completion of the preparation of the case for trial.²¹ Undue delay by either party may lead to a call from the judge for an explanation; as a result, the judge may “give such ruling or direction as he may consider appropriate for the purposes of expediting the proceedings or the conduct thereof”.²² Where any document, in part or in whole, is considered unnecessary or prolix, a costs penalty may ensue.²³ Likewise, any failure to comply with time limits may result in attributable costs being awarded in favour of the other party.²⁴

4.20 In addition to these initiatives, Order 63A focuses directly on the role of the judge as the manager from the outset of proceedings. Thus at the initial directions stage rule 6 equips the judge with a number of tools designed to make proceedings more efficient, namely:

- (i) direction for a pre-trial exchange of memoranda between the parties “for the purpose of clarifying issues”,²⁵
- (ii) direction for a suspension of proceedings for a period not exceeding 28 days to allow for inter-party “mediation, conciliation or arbitration”,²⁶
- (iii) direction for an estimation by the parties as to the likely duration of proceedings.²⁷

¹⁹ Order 63A, rule 14(2).

²⁰ Order 63A, rule 14(9).

²¹ Order 63A, rule 15(a).

²² Order 63A, rule 15(c).

²³ Order 63A, rule 15(d).

²⁴ Order 63A, rule 15(e).

²⁵ Order 63A, rule 6(1)(iv).

²⁶ Order 63A, rule 6(1)(xiii).

4.21 The judge may also direct that a concise written submission be lodged by the parties to a motion or application with the Registrar not less than one clear day prior to the date of the hearing of the motion or application.²⁸

4.22 It is likely that Order 63A will inject a substantial degree of pro-active judicial involvement into relevant judicial review proceedings and will endow the presiding judge with express power to take a ‘hands on’ approach to case management. If this results in the speedier dispatch of commercial judicial review proceedings, as was advocated by the Supreme Court in *Orange Communications Ltd v Director of Telecommunications Regulation (No 2)*,²⁹ it would be a welcome development.

(3) Report Recommendation

4.23 *The Commission commends the introduction of judicial case management in large commercial claims by Order 63A of the Rules of the Superior Courts 1986 and supports the recommendation of the Committee on Court Practice and Procedure that Rules of Court should enable the general development of case management.*

E Reading Time

(1) Consultation Paper Recommendation

4.24 The Consultation Paper recommended that the judges charged with administering the judicial review list (the lead judge and the other judicial nominees) should be granted reading time to help them manage the system more efficiently thereby reducing the delay between the substantive hearing and the delivery of judgment.³⁰

²⁷ Order 63A, rule 6(2).

²⁸ Order 63A, rule 8.

²⁹ [2000] 4 IR 159, 202 – 203.

³⁰ Consultation Paper paragraph 4.24.

(2) *Arguments*

4.25 Reading days could help reduce delay further by removing the requirement of opening affidavits in court. Were affidavits to be read in advance of the hearing with the opportunity for counsel to draw attention to particular features in open court, the practice of reading *verbatim* from a document (which could easily be made available to the judge) in the courtroom, a practice which developed long before the age of photocopying, could be replaced. Keane CJ in *Orange Communications Ltd v Director of Telecommunications Regulation (No. 2)* referred to the desirability of removing the reading of certain documents from the courtroom where he observed, with regard to the delays incurred in that case:

“If and when the issues had been identified in pleadings and discovery limited to those issues duly made, a preliminary conference between the judge, counsel and solicitors should have ensured that the issues were clearly understood and that the judge was provided well in advance of the hearing with the relevant documents – and only the relevant documents – so as to avoid the immensely time consuming process of documents being read in court during the opening and indeed throughout the giving of the evidence.”³¹

4.26 The Consultation Paper considered that such a change would not conflict with the constitutional imperative pursuant to Article 34.1 that justice be administered in public.³²

³¹ [2000] 4 IR 159, 202 – 203.

³² Consultation Paper paragraph 4.23. Note the comments of Geoghegan J in the recent case of *O'Dwyer v Boyd* [2003] 1 ILRM 112. The appellants, who represented themselves, had raised a query as to the manner in which affidavits had been presented in the High Court. Although this did not constitute a stateable ground of appeal, Geoghegan J clarified the position for the appellants as follows (at 118):

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

4.27 A recommendation to introduce the concept of reading days might be questioned on the basis of the capacity of judicial resources at current levels to cope with the added demand. It might be claimed that to remove judges from their work in the courtroom would slow down further an already over-burdened system. However such an objection seems rather short-sighted. The saving in court time brought about by removing the opening of affidavits from open court (with all the time-consuming protocol that entails) may in particular cases outweigh the time lost as a result of reading time.

(3) Report Recommendation

4.28 *The Commission recommends that affidavits need not necessarily be read in open court. To facilitate this, the judges on the judicial review list should be permitted sufficient time to allow affidavits to be read in chambers. This would reduce the time of court hearings and so contribute to reducing the period of delay between the substantive hearing and the delivery of judgment.*

F Preparation of Judgments

4.29 Notoriously, judicial review applications are, in comparison with other areas of the law, of a high level of complexity. Necessarily therefore, judicial review applications involve a high proportion of written judgments. Accordingly, it is arguable that judges on the judicial review list should be afforded additional ‘writing days’.

4.30 At the same time, it must be conceded that the main thrust of this Report is towards encouraging the speedy hearing and resolution of cases. Yet, in contrast with reading days, which it is submitted would save time,³³ the concept of setting aside time specifically for the preparation of judgments would entail no direct and corresponding gain to compensate for the judicial time lost save those instances where the time necessary to complete a judgment

See also MacGonagle *Media Law* (2nd ed Roundhall 2003) where, drawing on comments from the President of the High Court (*The Irish Times*, September 17, 2002), the author writes:

“The President of the High Court has said that judges reading documents in private to save time are not strictly administering justice in public. Affidavits read in such a way, he said, should be treated as read in open court and should be made available to the press.”

³³ See paragraphs 4.24 - 4.28 above.

increases considerably the further one moves from the event. With this in mind, the Commission here merely notes the need for judges on the judicial review list to be allocated time during court hours to write judgments, as and when resources become available for this.

G Time Limits for Filing

(1) Consultation Paper Recommendation

4.31 The Consultation Paper recommended that in *ex parte* applications for leave, papers should be filed at least two clear days in advance of the hearing although this rule could be waived in urgent applications.³⁴

(2) Arguments

4.32 This recommendation stems from a concern to ensure that the court has a real opportunity to consider the papers in advance of the application for leave. Where a hearing is scheduled for Monday, the papers should be filed by the preceding Wednesday.

4.33 This time limit should not become so rigid as to constitute a potential instrument for injustice. Thus, in the event of an urgent application of leave to apply for judicial review, the court could exercise its discretion to extend or waive this period for filing.

4.34 The Consultation Paper also noted that written submissions at the substantive hearing are also subject to time limits, and must be lodged seven days in advance of the hearing.³⁵ It was pointed out that

³⁴ Consultation Paper paragraph 4.29.

³⁵ Consultation Paper paragraph 4.26. Practice Direction 26 February 1993 reads:

“Practitioners are requested to lodge with the registrar seven days in advance of the hearing of the notice of motion for judicial review a bound book containing the following documents

1. copy notice of motion;
2. copy order granting leave to make application for judicial review;
3. copy grounding statement (notice of application);
4. copy verifying affidavit;
5. copy exhibits;

counsel should be encouraged to submit succinct but comprehensive, well-drafted submissions, with a view to the possibility of *ex tempore* judgments which would minimise, to a degree, the delay between the hearing of the case and the judgment.³⁶

(3) Report Recommendation

4.35 *The Commission recommends that in ex parte applications for leave, where the application is to be heard on a Monday, papers should be filed by the preceding Wednesday, or otherwise two clear days in advance of the hearing. This requirement should be waived in urgent applications and should be provided for in the Rules of Court or by practice direction.*

4.36 *It is also recommended that written legal submissions filed in accordance with the ruling practice direction should be as succinct but as comprehensive as possible and should be filed in sufficient time to allow the court a real opportunity to consider the contents of such submissions.*

H Pro Forma Timetable

(1) Consultation Paper Recommendation

4.37 The Commission in its Consultation Paper recommended the introduction of a *pro forma* timetable for the post-leave stage. This would grant the respondent 28 days to file a statement of opposition followed by a further 28 days within which the applicant could respond; these periods would be open to extension where good and sufficient reason is established. Those in default would face a costs order.³⁷

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6. copy affidavits verifying statement of opposition (if any);
 7. affidavit of personal service of motion, statement, affidavit and order giving leave on all parties to be served (Order 84, rule 22 (5));
 8. in applications for order of *certiorari* copy of order/decision subject of application verified by affidavit (if not already exhibited above) (See Order 84, rule 26(2)).”

³⁶ This should be read in light of paragraph 4.29 above. It is submitted that the number of written judgments in applications for judicial review will remain proportionately high.

³⁷ Consultation Paper paragraph 4.35.

