Strasbourg, 14 March 2005

CDL-UDT(2005)015
Eng.only

T-03-2005

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

UNIDEM
Campus Trieste Seminar

"ADMINISTRATIVE JUSTICE
AND INTER-MINISTERIAL COMMUNICATION
WITHIN PUBLIC ADMINISTRATION"

Trieste - Italy
14 – 18 March 2005

REPORT

"ADMINISTRATIVE JUSTICE SYSTEM: IRISH EXPERIENCE"

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1. PURPOSE OF THE PAPER

1.1 I take administrative justice to refer to the requirement that the State in its interactions with citizens should act in a manner that is lawful, reasonable and procedurally fair. To examine the way in which administrative justice works it is necessary to look at what occurs at the interface between the individual citizen and government.

1.2 For the purposes of this paper I am looking at four areas, firstly, and very briefly, how, in Ireland, government is regulated internally. I will then look at the measures which have been voluntarily adopted in order to facilitate the individual in his or her interaction with the administration. Certain specific steps have been taken to seek to balance the rights of the individual and those of the Administration and this paper looks at these. Finally the paper will examine how the courts have enforced administrative justice through judicial review.

1.3 In order to describe the Irish experience in administrative justice it is proposed to

- give you some relevant background information
- describe the legislation and other governmental measures taken to reform the Administration
- describe also measures adopted to assist the individual in his or her contact with the Administration
- describe the grounds for judicial review of administrative actions, giving you examples in respect of each ground.

2. BACKGROUND

2.1 Common law attributes

2.1.1 Ireland has a common law system which we inherited from the British. As you know in the common law system the principal sources of law are legislation and judge made law [1].

2.1.2 We share with the UK other features of the common law such as the system of adversarial court proceedings and the requirement for oral hearings. We also share the principle of parliamentary sovereignty where Parliament – made up in our case of a house of representatives called the Dail, a senate, or Seanad and the President – has, subject to the Constitution, the sole power to make and unmake any law.

2.2 The role of the Constitution

2.2.1 On becoming independent in 1922 Ireland adopted a written Constitution. This was replaced some 15 years later, in 1937, by a very similar Constitution which is the one in place today. You will be aware that in the United Kingdom there is no written Constitution and thus the written Constitution became for Ireland a symbol of independence. The Constitution is the fundamental law of the State and takes precedence over all other sources of law. The adoption of a written Constitution containing fundamental principles of how the State is to be governed

[1] Custom and the commentaries of scholars can also drawn upon, but that is usually the exception.

and also guaranteeing basic rights breaks completely from the British tradition of an unwritten, and somewhat flexible, constitution.

2.2.2 I will be referring frequently to our Constitution. I should therefore at the outset explain why it is so very important. In order to amend the Constitution it is necessary to hold a referendum. The People need to be persuaded of the benefit of change. We have instances where the Government has proposed a number of amendments at the same time and the People approved some and rejected others.

2.2.3 Constitutional referenda are relatively frequent. You may recall that constitutional amendments necessary to allow the State to ratify the Treaty of Nice was rejected when first put to the People. Following another referendum the amendment was adopted.

2.2.4 The Constitution plays a significant role in legal life in Ireland – any common law rule or provision in legislation which conflicts with the Constitution is invalid and of no legal effect. The Constitution then, governs all the sources of law and is itself a source of law. The higher courts in Ireland have the obligation, where this is claimed, to rule on the constitutionality of legislation. Thus, they make law not only to fill in gaps left by legislation and in its interpretation, but also in interpreting the Constitution. The priority of sources of law in Ireland is the Constitution, followed then by legislation enacted by our Parliament. Judge made law as a source of law is subservient to legislation and applies only where legislation does not cover the point at issue.

2.2.5 Under Irish law any individual affected by a law or an administrative decision can, if he or she believes the legislation or act to have been unconstitutional, challenge the law or decision on that ground. If a court finds that a law is unconstitutional, the law falls immediately. Similarly, if an administrative action is found to have been done in breach of the Constitution, the action is invalid. The Constitution and an activist judiciary mean that constitutional challenges are quite frequent.