(2) Discussion

4.38 At present Order 84, rule 22(4) of the *Rules of the Superior Courts 1986* permits the respondent seven days within which to file a statement of opposition to an application for judicial review.³⁸ It was accepted in the Consultation Paper³⁹ that this period is unrealistically short and that it is, as a consequence, observed most frequently in the breach.

4.39 Nonetheless, it smacks of anomaly to have a strict system of time limits in place for the pre-leave stage and none at all (in practice) post-leave. In order for time limits to work effectively and to achieve their aims, there should be a degree of consistency as between the two.

4.40 Thus a period of 28 days was recommended in the Consultation Paper for a respondent to file a statement of opposition following a grant of leave to apply for judicial review. This would be followed up with a further 28 days within which the applicant would be expected to respond.

4.41 Concerns have been raised about the rigidity of this approach. Would not a set 28 day two-way timetable fail to account for the wide range of issues subject to judicial review? Certain straightforward cases might easily lend themselves to a short period; on the other hand, more complicated applications might require a period longer than 28 days for the filing of a statement of opposition or response.

4.42 As an alternative to the fixed 28 day timetable, it has been suggested to the Commission that the *ad hoc* approach adopted by some judges in their administration of the judicial review list should

³⁸ Order 84, rule 22(4) reads:

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

³⁹ Consultation Paper paragraph 4.33.

be advocated. Under this model, time limits would be fixed on an individual basis to each case by the judge after hearing counsel, with later extensions being granted only in very exceptional circumstances.

4.43 Upon consideration of these alternatives, the Consultation Paper opted for the fixed period. While an *ad hoc* approach may have worked admirably in the past, the Commission is of the view that its open-ended nature might expose it to claims of injustice based on arbitrariness and inconsistency from judge to judge. Although a predictable rejoinder might note that discretion to extend could give way to equal scope for injustice, it is submitted that a 28 day limit would act as a valuable guide even in the minority of cases which might reasonably fail to comply with the timetable.

4.44 While fully aware of the varying degrees of complexity of cases subject to judicial review (which will often affect the time required), it is submitted that the Consultation Paper's recommendation, including as it does, the possibility of extension is sufficiently flexible to take account of this concern. It is accepted that although, in most instances, 28 days should be an adequate period for the respondent and applicant to act respectively, there will be a minority of cases requiring longer periods. Thus where the party seeking an extension of the time limits can establish good and sufficient reason for such extension, the court should have the discretion so to grant an extension or abridgement of time.

4.45 With a view to ensuring compliance with this timetable, the party in default of the rule should be fixed with a costs order.

(3) Report Recommendation

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

I Procedural Exclusivity

(1) Introduction

4.47 Judicial review procedure is replete with procedures safeguarding the special position of public bodies when faced with administrative challenges. These obstacles often take the form of additional hurdles above and beyond those applicable to plenary actions. Many of these procedural safeguards such as the leave stage and time limits have already been discussed in this Report.

4.48 The difficulties for an applicant arising from these hurdles may work as an incentive for a litigant to avoid judicial review procedure and instead to cast his claim as a plenary summons thereby avoiding the inbuilt procedural strictures of any judicial review application and rendering the public body protections redundant.

4.49 A counter to such an attempt at avoidance must take the general form of shepherding ‘public law’ claims into the avenue marked ‘applications for judicial review’. How to do this in practice and, in particular, how to define ‘public law’ raises substantial difficulties. An overly rigid application of the exclusivity principle may lead to a strict procedural mindset which inflicts undue harshness on an applicant. The public/private distinction is a notoriously difficult one to negotiate and recourse to a rigid system of rules may be open to claims of procedural formalism.

4.50 This Report will deal with the area of procedural exclusivity under two headings:

- (i) procedural conversion;
- (ii) procedural choice.

4.51 Procedural conversion, which was dealt with in the Consultation Paper,⁴⁰ refers to proceedings which begin as a judicial review application and end as a plenary summons, or *vice versa*, the conversion having occurred mid-proceedings.

4.52 The latter category covers a scenario where a plaintiff chooses the procedure strictly applicable to plenary summons to litigate a public law issue by seeking a declaration.

⁴⁰ Consultation Paper paragraphs 4.36 – 4.44.

(2) Procedural Conversion

(a) Consultation Paper Recommendation

4.53 The Consultation Paper recommended that, in appropriate cases, recourse should be had to Order 84, rule 26(5) in order to ensure efficiency and to prevent unnecessary (and avoidable) delays on the judicial review list.⁴¹

(b) Discussion

4.54 Order 84, rule 26(5) reads:

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

4.55 The *Rules of the Superior Court 1986* therefore clearly envisage a judicial discretion to convert proceedings begun by way of an application for judicial review into a plenary summons. Without the flexibility provided for by rule 26(5), an applicant (who has already adhered to the more stringent Order 84 procedure) having chosen the wrong procedural route would be forced to abandon the current action and to reinstitute the same proceedings under plenary summons. This might help nobody and could lead to the prospect of a fresh application being brought with further cost in terms of time and expense.

4.56 It has been noted by Hogan and Morgan⁴² that “no converse power” to that contained in Order 84, rule 26(5) exists whereby proceedings commenced by way of plenary summons may be converted into judicial review proceedings as to do so would facilitate the circumvention of the restrictions contained in Order 84.

⁴¹ Consultation Paper paragraph 4.44.

⁴² Hogan and Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 789.

(3) Report Recommendation

4.57 *The Commission is satisfied that, in appropriate cases, recourse should be had to Order 84, rule 26(5) of the Rules of the Superior Courts 1986, in order to ensure efficiency and to prevent unnecessary and avoidable delays in the judicial review list.*

(4) Procedural Choice

4.58 This area provides for much more heated debate as is evidenced by the divergent, unsettled positions it has provoked. Speaking very generally, we can say that an application for judicial review is designed to cater for public law issues (leaving aside for the moment any attempt to define this difficult category). But is this an exclusive system? In other words, may a plaintiff who wishes to do so, for whatever reason, litigate a public law controversy by way of plenary proceedings for a declaration? If so, then the appalling vista opens up of a by-pass which circumvents all of the features of application for judicial review designed to protect the special position of the respondent such as time limits, rules regarding undertakings as to damages and even the requirement as to leave itself.

4.59 This is, of course, the bloc of law which in England marches under the banner of *O'Reilly v Mackman*⁴³ where the House of Lords held that exclusive jurisdiction for judicial review applications lay under Order 53 of the *Rules of the Superior Courts 1977*.⁴⁴ Where the applicant seeking a declaration had in this case eschewed the Order 53 procedure in favour of proceeding by way of plenary summons, it was held that this constituted an abuse of process and the action should have been struck out on that basis. Lord Diplock maintained that any other finding could negate the policy that challenges to the validity of an administrative action should be determined in an expeditious manner.⁴⁵ Since then the courts in England have resiled somewhat from the House of Lords' strict

⁴³ [1983] 2 AC 237.

⁴⁴ The English equivalent of Order 84 of the *Rules of the Superior Courts* governing procedure for judicial review applications.

⁴⁵ [1983] 2 AC 237, 284.

approach in *O'Reilly v Mackman* choosing, instead to adopt a more flexible approach.⁴⁶

4.60 Where it has arisen in cases in this jurisdiction, the Irish courts have generally sought to distance themselves from the *O'Reilly v Mackman* stance. Thus in *O'Donnell v Dun Laoghaire Corporation*⁴⁷ Costello J held that an applicant would not be barred from obtaining declaratory relief simply by failing to seek an order of *certiorari* since the court cannot decide as a matter of public policy that litigants who ask the courts to exercise their statutory discretion are acting in abuse of process. With regard to Lord Diplock's concerns about the expeditious manner in which administrative challenges should be brought, Costello J held that this problem could be avoided by applying Order 84 time limits to plenary actions by analogy:

“[I]n considering the effects of delay in a plenary action there are now persuasive reasons for adopting the principles enshrined in Order 84, rule 21 relating to delay in applications for judicial review, so that if the plenary action is not brought within the three months from the date on which the cause of action arose the court would normally refuse relief unless it is satisfied that had the claim been brought under Order 84, time would have been extended.”⁴⁸

Thus in practice the distance between the approaches of the House of Lords in *O'Reilly v Mackman* and Costello J is much less than might at first appear, at least with regard to time limits.

4.61 A greater divergence from the *O'Reilly v Mackman* approach is apparent in the judgment from the more recent Irish case of *Landers v An Garda Síochána Complaints Board*.⁴⁹ The applicants

⁴⁶ The application of the notion of procedural exclusivity has more recently been relaxed by the English courts: *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705; *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1994] 3 WLR 409; *Mercury Communications v Director General of Telecommunications* [1996] 1 All ER 574. See Bradley *Judicial Review* (Round Hall 2000) at 98 – 103 and generally at 77 – 103.

⁴⁷ [1991] ILRM 301.

⁴⁸ *Ibid* at 314.

⁴⁹ [1997] 3 IR 347.

had been granted leave by the High Court to commence judicial review proceedings by way of plenary summons against four respondents. Subsequently two further respondents, the Director of Public Prosecutions and the chief executive of the respondent board, who had not been included as respondents to the *ex parte* application for leave, were joined to the proceedings. Kelly J cited Costello J's judgment in *O'Donnell* as authority for there being no *O'Reilly v Mackman*-type approach in Irish law and went on to hold that challenges to the procedural route chosen were bound to fail. Serious misgivings were expressed regarding the procedural route chosen by the applicants:

“By not including these persons as respondents to the *ex parte* application for leave to apply for judicial review, they avoided having to demonstrate to the court that they had satisfied the necessary standard of proof for such leave to be granted as far as the Director of Public Prosecutions and Mr Hurley (the chief executive of the board) were concerned.”⁵⁰

As Kelly J explained, the applicants had avoided the time limits of Order 84, rule 21(1) as regards the case against the two respondents joined at the plenary stage:

“The application for judicial review was made on the 9th December, 1994, and the complaint is made in respect of a decision of the Director of Public Prosecutions of the 15th June, 1998. Order 84, r. 21 requires that an application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when the grounds for the application first arose unless the court considers that there is good reason for extending the period. An extension of time of over six years would have been required in this case. The necessity to obtain such an extension was avoided by the plaintiffs adopting the course they did.”⁵¹

However, despite setting out a lengthy quotation from Costello J's judgment in *O'Donnell* on the point, no express consideration was given to extending by analogy the Order 84 time limits to the present case.

⁵⁰ [1997] 3 IR 347, 355.

⁵¹ *Ibid* at 355 – 356.

4.62 Thus there exists a degree of uncertainty as to the time limits in such cases. Moreover, Costello J's adroit approach does not take into account all of the evils against which *O'Reilly* is directed. The protection offered by the leave stage might still be side-stepped by an applicant who chooses to take an administrative challenge by way of plenary summons.⁵²

4.63 In this there is undoubtedly a question of conceptual interest. It may, one day, become a question of practical importance. However, it is *par excellence* the sort of issue which is best developed only where there is some judicial experience to give guidance.

4.64 On balance, it seems to the Commission that there are too few straws to make a brick and that for the Commission to rush in would be to establish legal policy without the benefit of judicial or legal experience and argument. In short, the time is not ripe and we need do no more here than mark this as a subject which may need more attention in the future.

J Discovery

(1) Consultation Paper Recommendation

4.65 The Consultation Paper recommended that on balance, the current practice in relation to discovery is operating satisfactorily, achieving the necessary balance between the various elements.⁵³

(2) Competing Interests

4.66 Order 84, rule 25 of the *Rules of the Superior Courts 1986* reads:

“Any interlocutory application may be made to the Court in proceedings on an application for judicial review ...”

An interlocutory application is to be read as including an order under Order 31 dealing with discovery.

4.67 Applications for orders of discovery require a careful balance to be struck between the interests of the parties involved; those made in the course of judicial review applications are no

⁵² See Hogan and Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 793 – 794.

⁵³ Consultation Paper paragraph 4.47.

exception. While unlimited access to the archives of a public body may please the individual applicant, it is unlikely to serve the interests of others and probably not the public interest which favours the speedy conclusion of public body decisions.

4.68 From an applicant's perspective, the inspection of certain documentation may be vital so that there is a fair opportunity to substantiate the case at hand. The respondent will often be in possession of this material and will usually be unwilling to volunteer it. In judicial review applications, it is arguable that there is a particular duty on a public body which has collected and held this information on the applicant's case, to disclose the documents in these circumstances. On this reading, the level of transparency expected from a public body is above and beyond that applicable to other respondents.

4.69 On the other hand, judicial review proceedings tend, by their nature, not to lend themselves to extensive orders of discovery. As Finlay Geoghegan J noted in *Kennedy Ayaya v Minister for Justice, Equality and Law Reform*:

“It is ... inherent in the nature of judicial review that the necessity for discovery will be more difficult to establish than in plenary proceedings. This follows from the fact that in judicial review at issue is the legality of the decision challenged. In many instances the facts are not in dispute. Discovery will normally but not exclusively be confined to factual issues in dispute.”⁵⁴

4.70 Indeed, the courts have frequently restated the requirement that there need be a link between the matter in dispute at full hearing and the material sought by way of discovery. The classic statement of the need for this link is to be found in the judgment of Brett LJ in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Company*:

“It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit

⁵⁴ High Court (Finlay Geoghegan J) 2 May 2003, at 9.

either to advance his own case or to damage the case of his adversary.”⁵⁵

An overly generous approach by the courts runs the risk of unfairly exposing public authorities to what are commonly referred to as ‘fishing expeditions’. If the link between the grounds of application and the order is not sufficiently tight, there is a danger that the applicant will attempt to use the array of documents obtained as an investigative, rather than as an evidential tool. As was held by McCracken J in *Hannon v Commissioner of Public Works*: “... a party may not seek discovery of a document in order to find out whether the document may be relevant. A general trawl through the other parties’ documentation is not permitted under the rules”.⁵⁶

(3) Testing the Link

4.71 How this link is to be adjudged lies at the interface of these competing interests. There appears to be no general formula with which to decide this issue and the tests proposed differ only by way of degree.

4.72 The test for Brett LJ in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Company* was one of reasonableness:

“The question must be whether from the description either in the first affidavit itself or in the list of documents referred to in the first affidavit or in the pleadings of the action, there are still documents in the possession of the party making the first affidavit which, it is not *unreasonable* to suppose, do contain information which may, either directly or indirectly, enable the party requiring a further affidavit either to advance his own case or to damage the case of his adversary.”⁵⁷

4.73 After citing Brett LJ as above, McCracken J in *Hannon v Commissioners of Public Works*,⁵⁸ distilled from the case of *Bula*

⁵⁵ (1882) 11 QBD 55, 63.

⁵⁶ High Court (McCracken J) 4 April 2001, at 4.

⁵⁷ (1882) 11 QBD 55, 63.

⁵⁸ High Court (McCracken J) 4 April 2001, at 3.

*Limited (in receivership) v Crowley*⁵⁹ the principle that: “The Court must decide *as a matter of probability* as to whether any particular document is relevant to the issues to be tried”.

4.74 The Court of Appeal of Northern Ireland in *Re Rooney’s Application* set the bar a touch higher still:

“In an application for judicial review it can quite frequently be seen when the affidavits have been filed that the applicant has not established any *prima facie* ground for impugning the decision-making process. The courts have consistently refused to order discovery in such cases, by imposing a limitation on the extent to which it will be permitted ...”⁶⁰

But while the “general tenor” of Carswell LJ’s approach was recently accepted in this jurisdiction by Ó Caoimh J in *Shortt v Dublin City Council*,⁶¹ the High Court also on that occasion cited the *Hannon* approach of probability.⁶²

4.75 Overall, the difference between the tests of reasonableness, probability and *prima facie* link may be limited. As the recent Supreme Court judgment in *Carlow/Kilkenny Radio Ltd v Broadcasting Commission of Ireland*⁶³ makes clear, there is no settled test to be applied to an application for discovery. Geoghegan J cited the following *dicta* of Bingham MR from *R v Secretary of State for Health, ex parte Hackney London Borough* as representing the law in this jurisdiction:

“The basic approach is that discovery and production will be ordered in judicial review proceedings where they are necessary for disposing fairly of the application but not otherwise. The rules themselves provide no guidance as to when discovery should be treated as necessary for disposing fairly of an action or application, but over the years a practice has developed, the broad principles of which are

⁵⁹ [1991] 1 IR 220.

⁶⁰ [1995] NI 398, 415.

⁶¹ High Court (Ó Caoimh J) 21 February 2003, at 22.

⁶² *Ibid* at 21.

⁶³ Supreme Court (Geoghegan J) 31 July 2003, at 10 – 11.

clearly understood, even if the application of those principles inevitably gives rise to controversy in individual cases. It is undesirable to attempt any precise definition of the existing practice, but I think it is broadly true to say that discovery will be regarded as necessary for disposing fairly of the action, or application, if a party raises a factual issue of sufficient substance to lead the court to conclude that it may, or will, be unable to try the issue fairly, fairly that is to all parties, without discovery of documents bearing on the issue one way or the other.”⁶⁴

4.76 This degree of linkage would seem to require the establishment of at least a *prima facie* case. Thus the Supreme Court in *Carlow/Kilkenny Radio Ltd v Broadcasting Commission of Ireland* refused to grant an order of discovery where no such case was made out.⁶⁵ Geoghegan J echoed this finding in another Supreme Court judgment delivered on the same day where again the lack of a *prima facie* case proved fatal to an application for an order of discovery.⁶⁶

4.77 It is clear, therefore, that a party to judicial review proceedings will not be granted discovery for the asking, but must establish the link that the document sought has to either the substantiation or refutation of the grounds pleaded. This general trend towards tightening up the grounds on which discovery will be granted goes some way towards making the court process more efficient and less costly and ultimately helps to expedite the conclusion of public body decisions.