2.2.6 The Constitution is not just something which lawyers debate. Perhaps it is the number of referenda for its amendment that we have had which itself has generated interest. The frequency of challenges to the constitutionality of legislation or an administrative act – and the reporting of those court cases in the media - also ensures that the Constitution remains to the fore in people's minds.

2.2.7 It might be worth mentioning here a consequence of the principle of Parliamentary sovereignty which is that save for the possibility of subordinate bodies such as local authorities who may be authorised by Parliament to enact legislation in their areas, all legislation comes from Parliament. Parliament may, however, delegate to the Government or a Minister the power to make delegated legislation to give effect to the principles and polices set out in the primary legislation.

2.3 The development of Administrative Law

2.3.1 Administrative law is not a cohesive system in Ireland. The reason for this lies in British history. By the 17th century a system had begun to evolve built around the Council which advised the King – the Privy Council - for the supervision of the operation of the lower courts. The Judicial Committee of the Privy Council – eventually called the Star Chamber – did, however, become the focus of revolutionary anger. Thus, when the parliamentarians won the

Civil War, the Star Chamber and any prospect of a system of administrative courts was set aside. Subsequently, Professor Dicey - a very respected legal commentator - reported on the French system of *droit administratif* in such negative terms that any prospects for the development of administrative law in the UK in the 19th century were defeated [2].

2.3.2 What we now have is a patchwork of administrative justice, drawn from the sources I have mentioned – the Constitution, legislation, and judge made law. Until recently issues have been addressed as they have arisen. Recent reform of the public service, however, have been aimed at improving the balance of rights between individuals and the State authorities.

2.4 Local Government

2.4.1 In Ireland we do not have a strong regional tradition. This comes partly from the structures we inherited from the UK but also arises from the small size of the country. Local government is, therefore, perhaps not as significant to daily life as it is in other, larger countries whose regions have for centuries had their own traditions.

2.4.2 Local authorities in Ireland are local branches of the Irish Government responsible for the provision of some local public services. They are elected every five years.

2.4.3 Local authorities current expenditure is financed from payments from the provision of services, e.g. waste disposal charges, planning permission fees, rents on property etc. commercial rates which are charges made on commercial premises and central Government grants. Local authorities are left discretion as to how to spend the grant from the central Government. The dependence of local authorities on central Government grants makes them quite dependent upon Central Government.

2.4.4 Irish local authorities have a narrow range of functions compared to other countries and these are mainly infrastructural. In most areas the policies are set by Central Government with local authorities executing those policies.

2.4.5 Local authorities provide and maintain public housing and also provide loans for the repair and improvement of houses. They are responsible for recreational facilities such as libraries, civic monuments. The local authority is the planning authority for its area. It decides whether to grant or refuse planning permission for building and development in the area. It also creates a development plan every six years which sets out its planning policies. Local authorities provide services with regard to roads, fires services, water, sewerage and drainage. They also control dangerous places and buildings such as abattoirs and provide and maintain graveyards and burial grounds.

2.4.6 The local authority has an important function in relation to pollution control and animal control. It issues licences for waste disposal and emissions into the air. It collects domestic and other waste and monitors the environment for signs of pollution. It also issues licences for keeping dogs and keeping horses within its area. It grants licences for street traders to allow them to sell on the street. Local authorities also play an important role in relation to health services through the local Health Boards. Health Boards provide and maintain hospitals,

[2] However, see "French Administrative Law" by Brown and Bell, 5th Ed., p. 4

clinics, health centres etc. Local authorities are represented on Health Boards as is central Government and representatives of the medical profession.

2.4.7 The functions of local authorities are divided into two categories – those which can be carried out by the elected representatives acting as one authority or functions which can be carried out by the salaried Chief Executive, i.e. the county or city Manager.

2.5 European law

2.5.1 European law is given supremacy by the Constitution [3]. Our Constitution provides that where an act is done or measure adopted which is necessitated by an obligation of membership of the European Union or of the Communities, no provision of the Constitution can be used to seek to invalidate such laws, acts or measures. This means, in effect, that the Constitution is suspended when it comes to EC law and to legislation implementing EC law.