(4) Report Recommendation

4.78 *The Commission is satisfied that current practice in relation to discovery is operating satisfactorily, and achieves the necessary balance between the various elements. Accordingly the Commission recommends no change.*

⁶⁴ Court of Appeal (Civil Division) 29 July 1994, at 9.

⁶⁵ Supreme Court 31 July 2003, at 14.

⁶⁶ *Kilkenny Community Communications Cooperative Society Ltd v Broadcasting Corporation of Ireland* Supreme Court 31 July 2003, at 12.

CHAPTER 5 SINGLE ORDER

(1) Introduction

5.01 In the 1979 Working Paper the Commission recommended that a procedure of a ‘single order for judicial review’ be introduced. However, this reform proposal did not form part of the recommendations adopted in the 1986 amendment to the Rules of the Superior Courts.

5.02 The issue discussed in this chapter is whether the six traditional remedies in judicial review (*certiorari*, *mandamus*, *quo warranto*, prohibition, declaration and injunction) ought to be replaced by a single order for judicial review.

(2) Consultation Paper Recommendation

5.03 The Consultation Paper recommended that the distinctions between the six remedies available in judicial review proceedings should not be collapsed so as to create a procedure involving a ‘single order’.

5.04 The Commission did, however, reiterate the recommendation contained in its 1979 Working Paper, *Judicial Review of Administration Action: The Problem of Remedies*,¹ that the remedy of *quo warranto* be abolished.²

(3) Consideration of Proposal for Reform

(a) ‘Single Order for Judicial Review’

5.05 The essential point is that, since it is now possible for a court to award whichever remedy it considers appropriate,³ the difference between the remedies (which is so rich in antiquarian learning) might, on one view, be regarded as serving no purpose.

¹ (Working Paper No 8 1979).

² Consultation Paper paragraphs 5.21 – 5.22.

³ Introduced by Order 84, rule 19.

Indeed, these orders draw with them a large degree of unnecessary learning, verbiage and inaccessibility for non-lawyers, students and practitioners alike.⁴

5.06 As against this, it might be thought that in considering the proposal for reform of the present law by replacing the six discrete traditional remedies with the single remedy of an order for judicial review it would still remain necessary to refer to the traditional remedies in the Rules of the Superior Courts, in order to delimit the scope of judicial review. This might be said to render these proposals susceptible to the accusation of admitting by the back door that which was ceremoniously expelled at the front door. However, by now this is probably more a theoretical danger than a practical one; it is most unlikely that the argument in relation to the scope of judicial review would be resolved by reference to the technicalities of the old remedies. Rather it would be decided by such matters as the proper scope of public law, bearing in mind the character of the function and institution under review.

⁴ “Danckwerts was a rotund man, of considerable girth, with a red face, pleasant enough in repose, but liable to assume a truculent expression if he found any obstinate contention, or foolish costumacy towards his expressed opinion. He made no suavity of manner, his voice was aggressive, and his sense of humour limited.

Soon after Lord Alverstone was made Lord Chief Justice, a case was being arranged about Crown Office practice, in which branch of the Law Danckwerts was a zealous expert, and a question arose which sort of writ ought to be issued: *mandamus*, *quo warranto* or *prohibition*. Lord Alverstone expressed the opinion that something should be done quickly in the matter, as ‘all these remedies were much the same thing’, and adjourned the matter for the right one to be applied.

Above the din and bustle of the Court, Danckwerts was heard solemnly soliloquizing, in the back row, in slow and measured tones: ‘*Mandamus*, a writ in the King’s name commanding a specified act to be done. *Quo warranto*, a writ against a person or corporation that usurps a franchise. *Prohibition*, a writ to forbid any Court to proceed. And the Lord Chief Justice of England thinks that all these remedies are much the same thing. Oh Lord!’

There were cries of ‘Order’ by the usher, counsel started a new case hurriedly, and Lord Alverstone gazed at the ceiling.”

Extract from *The Oxford Book of Legal Anecdotes* (Oxford University Press, 1989), edited by Michael Gilbert, at 90.

5.07 Commenting on the distinction between the various judicial review remedies, Hogan and Morgan conclude that probably the main distinction between the individual remedies is that in relation to time limits.⁵ The time limit within which *certiorari* must be sought is six months, while all other remedies have a time limit of three months.⁶ However, assuming that the Commission's recommendation to establish a uniform time limit for all remedies were adopted, then this objection would fall away.⁷

5.08 The primary reason for retaining the present system is that to abolish the separate orders and recommend their replacement with a single order would encourage an amorphous approach to drafting in judicial review proceedings, whereby the papers as filed might not necessarily disclose the specific nature of the remedy sought. In the light of the emphasis on the issues of expedition, clarity and efficiency in judicial review proceedings, such a result would clearly be undesirable and contradict much of the focus of this paper.

5.09 Accordingly the Commission is satisfied that the case for retaining the traditional distinctions between the remedies comprising an 'order for judicial review' is stronger than the case for their abolition.

(b) *Quo Warranto*

5.10 While the Commission was agreed that the proposal to abolish the distinctions between the separate remedies should not be adopted, one issue on which consensus was apparent is in relation to the individual remedy of *quo warranto*. In its 1979 Working Paper,⁸ the Commission recommended the abolition of the remedy of *quo warranto*, although this recommendation was not adopted in the formulation of Order 84 of the *Rules of the Superior Courts 1986*.

5.11 The order of *quo warranto* derives from the old writ of the same name which was a means of determining whether someone who

⁵ Hogan & Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 692-694.

⁶ Order 84, rule 21(1) *Rules of the Superior Courts 1986*.

⁷ See paragraphs 2.44 – 2.45 above.

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

claimed an office, franchise or liberty was entitled to it. As Kenny J observed in *Garvey v Ireland*:

“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.”⁹

5.12 However, in 1979 the Commission stated that “no application for such an order has been made for many years, and it would appear to be obsolescent, if not indeed obsolete”.¹⁰ Thus, it has been suggested that those proceedings formerly raising issues which would have been determinable pursuant to the remedy of *quo warranto* would now be dealt with by way of declaratory relief, namely by seeking a declaration that the office had not been lawfully filled and an injunction to restrain the purported office-holder from acting. As the Commission concluded in 1979, “[t]his being so, it seems unnecessary – and a possible source of confusion – to retain the separate procedure by way of *quo warranto*”.¹¹

(4) Recommendation

5.13 *The Commission is satisfied that there would be little, if anything, to be gained by collapsing the distinction between the six remedies available in judicial review proceedings, to a procedure involving a ‘single order’; specifically, the Commission accepts*

⁹ [1981] IR 75, 113. As the Commission noted in 1979, “this procedure could also be used where the ground of challenge was the lack of qualification for office of the person appointed, rather than the way the vacancy had been brought about”; see, for example *R (Moore) v Moriarty* [1915] 2 IR 375.

¹⁰ Law Reform Commission *Judicial Review of Administrative Action: The Problem of Remedies* (Working Paper No 8 1979) at 73. Indeed, there have been no reported cases in which the remedy of *quo warranto* has been sought since the publication of the 1979 Report, lending credence to the description of the remedy as “obsolete”. See also Hogan and Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 691.

¹¹ Law Reform Commission *Judicial Review of Administrative Action: The Problem of Remedies* (Working Paper No 8 1979) at 73. The remedy of *quo warranto* was abolished in England by section 9 of the *Administration of Justice (Miscellaneous Provisions) Act 1938*.

concerns that such reform could have adverse consequences for court time and also for public bodies as respondents.

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

CHAPTER 6 SUMMARY OF RECOMMENDATIONS

Chapter 1 Leave Stage

6.01 Currently the leave stage is a mandatory element in all judicial review proceedings. The Commission recommends the retention of this system. [paragraph 1.23]

6.02 In conventional judicial review proceedings the leave stage is typically conducted on an *ex parte* basis. There exists, however, a judicial discretion to conduct the hearing *inter partes*. The Commission recommends the retention of this discretion which should be exercised on an exceptional basis only. The leave stage in statutory judicial review proceedings is, at present, held on an *inter partes* basis. The Commission recommends the creation of a judicial discretion to conduct these proceedings *ex parte*. [paragraphs 1.35 - 1.36]

6.03 At the leave stage a successful applicant must at present establish an ‘arguable case’ in conventional judicial review proceedings and ‘substantial grounds’ where the proceedings are taken by way of statutory judicial review. The Commission recommends the retention of these standards regardless of whether the application is conducted on an *ex parte* or *inter partes* basis. [paragraph 1.54]

6.04 Regarding the issue of alternative remedies, the Commission commends the approach taken by O’Higgins CJ in *State (Abenglen Properties Ltd) v Dublin Corporation* [1984] IR 381, 393, where he held that the existence of a right of appeal or an alternative remedy ought not automatically to preclude the possibility of a court granting relief by way of judicial review. It is a matter best decided on at the

discretion of the court taking into account all the circumstances of the case. [paragraph 1.59]

6.05 The Commission recommends that amendments should be permitted to the grant of leave, in both conventional and statutory judicial review, where the material upon which such amendments are based was not or could not have been discovered with reasonable diligence at the time, provided that there is no unacceptable delay in making the application. [paragraph 1.67]

6.06 In the event of an application to set aside a grant of leave, the Commission commends the approach taken by McGuinness J in *Adam v Minister for Justice, Equality and Law Reform* [2001] 2 ILRM 452, 469, that “the exercise of the court’s inherent jurisdiction to discharge orders giving leave should ... be used only in exceptional cases”. Where the application for leave is conducted *inter partes*, the respondent should not be permitted to seek to have the grant of leave set aside unless there is a change in circumstances such as to render the substantive hearing nugatory. [paragraphs 1.73 – 1.74]

6.07 The Commission recommends the retention of the current system whereby under certain schemes of statutory judicial review, in order to appeal a refusal of a grant of leave, the applicant must obtain a certificate from the High Court. It is recommended that the High Court, in granting such a certificate, should set out the specific grounds of appeal. It is further recommended that a refusal of such a certificate should be reviewable by a single judge of the Supreme Court. [paragraphs 1.90 – 1.91]

Chapter 2 Time Limits

6.08 Order 84, rule 21(1) of the *Rules of the Superior Courts 1986* sets out the time limits applicable to conventional judicial review proceedings. It reads:

“An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*, unless

the Court considers that there is good reason for extending the period within which the application shall be made.”

6.09 The Commission recommends that it is important to stress that the onus lies on the applicant to establish good reason to extend time. Lack of prejudice should not, in and of itself, be sufficient to satisfy this onus. Instead the issue of prejudice should be regarded as one of a number of factors to be weighed up in deciding the question of an extension of time and where prejudice exists it should not, in itself, foreclose the possibility of an extension. [paragraphs 2.19 – 2.21]

6.10 Regarding the special time limits allowed where the relief sought is an order of *certiorari*, the Commission recommends the abolition of the current distinction. To this end it is recommended that reference to *certiorari* be erased from Order 84, rule 21(1) of the *Rules of the Superior Courts 1986*. It is further recommended that the three month time limit in Order 84, rule 21(1) be abolished in favour of a standard limit of six months which would remain subject to the requirement of promptness and open to the possibility of an extension where the court considers that there is good reason. [paragraphs 2.44 – 2.45]

6.11 When dealing with the time limits prescribed by the various schemes of statutory judicial review, the Report focuses on section 5(2)(a) of the *Illegal Immigrants (Trafficking) Act 2000* which currently allows for a period of 14 days within which to make an application to apply for judicial review, this fixed period being accompanied by judicial discretion to extend where good and sufficient reason is established. The Commission recommends that this fixed time limit be extended to 28 days subject to the same equitable discretion on the part of the court to extend as at present. [paragraph 2.35]

Chapter 3 Costs

6.12 The Commission recommends that in appropriate cases, the courts should make greater use of their discretion in relation to the issue of costs at the leave stage. Specifically, the Commission suggests that greater use should be made of the possibility of apportioning the costs of the leave stage to allow recovery of costs

only in relation to those grounds successfully argued or challenged. [paragraph 3.10]

6.13 Order 99, rule 1 of the *Rules of the Superior Courts 1986* leaves the issue of costs entirely at the discretion of the court. Where the court considers that an unsuccessful applicant's case involves a point of general public importance, this discretion may be invoked to insulate the applicant from an order of costs. The Commission recognises the importance of the court's discretion in this regard and accordingly recommends no change to the current law. [paragraph 3.16]

6.14 Where a successful judicial review application involves a respondent judge and where the error was made *bona fide* and the application was unopposed, the Commission recommends that costs, appropriately taxed, be awarded out of a central fund. [paragraph 3.20]

6.15 The Commission recommends that the jurisdiction of the courts in relation to pre-emptive costs should be exercised only in exceptional circumstances and that, where any doubt exists, the court should instead simply indicate the approach to be taken in relation to costs at the conclusion of the judicial review proceedings. [paragraph 3.38]

6.16 Orders for security for costs are typically made in relation to foreign applicants and companies. However, the courts also have jurisdiction to make an order for security for costs against an individual within the jurisdiction in certain circumstances. The Commission is satisfied that the current system in relation to security for costs in the context of judicial review proceedings is operating satisfactorily and is sufficiently flexible to allow the court to make an order which is fair in the circumstances of each individual case. [paragraph 3.52]

6.17 Laffoy J in *Broadnet Ireland Ltd v Office of the Director of Telecommunications Regulation* held that in the exercise of its jurisdiction under Order 84, rule 20(6) of the *Rules of the Superior Courts 1986* in relation to undertakings as to damages, the court

should consider whether such an undertaking is necessary “in the interests of justice”. The Commission recommends this approach as a means of providing a useful and measured basis upon which the courts’ jurisdiction to require an undertaking as to damages should operate. [paragraph 3.58]

Chapter 4 Case Organisation

6.18 The Commission recommends that prior to the application for leave to apply for judicial review, the would-be applicant should send a letter to the opposing side informing them that failure to concede the claim within ten days will result in leave being sought to apply for judicial review. While this procedure should not be mandatory, failure to issue such a letter may be taken into account when determining costs, save where the failure to comply with this procedure is attributable to the fact that the making of the application for leave was a matter of justifiable or demonstrable urgency. [paragraph 4.08]

6.19 The Commission recommends that a minimum of three judges from the High Court be nominated by the President of the High Court to administer the judicial review list, with one judge to act as ‘lead judge’ with overall responsibility for the list and a minimum of two other judges available to hear cases from the judicial review list. If sufficient judges are not available to meet this recommendation, then it is suggested that consideration be given to the appointment of sufficient judges to fulfil this recommendation. [paragraph 4.15]

6.20 Order 63A of the *Rules of the Superior Courts 1986* introduces a specialised case management procedure to be used in cases coming before the Commercial Court. The Commission commends these developments and supports the recommendation of the Committee on Court Practice and Procedure that Rules of Court should enable the general development of case management. [paragraph 4.23]

6.21 The Commission recommends that affidavits need not necessarily be read in open court. To facilitate this, the judges on the judicial review list should be permitted sufficient time to allow affidavits to be read in chambers. This would reduce the time of

court hearings and so contribute to reducing the period of delay between the substantive hearing and the delivery of judgment. [paragraph 4.28]

6.22 The Commission recommends that in *ex parte* applications for leave, where the application is to be heard on a Monday, papers should be filed by the preceding Wednesday, or otherwise two clear days in advance of the hearing. This requirement should be waived in urgent applications and should be provided for in either the Rules of Court or by practice direction. It is further recommended that written legal submissions filed in accordance with the ruling practice direction should be as succinct but as comprehensive as possible and should be filed in sufficient time to allow the court a real opportunity to consider the content of such submissions. [paragraphs 4.35 – 4.36]

6.23 The Commission recommends the introduction of a *pro forma* timetable to operate once the applicant has obtained an order granting leave to apply for judicial review. The respondent should be required to file a statement of opposition within 28 days and the applicant should file any reply within a further 28 days. These time limits should not be extended save where there is good and sufficient reason. Failure to comply with this procedure should be subject to the imposition of a costs order against the party in default. [paragraph 4.46]

6.24 Under Order 84, rule 26(5) of the *Rules of the Superior Courts 1986* the court may convert proceedings commenced by way of judicial review into plenary summons. The Commission is satisfied that, in appropriate cases, recourse should be had to Order 84, rule 26(5) in order to ensure efficiency and to prevent unnecessary and avoidable delays in the judicial review list. [paragraph 4.57]

6.25 The courts have typically exercised caution in granting orders of discovery in judicial review proceedings. The Commission is satisfied that current practice in relation to discovery is operating satisfactorily and achieves the necessary balance between the various elements. [paragraph 4.78]

Chapter 5 Single Order

6.26 The Commission is satisfied that there would be little, if anything, to be gained by collapsing the distinction between the six remedies available in judicial review proceedings, into a procedure involving a ‘single order’; specifically, the Commission accepts concerns that such reform could have adverse consequences for court time and also for public bodies as respondents. [paragraph 5.13]

6.27 The Commission is satisfied that the remedy of *quo warranto* no longer serves any purpose and should any cases arise in future which would formerly have been dealt with by way of *quo warranto*, the extant remedies of declaration and injunction would be sufficient to remedy the complaint. The Commission therefore reiterates the recommendation in its 1979 *Working Paper on Judicial Review* that the remedy of *quo warranto* be abolished. [paragraph 5.14]

**APPENDIX A DRAFT RULES OF THE SUPERIOR
COURTS 1986 AS AMENDED¹**

Order 84 Judicial Review and Orders Affecting Personal Liberty

1. (1) Orders of habeas corpus, orders of certiorari, orders of mandamus, orders of prohibition and orders of attachment shall be witnessed in the name of the Chief Justice or, if the office of Chief Justice be vacant, in the name of the President of the High Court, sealed with the seal of the High Court and bearing date of the day of issue.

(2) The expression "order of habeas corpus" does not include an order made pursuant to Article 40 section 4 of the Constitution.

(3) Every order referred to in this rule shall be served personally on the person to whom it is directed, unless the Court otherwise directs.