2.5.2 Laws are "necessitated" by membership when the State is obliged to apply or implement them, i.e. in areas in which the Communities have exclusive competence. Where, however, the State has a choice in whether to adopt an EU measure or not – say in the intergovernmental areas of the second and third pillar – then the measure is not "necessitated". In the case of the choice which the State has as regards third pillar measures of the Treaty on European Union, there is a constitutional mechanism [4] whereby, with the prior approval of the Houses of Parliament, the State may adopt these measures. In the case of the second pillar however – the area of security and defence – here is no licence contained in the Constitution enabling an unconstitutional measure to be adopted even though it is an European Union measure.

2.5.3 EC and EU measures are implemented in delegated legislation where their implementation falls within the term of primary legislation enacted to facilitate the transposition of EC measures [5]. Where the EC measures cannot be implemented within the terms of the primary enabling legislation, then Parliament enacts the implementing legislation.

2.6 European Convention on Human Rights

2.6.1 Ireland has only recently incorporated the European Convention on Human Rights into domestic law [6]. It was a commonly held view that the Irish Constitution gave better protection to individuals that did the ECHR. Thus there was no real push to give domestic effect to the ECHR. Although a very early signatory to the ECHR – we signed in 1950 – it was only in 2001 that Ireland gave domestic effect to the ECHR. Until then the ECHR obligations bound the State only at international law.

2.6.2 Ireland is a dualist State so treaties require to be translated into domestic legislation before they have effect in domestic law. Now the ECHR is part of domestic law we have two

[3] Article 29.4.10

[4] Article 29.4.6

[5] European Communities Act, 1972

[6] European Convention of Human Rights Act, 2001

different standards – constitutional and ECHR - to be applied in determining the rights of individuals.

2.6.3 In this context it might be worth mentioning that there have only been 9 findings of incompatibility against Ireland before the European Court of Human Rights.

2.7 Organisation of the Government

2.7.1 As I have mentioned, the Constitution embodies the principle of the supremacy of Parliament, subject to the Constitution. It also prescribes the separation of powers as amongst the Executive, the Legislature, and the Judiciary. Each is given supremacy in its different areas of influence but is subject to a system of checks and balances [7].

2.7.2 The line between the Executive and Legislature is blurred by the fact that the Legislature elects the Executive which has a majority in the Legislature. In practical terms, then, the fact that the Executive holds a majority in the Legislature effectively means that the polices of the Legislature and the Executive are one and the same.

2.7.3 The Constitution vests in the Executive the executive power of State. It provides that the Government shall be collectively responsible and that the work of the Government shall be divided up amongst Departments of State as provided by law. The collective responsibility of the Government means, for example, that a disaffected Minister cannot subsequently disown responsibility for the acts of the Government of which he was part. It has also led to the finding of a constitutional principle of Cabinet Confidentiality.

2.7.4 Legislation sets out in broad terms the allocation of business as between different Departments of State [8]. It is the Minister heading a Department who is the legal entity, rather than his or her Department. Civil servants act as the *alter ego* of the Minister [9].

2.7.5 Departments often establish bodies to carry out consultative roles. These bodies are accountable to the Legislature through the Minister under whose aegis they are established. Other, more independent bodies, are also established. Where public funds are used then these are subject to a regime controlled by the Auditor and Controller General who is a constitutional officer.

2.7.6 While in certain areas commercial undertakings have replaced former public ownership such as in the area of electricity and telecommunications, this has been a natural change resulting from economic changes in the sector concerned whereby competition is capable of been introduced which might benefit the consumer. In other areas bodies are established which are funded by the State and in an effort to bring the management closer to the subject matter of what is being managed – a form of decentralisation. For example a Courts

[7] The judiciary can strike down legislation and executive acts which are unconstitutional. It interprets the law. Judges, on the other hand, are appointed by the Executive. The Legislature, subject to the Constitution enacts the law which must be applied and enforced by the judges. Judges may be removed on grounds set out in the Constitution by Parliament.