I. *Habeas Corpus*.

2. An application for an order of *habeas corpus ad subjiciendum* shall be by motion *ex-parte* for a conditional order.

3. Unless the Court shall otherwise direct

(a) the application for an order of *habeas corpus ad subjiciendum* shall be on affidavit which shall be entitled shortly in the matter in question and in the matter of the Habeas Corpus Act, 1782,

¹ The rules in bold print are those where proposed amendments have been made.

(b) No order of *habeas corpus ad subjiciendum* shall be granted where the validity of any warrant, committal order, conviction or record shall be questioned, unless at the time of moving a copy of such warrant, committal order, conviction or record verified by affidavit be produced to the Court, or the absence thereof accounted for to the satisfaction of the Court.

4. The order of *habeas corpus ad subjiciendum* shall be served personally on the person to whom it is directed, unless the Court shall otherwise direct. If the order is directed to a jailer or other public official, it shall be served by leaving it with him or his servant or agent at the place of confinement or restraint, or in such manner as the Court may direct.

5. The Court may, on the motion to make absolute notwithstanding cause shown, order either that the body of the person detained be produced before the Court or that such person be released from such detention.

6. Every conditional order of habeas corpus shall be filed in the Central Office and served together with a copy of the grounding affidavit (if any) within ten days from the day the same shall be pronounced, unless further time is allowed by the Court, and in default thereof such conditional order shall stand discharged.

7. Unless the conditional order shall otherwise direct, cause shall be shown within ten days after service thereof.

8. Where cause is shown it shall be by affidavit. The affidavit shall in addition to the facts deposed to, state concisely the grounds relied on as cause. The affidavit shall be filed in the Central Office and notice of filing shall be served on the applicant or his solicitor within the time allowed for showing cause.

9. (1) Where cause has been shown as aforesaid the applicant may apply to the Court by motion on notice to make absolute the conditional order, in whole or in part notwithstanding the cause shown.

(2) Notice of such motion shall be served on the party showing cause or his solicitor within six days after service by him of a notice

of filing in pursuance of rule 8 or, where cause is shown by more than one party then within six days of the service of the last of such notices, and if such notice of motion shall not be served on such party he shall be entitled to an order of course allowing the cause shown and directing that his costs of showing cause be taxed and paid by the applicant.

10. Where cause has not been shown in the manner and within the time aforesaid the applicant shall on filing an affidavit of service of the conditional order and a certificate that no cause has been shown, be entitled to obtain a side bar order making the conditional order absolute (unless the conditional order shall have otherwise directed).

11. The return to the order of habeas corpus, where the body is not produced, shall be by affidavit to be made by the party to whom the order is directed and shall contain such full answer to the allegation that the person is detained as the circumstances may require.

12. If an order of habeas corpus is disobeyed by the person to whom it is directed, application may be made to the Court, on an affidavit of service and disobedience, for an attachment for contempt. In vacation an application may be made to the Court for a warrant for the apprehension of the person in contempt to be brought before the Court to be bound over to appear at the next ensuing sittings, to answer for his contempt, or to be committed to prison for want of bail.

13. An application to bring up a prisoner to give evidence in any cause or matter, civil or criminal, before any Court, may be made to the Court on affidavit.

II. *Attachment for Contempt.*

14. An application for an order of attachment for contempt shall be made by motion *ex-parte*.

III. *Bail.*

15. (1) An application for bail by a person in custody shall be by motion on notice to the Chief State Solicitor grounded on the affidavit of the applicant.

(2) Proceedings shall be entitled:

THE HIGH COURT

IN THE MATTER OF A BAIL APPLICATION

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

.V.

AT PRESENT PENDING IN THE COURT

AT

or to the appropriate effect.

(3) Where an applicant has no solicitor, the Court may dispense with the necessity for a notice of motion and affidavit, and in lieu thereof shall give all appropriate directions including a direction that the applicant be brought before the Court on a date and at a time to be specified, of which the Chief State Solicitor shall be notified, and for the purpose of giving such directions, the Court may hear the applicant.

(4) References to the Director of Public Prosecutions shall, where appropriate, be deemed to include references to the Attorney General.

IV. Recognizances.

16. Every recognizance acknowledged on the removal of an order, or other proceeding, or for the appearing or answering of any party in the Court, or for good behaviour shall, after the acknowledgement thereof, be transmitted to the Central Office and filed there.

17. No recognizance shall be forfeited or estreated without an order of the Court. Notice of application for any such order shall be served on the parties by whom such recognizances shall have been given.

V. *Judicial review.*

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

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

- (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition, certiorari, or quo warranto,
- (b) the nature of the persons and bodies against whom relief may be granted by way of such order, and
- (c) all the circumstances of the case,

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

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

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

(2) An application for such leave shall, subject to rule 2(A), be made by motion *ex parte* grounded upon—

- (a) a notice in Form No.13 in Appendix T containing a statement of:
 - (i) the name, address and description of the applicant,
 - (ii) the relief sought and the grounds upon which it is sought,

- (iii) the name and registered place of business of the applicant's solicitors (if any), and
 - (iv) the applicant's address for service within the jurisdiction (if acting in person); and
- (b) an affidavit which verifies the facts relied on.

Such affidavit shall be entitled:—

THE HIGH COURT

JUDICIAL REVIEW

BETWEEN

A.B. APPLICANT

AND

C.D. RESPONDENT

(2)(A) The Court may in exceptional circumstances direct that an application for leave be made by motion on notice.²

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

(4) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates and can establish an arguable case.³

(5) Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceeding which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the

² See paragraph 1.35 above.

³ See paragraph 1.54 above.

application for leave until the appeal is determined or the time for appealing has expired.

(5)(A) The Court may in exceptional circumstances set aside the grant of leave.⁴

(6) If the Court grants leave, it may impose such terms as to costs as it thinks fit and may require an undertaking as to damages where the interests of justice so require.⁵

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

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

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

21. (1) An application for leave to apply for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.⁶

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

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

⁴ See paragraphs 1.73 – 1.74 above.

⁵ See paragraph 3.58 above.

⁶ See paragraphs 2.44 – 2.45 above.

22. (1) An application for judicial review shall be made by originating notice of motion unless the Court directs that it shall be made by plenary summons.

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

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

(4) Any respondent who intends to oppose the application for judicial review by way of motion on notice shall file in the Central Office a statement setting out concisely the grounds for such opposition and, if any facts are relied on therein, an affidavit verifying such facts. Such respondent shall serve a copy of such statement and affidavit (if any) on all parties not later than 28 days from the date of service of the notice of motion unless the Court considers that there is good and sufficient reason for extending this period. The statement shall include the name and registered place of business of the respondent's solicitor (if any).⁷

(4)(A) Any applicant who intends to reply to the statement of opposition referred to in rule 20(4) shall file such reply within a further 28 days.⁸

⁷ See paragraph 4.46 above.

⁸ See paragraph 4.46 above.

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

(6) If on the hearing of the motion or summons the Court is of opinion that any person who ought, whether under this rule or otherwise, to have been served has not been served, the Court may adjourn the hearing on such terms (if any) as it may direct in order that the notice or summons may be served on that person.

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

(2) The Court may, on the hearing of the motion or summons, allow the applicant or the respondent to amend his statement, whether by specifying different or additional grounds of relief or opposition or otherwise, on such terms, if any, as it thinks fit to do justice between the parties and may allow further affidavits to be used if they deal with new matters arising out of an affidavit of any other party to the application.⁹

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

24. (1) On an application for judicial review the Court may, subject to paragraph (2), award damages to the applicant if —

(a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates, and

⁹ See paragraph 1.67 above.

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

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

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

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

26. (1) On the hearing of any motion or summons under rule 22, any person who desires to be heard in opposition to the motion or summons, and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of the motion or the summons.

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

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

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

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

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

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

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

**APPENDIX B DRAFT SECTION 5(2), ILLEGAL
IMMIGRANTS (TRAFFICKING) ACT 2000
AS AMENDED¹**

Section 5 (2) An application for leave to apply for judicial review under the Order in respect of any of the matters referred to in *subsection (1)* shall—

(a) be made within the period of 28 days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the Order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and²

(b) be made by motion on notice (grounded in the manner specified in the Order in respect of an *ex parte* motion for leave) to the Minister and any other person specified for that purpose by order of the High Court, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed.

¹ The section in bold print is where proposed amendments have been made.

² See paragraph 2.35 above.

**APPENDIX C MISCELLANEOUS DRAFT AMENDMENTS
TO STATUTORY JUDICIAL REVIEW
SCHEMES**

An amended section 50 of the *Planning and Development Act 2000* is set out here in order to illustrate by way of example how the recommendations contained in this Report would fit into the statutory schemes. To this end, it is intended that the proposed amendments below be applied *mutatis mutandis* to the various schemes of statutory judicial review.

Planning and Development Act 2000¹

Section 50.—(1) Where a question of law arises on any appeal or referral, the Board may refer the question to the High Court for decision.