[8] Ministers and Secretaries Acts, the first being 1924

[9] *Devanney v. Minister for Justice* [1998] 1 ILRM 81

Service has been established to administer the courts. The intention behind such bodies is to make the management of that functional area more responsive.

3. REFORM OF THE ADMINISTRATION

3.1 Administrative reform

3.1.1 In common with other European countries changes have been introduced to the Civil Service in Ireland to make it more focussed on results, rather than processes. These changes were introduced by the Strategic Management Initiative in 1994 and have gone through a number of stages. The modernisation programme aims to ensure the public service contributes more to national development, provides an excellent service to the public and makes effective use of resources. In 1996 the focus turned to ensuring greater openness and accountability in the public service, the provision of quality customer service and the efficient and fair operation of simplified regulations. Some of the changes have been introduced administratively and others are based in legislation.

3.1.2 Departments of State are now required to produce statements of their strategy setting out their key objectives and outputs and how they propose to achieve these. The goals in the statements of strategy are broken down into business plans. Annual reports detailing progress are also published. As well as focussing individual Departments on the achievement of the goals which have been set, these measures also ensure that the public has greater information about the work of Departments. I will refer to other initiatives such as customer charters and what is termed "Better Regulation" which are part of this same modernisation programme when looking at reforms which have been made to balance out the rights of individuals and those of public bodies.

3.2 Legislative changes

3.2.1 The Public Service Management Act was introduced in 1997 to give statutory basis to some of the changes envisaged. This Act introduced the requirement for Ministers and the Heads of their Departments – known in Ireland as Secretaries General - to agree the "statement of strategy" I have mentioned at regular intervals and also when the Government changes. The "statement of strategy" is intended effectively to constitute a contract between the Minister and the head of the Department setting out how Government policies will be implemented over the period covered by the statement of strategy. In addition the Public Service Management Act requires each Department to produce a document showing the delegation of responsibility within the Department. Statements of strategy are published and the delegation authorisations are available under the Freedom of Information Act (see below).

3.2.2 The Ethics Acts – which comprise the Ethics in Public Office Act, 1995 and the Standards in Public Office Act, 2001 – are an important element of the response by the Legislature to the public demand for transparency in public life. The intention behind the legislation is to assure the public that those participating in public life are not seeking to derive personal advantage from the outcome of their actions. The legislation puts in place a statutory code for the voluntary disclosure of interests by members of Parliament, office holders and senior civil servants and provides for a sanction in the event of contraventions.

3.2.3 The 2001 Act provides that members of Parliament, office holders and persons to be appointed to senior offices in public bodies are required to provide tax clearance certificates

which specify that they are up to date in the payment of their tax. The 2001 Act also enables the drawing up of codes of conduct to set the standards of conduct necessary for members of Parliament, office holders and persons in the public service.

3.2.4 There is a Standards in a Public Office Commission which supervises the Ethics Acts. It is concerned primarily with providing guidelines and advice to those subject to the Ethics Act as regards their compliance with the legislation, overseeing the disclosure of interests, administering the tax compliance obligations, publishing codes of conduct and, where necessary, investigating alleged contraventions of the Ethics Act. The Commission is chaired by a High Court Judge and has the powers of a Court in requiring documentation and evidence to be forthcoming to allow it to fulfil its functions.

3.3 Tribunals

3.3.1 This brings me to an area which impacts upon the accountability of public bodies and has become quite important in Ireland in recent times, that is, the mechanism for responding to public concern over urgent matters of public importance.

3.3.2 Apart from administrative bodies established by legislation to carry out particular functions such as the Labour Court which deals with industrial disputes, or the Employment Appeals Tribunals which deals with employment issues or the Refugee Appeals Tribunal which deals with appeals from refusal to grant refugee status, Parliament also has the power to establish Tribunals of inquiry to investigate into specific matters of urgent public importance [10]. These Tribunals are invested with the powers of a court. They may also be given the power to make recommendations with a view to preventing the future occurrence of whatever it is that gave rise to the establishment of the Tribunal.