(2) A person shall not question the validity of—

(a) a decision of a planning authority—

- (i) on an application for a permission under this Part, or
- (ii) under [section 179](#),

(b) a decision of the Board—

- (i) on any appeal or referral,
- (ii) under [section 175](#), or
- (iii) under *Part XIV*,

otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts ([S.I. No. 15 of 1986](#)) ("the Order").

¹ The sections in bold print are where proposed amendments have been made.

(3) The Board or any party to an appeal or referral may, at any time after the bringing of an application for leave to apply for judicial review of a decision of a planning authority, apply to the High Court to stay the proceedings pending the making of a decision by the Board in relation to the appeal or referral concerned, and the Court may, where it considers that the matter is within the jurisdiction of the Board, make an order on such terms as it thinks fit.

(4) (a) (i) Subject to *subparagraph (iii)*, application for leave to apply for judicial review under the Order in respect of a decision referred to in *paragraph (a) (i)* or *(b) (i)* of *subsection (2)*, shall be made within the period of 8 weeks commencing on the date of the decision of the planning authority or the Board, as the case may be.

(ii) Subject to *subparagraph (iii)*, application for leave to apply for judicial review under the Order in respect of a decision referred to in *paragraph (a) (ii)* or *(b) (ii)* or *(iii)* of *subsection (2)*, shall be made within the period of 8 weeks commencing on the date on which notice of the decision was first published.

(iii) The High Court shall not extend the period referred to in *subparagraph (i)* or *(ii)* unless it considers that there is good and sufficient reason for doing so.

(b) An application for leave to apply for judicial review shall be made by motion (grounded in the manner specified in the Order in respect of a motion for leave)—²

(i) if the application relates to a decision referred to in *paragraph (a)* of *subsection (2)*, to the planning authority concerned and, with regard to a decision on an application for permission under this Part, to the applicant for the permission where he or she is not the applicant for leave,

(ii) if the application relates to a decision referred to in *subparagraph (i)* of *subsection (2)(b)*, to the Board and each party or each other party, as the case may be, to the appeal or referral,

² See paragraph 1.36 above.

(iii) if the application refers to a decision referred to in *subparagraph (ii)* or *(iii)* of *subsection (2)(b)*, to the Board and the planning or local authority concerned, and

(iv) to any other person specified for that purpose by order of the High Court,

and leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed, and that the applicant has a substantial interest in the matter which is the subject of the application.

(c) Without prejudice to the generality of *paragraph (b)*, leave shall not be granted to an applicant unless the applicant shows to the satisfaction of the High Court that—

(i) the applicant—

(I) in the case of a decision of a planning authority on an application for permission under this Part, was an applicant for permission or is a prescribed body or other person who made submissions or observations in relation to the proposed development,

(II) in the case of a decision of a planning authority under [section 179](#), is a prescribed body or other person who made submissions or observations in relation to the proposed development,

(III) in the case of a decision of the Board on any appeal or referral, was a party to the appeal or referral or is a prescribed body or other person who made submissions or observations in relation to that appeal or referral,

(IV) in the case of a decision of the Board under [section 175](#), is the planning authority which applied for approval, or is a prescribed authority or other person who made submissions or observations under *subsection (4)* or *(5)* of that section, or

(V) in the case of a decision of the Board under *Part XIV*, is a local authority that proposes to acquire land or to carry out a scheme or proposed road development or is a person who made objections, submissions or observations in relation to that proposal,

or

(ii) in the case of a person (other than a person to whom *clause (I), (II), (III), (IV) or (V)* applies), there were good and sufficient reasons for his or her not making objections, submissions or observations, as the case may be.

(d) A substantial interest for the purposes of *paragraph (b)* is not limited to an interest in land or other financial interest.

(e) A Member State of the European Communities or a state which is a party to the Transboundary Convention shall not be required, when applying for leave to apply for judicial review of a decision referred to in *paragraph (c)*, to comply with the requirements of that paragraph.

(f) (i) The determination of the High Court of an application for leave to apply for judicial review, or of an application for judicial review, shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case, except with the leave of the High Court, which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court. Where such a grant of leave to appeal is certified, the High Court shall specify the grounds upon which the leave is granted.³

(ii) This paragraph shall not apply to a determination of the High Court, in so far as it involves a question as to the validity of any law, having regard to the provisions of the Constitution.

(iii) The refusal of the High Court to certify a grant of leave to appeal to the Supreme Court shall be subject to review by a single judge of the Supreme Court.⁴

³ See paragraph 1.90 above.

⁴ See paragraph 1.91 above.

(g) Where an application is made for judicial review under this section in respect of part only of a decision referred to in *subsection (2)*, the High Court may, if it thinks fit, declare to be invalid or quash the part concerned or any provision thereof without declaring to be invalid or quashing the remainder of the decision or part of a decision, and if the Court does so, it may make any consequential amendments to the remainder of the decision or part of a decision that it considers appropriate.

(h) References in *subsection (2)* and this subsection to the Order shall be construed as including references to the Order as amended or re-enacted (with or without modification) by rules of court.

(5) (a) Where an application is made for leave to apply for judicial review, or an application is made for judicial review, in respect of—

(i) a decision by a planning authority under [section 34](#) of a class in relation to which the Minister has given a direction under [section 126\(5\)](#),

(ii) a decision of the Board on an appeal of a decision of a class in relation to which the Minister has given a direction under [section 126\(5\)](#),

(iii) a decision of a planning authority referred to in *subsection (2)(a)(ii)*, or

(iv) a decision of the Board referred to in *subsection (2)(b)(ii)* or *(iii)*,

the High Court shall, in determining the application, act as expeditiously as possible consistent with the administration of justice.

(b) The Supreme Court shall act as expeditiously as possible consistent with the administration of justice in determining any appeal made in respect of a determination by the High Court of an application referred to in *paragraph (a)*.

(c) Rules of court may make provision for the expeditious hearing of an application referred to in *paragraph (a)*.

**APPENDIX D MATTERS SUITABLE FOR PRACTICE
DIRECTION AND SUGGESTED
PRACTICAL MEASURES**

Draft Practice Directions

(1) *Costs at the leave stage*

In their overall discretion as to the issue of costs at the leave stage of judicial review proceedings, the courts should consider the apportionment of costs so as to allow for recovery of costs only in relation to those grounds successfully argued or challenged.¹

(2) *Points of General Importance*

In their overall discretion as to the issue of costs, the courts may decide not to make an order of costs against an unsuccessful applicant and in exceptional cases an order of costs could be made against a successful respondent, where the court considers that an issue of sufficient general public importance is at stake.²

(3) *Pre-Emptive Costs Orders*

The jurisdiction of the courts to award pre-emptive costs should be exercised only in exceptional circumstances.³

(4) *Security for Costs*

The court's jurisdiction to make an order of security for costs should be invoked as it thinks fit.⁴

¹ See paragraph 3.10 above.

² See paragraph 3.16 above.

³ See paragraph 3.38 above.

⁴ See paragraph 3.52 above.

(5) *Early Settlement*

Prior to the application for leave to apply for judicial review, the would-be applicant should send a letter to the opposing side informing them that failure to concede the claim within ten days will result in leave being sought to apply for judicial review. Failure to issue such a letter may be taken into account when determining costs, save where the failure to comply with this procedure is attributable to the fact that the making of the application for leave was a matter of justifiable or demonstrable urgency.⁵

(6) *Time Limits for Filing*

In *ex parte* applications for leave to apply for judicial review, where the application is to be heard on a Monday, papers should be filed by the preceding Wednesday, or otherwise two clear days in advance of the hearing. This requirement should be waived in urgent applications.⁶

Suggested Practical Measures

(1) *High Court Specialisation*

A minimum of three judges from the High Court should be nominated by the President of the High Court to administer the judicial review list, with one judge to act as ‘lead judge’ with overall responsibility for the list and a minimum of two other judges available to hear cases from the judicial review list.⁷

(2) *Reading Time*

Judges on the judicial review list should be permitted sufficient reading time to allow affidavits to be read in chambers where necessary.⁸

⁵ See paragraph 4.08 above.

⁶ See paragraph 4.35 above.

⁷ See paragraph 4.15 above.

⁸ See paragraph 4.28 above.

**APPENDIX E LIST OF LAW REFORM COMMISSION
PUBLICATIONS**

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

Working Paper No 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse (December 1978)	€1.27
Working Paper No 6-1979, The Law Relating to Seduction and the Enticement and Harboursing of a Child (February 1979)	€1.90
Working Paper No 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979)	€1.27
Working Paper No 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (December 1979)	€1.90
Second (Annual) Report (1978/79) (Prl 8855)	€0.95
Working Paper No 9-1980, The Rule Against Hearsay (April 1980)	€2.54
Third (Annual) Report (1980) (Prl 9733)	€0.95
First Report on Family Law – Criminal Conversation, Enticement and Harboursing of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981)	€2.54

Working Paper No 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (September 1981)	€2.22
Fourth (Annual) Report (1981) (PI 742)	€0.95
Report on Civil Liability for Animals (LRC 2-1982) (May 1982)	€1.27
Report on Defective Premises (LRC 3-1982) (May 1982)	€1.27
Report on Illegitimacy (LRC 4-1982) (September 1982)	€4.44
Fifth (Annual) Report (1982) (PI 1795)	€0.95
Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983)	€1.90
Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (November 1983)	€1.27
Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (December 1983)	€1.90
Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (December 1983)	€3.81
Sixth (Annual) Report (1983) (PI 2622)	€1.27

Report on Nullity of Marriage (LRC 9-1984) (October 1984)	€4.44
Working Paper No 11-1984, Recognition of Foreign Divorces and Legal Separations (October 1984)	€2.54
Seventh (Annual) Report (1984) (PI 3313)	€1.27
Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985) (April 1985)	€1.27
Report on Vagrancy and Related Offences (LRC 11-1985) (June 1985)	€3.81
Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12-1985) (June 1985)	€2.54
Report on Competence and Compellability of Spouses as Witnesses (LRC 13-1985) (July 1985)	€3.17
Report on Offences Under the Dublin Police Acts and Related Offences (LRC 14-1985) (July 1985)	€3.17
Report on Minors' Contracts (LRC 15-1985) (August 1985)	€4.44
Report on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (LRC 16-1985) (August 1985)	€2.54

Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors (LRC 17-1985) (September 1985)	€3.81
Report on the Liability in Tort of Mentally Disabled Persons (LRC 18-1985) (September 1985)	€2.54
Report on Private International Law Aspects of Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage (LRC 19-1985) (October 1985)	€4.44
Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decrees, and the Hague Convention on the Celebration and Recognition of the Validity of Marriages (LRC 20-1985) (October 1985)	€2.54
Eighth (Annual) Report (1985) (PI 4281)	€1.27
Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries (LRC 21-1987) (September 1987)	€5.71
Consultation Paper on Rape (December 1987)	€7.62
Report on the Service of Documents Abroad re Civil Proceedings -the Hague Convention (LRC 22-1987) (December 1987)	€2.54
Report on Receiving Stolen Property (LRC 23-1987) (December 1987)	€8.89

Ninth (Annual) Report (1986-1987) (PI 5625)	€1.90
Report on Rape and Allied Offences (LRC 24-1988) (May 1988)	€3.81
Report on the Rule Against Hearsay in Civil Cases (LRC 25-1988) (September 1988)	€3.81
Report on Malicious Damage (LRC 26-1988) (September 1988)	€5.08
Report on Debt Collection: (1) The Law Relating to Sheriffs (LRC 27- 1988) (October 1988)	€6.35
Tenth (Annual) Report (1988) (PI 6542)	€1.90
Report on Debt Collection: (2) Retention of Title (LRC 28-1988) (April 1989)	€5.08
Report on the Recognition of Foreign Adoption Decrees (LRC 29-1989) (June 1989)	€6.35
Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989) (June 1989)	€6.35
Consultation Paper on Child Sexual Abuse (August 1989)	€12.70
Report on Land Law and Conveyancing Law: (2) Enduring Powers of Attorney (LRC 31-1989) (October 1989)	€5.08

Eleventh (Annual) Report (1989) (PI 7448)	€1.90
Report on Child Sexual Abuse (LRC 32-1990) (September 1990)	€8.89
Report on Sexual Offences against the Mentally Handicapped (LRC 33-1990) (September 1990)	€5.08
Report on Oaths and Affirmations (LRC 34-1990) (December 1990)	€6.35
Report on Confiscation of the Proceeds of Crime (LRC 35-1991) (January 1991)	€7.62
Consultation Paper on the Civil Law of Defamation (March 1991)	€25.39
Report on the Hague Convention on Succession to the Estates of Deceased Persons (LRC 36-1991) (May 1991)	€8.89
Twelfth (Annual) Report (1990) (PI 8292)	€1.90
Consultation Paper on Contempt of Court (July 1991)	€25.39
Consultation Paper on the Crime of Libel (August 1991)	€13.97
Report on the Indexation of Fines (LRC 37-1991) (October 1991)	€8.25
Report on the Civil Law of Defamation (LRC 38-1991) (December 1991)	€8.89

Report on Land Law and Conveyancing Law: (3) The Passing of Risk from Vendor to Purchaser (LRC 39-1991) (December 1991); (4) Service of Completion Notices (LRC 40-1991) (December 1991)	€7.62
Thirteenth (Annual) Report (1991) (PI 9214)	€2.54
Report on the Crime of Libel (LRC 41-1991) (December 1991)	€5.08
Report on United Nations (Vienna) Convention on Contracts for the International Sale of Goods 1980 (LRC 42-1992) (May 1992)	€10.16
Report on the Law Relating to Dishonesty (LRC 43-1992) (September 1992)	€25.39
Land Law and Conveyancing Law: (5) Further General Proposals (LRC 44-1992) (October 1992)	€7.62
Consultation Paper on Sentencing (March 1993)	€25.39
Consultation Paper on Occupiers' Liability (June 1993)	€12.70
Fourteenth (Annual) Report (1992) (PN 0051)	€2.54
Report on Non-Fatal Offences Against The Person (LRC 45-1994) (February 1994)	€25.39
Consultation Paper on Family Courts (March 1994)	€12.70

Report on Occupiers' Liability (LRC 46-1994) (April 1994)	€7.62
Report on Contempt of Court (LRC 47-1994) (September 1994)	€12.70
Fifteenth (Annual) Report (1993) (PN 1122)	€2.54
Report on the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (LRC 48-1995) (February 1995)	€12.70
Consultation Paper on Intoxication as a Defence to a Criminal Offence (February 1995)	€12.70
Report on Interests of Vendor and Purchaser in Land during the period between Contract and Completion (LRC 49-1995) (April 1995)	€10.16
An Examination of the Law of Bail (LRC 50-1995) (August 1995)	€12.70
Sixteenth (Annual) Report (1994) (PN 1919)	€2.54
Report on Intoxication (LRC 51-1995) (November 1995)	€2.54
Report on Family Courts (LRC 52-1996) (March 1996)	€12.70
Seventeenth (Annual) Report (1995) (PN 2960)	€3.17

Report on Sentencing (LRC 53-1996) (August 1996)	€10.16
Consultation Paper on Privacy: Surveillance and the Interception of Communications (September 1996)	€25.39
Report on Personal Injuries: Periodic Payments and Structured Settlements (LRC 54-1996) (December 1996)	€12.70
Eighteenth (Annual) Report (1996) (PN 3760)	€7.62
Consultation Paper on the Implementation of The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993 (September 1997)	€12.70
Report on The Unidroit Convention on Stolen or Illegally Exported Cultural Objects (LRC 55-1997) (October 1997)	€19.05
Report on Land Law and Conveyancing Law; (6) Further General Proposals including the execution of deeds (LRC 56-1998) (May 1998)	€10.16
Consultation Paper on Aggravated, Exemplary and Restitutory Damages (May 1998)	€19.05
Nineteenth (Annual) Report (1997) (PN 6218)	€3.81

Report on Privacy: Surveillance and the Interception of Communications (LRC 57-1998) (June 1998)	€25.39
Report on the Implementation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993 (LRC 58-1998) (June 1998)	€12.70
Consultation Paper on the Statutes of Limitation: Claims in Contract and Tort in Respect of Latent Damage (Other Than Personal Injury) (November 1998)	€6.35
Twentieth (Annual) Report (1998) (PN 7471)	€3.81
Consultation Paper on Statutory Drafting and Interpretation: <i>Plain Language and the Law</i> (LRC CP14-1999) (July 1999)	€7.62
Consultation Paper on Section 2 of the Civil Liability (<i>Amendment</i>) Act, 1964: <i>The Deductibility of Collateral Benefits from Awards of Damages</i> (LRC CP15-1999) (August 1999)	€9.52
Report on Gazumping (LRC 59-1999) (October 1999)	€6.35
Twenty First (Annual) Report (1999) (PN 8643)	€3.81
Report on Aggravated, Exemplary and Restitutionary Damages (LRC 60-2000) (August 2000)	€7.62

Second Programme for examination of certain branches of the law with a view to their reform: 2000-2007 (PN 9459) (December 2000)	€6.35
Consultation Paper on the Law of Limitation of Actions arising from Non-Sexual Abuse Of Children (LRC CP16-2000) (September 2000)	€7.62
Report on Statutory Drafting and Interpretation: <i>Plain Language and the Law</i> (LRC 61-2000) (December 2000)	€7.62
Report on the Rule against Perpetuities and Cognate Rules (LRC 62-2000) (December 2000)	€10.16
Report on the Variation of Trusts (LRC 63-2000) (December 2000)	€7.62
Report on The Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury) (LRC 64-2001) (March 2001)	€7.62
Consultation Paper on Homicide: The Mental Element in Murder (LRC CP17-2001) (March 2001)	€6.35
Seminar on Consultation Paper: Homicide: The Mental Element in Murder (LRC SP 1-2001)	
Twenty Second (Annual) Report (2000) (PN 10629)	€3.81

Consultation Paper on Penalties for Minor Offences (LRC CP18-2002) (March 2002)	€5.00
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