3.3.3 In recent years Tribunals have been established to inquire into the circumstances surrounding an explosion of an oil tanker which resulted in loss of life, a fire in a discotheque which resulted in almost 50 deaths, the failure of a homicide prosecution, allegations relating to the beef processing industry in the State, the infection of a large number of persons in the 1970's and 80's with contaminated blood products, the payment of monies to politicians, planning matters and payments to politicians and other persons in relation to planning.

3.3.4 While Tribunals have the power to compel the attendance of witnesses such as the High Court has, they do not exercise judicial powers. They do not, for example, make determinations which affect pending or future civil or criminal proceedings and their role is limited to one of "fact finding". They are intended to be inquisitorial but it has been said that they have become more adversarial.

3.3.5 The legal costs of these Tribunals has led to a great deal of criticism. In addition, some Tribunals have been going on for many years so that their ability to respond to public disquiet is considerably lessened by lapse of time.

3.3.6 Alternatives to this form of tribunal have been considered. Parliamentary committees have been given the power to summons witnesses in the same manner as courts [11]. Following

[10] Tribunals of Inquiry (Evidence) Act, 1921 and amendments to that Act

[11] Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997

the introduction of the legislation an inquiry into tax evasion was conducted and was regarded as highly successful as it was quick and decisive. Subsequently, a Parliamentary committee was asked to investigate the shooting by the police of a young man in unusual circumstances following a siege. The courts decided that a Parliamentary committee could not conduct an inquiry into the matter as this could result in the findings of fact and conclusions which might impact adversely on the good names and reputations of persons who were not members of Parliament [12]. The issue has since been referred to a Tribunal of the kind I have just mentioned.

3.3.7 In this context I should also mention a statutory Commission which has been established to investigate alleged abuse against children when they were in institutional care, the greatest number from the 40s to the 70s. The Commission has a number of different functions, namely, to listen to victims and offer counselling, to investigate allegations and finally, to publish a report directly to the public. The report may identify institutions where abuse took place and the people responsible and may make recommendations on measures to alleviate the effects of abuse and prevent future such abuse.

3.3.8 A Redress Board has also been established to make reasonable redress to victims of institutional abuse. The average award of the Redress Board is euro 77,000. The existence of the Redress Board, however, does not preclude anyone applying to the courts for damages in the usual way. Indeed, just a short time ago a victim succeeded in obtaining from a court an award for loss of earnings of euro 370,000 resulting for the damage cause by the abuse he suffered and time will tell whether the mechanisms which have been put in place to deal with this issue will succeed without recourse to the courts.

4. BALANCING THE RIGHTS OF INDIVIDUALS AND THOSE OF THE ADMINISTRATION

4.1 Background

4.1.1 A number of measures have been put in place recently by the Legislature to enable citizens to be better informed about decisions of the authorities in their regard. In addition, the system of judicial review of administrative decisions has grown dramatically in recent years.

4.1.2 There are so many areas of life where the citizen interacts with authority that it is not possible to list them all. There are systems of licensing whereby the State regulates conditions under which certain activities may be carried out, for example, there is a system of licensing the catching of fish, of selling alcohol, of holding explosives. There are also matters such as the issue of passports in which the Executive may be called to account. Where the State licences activities, there you will find applications to review.

4.1.3 Rather then deal with individual areas of administrative law I thought it more appropriate firstly to outline for you the legislation applicable to regulate the rights of citizens as against the authorities and then to describe to you our system of judicial review. Principles applicable in judicial review apply wherever public bodies make decisions with regard to individual citizens. Thus, in describing our system of judicial review – and giving you examples of cases – I hope to convey the principles and how they work in practice.

[12] *Maguire v. Ardagh* [2002] 1 IR 385

4.2 State prerogative and executive privilege

4.2.1 Before describing the legislation and the judicial review principles which cover the relations between individual citizens and the State I should first of all explain something unusual in Irish law, namely the issue of State prerogative and immunities.

4.2.2 Before Ireland became independent in 1922 the British Crown and the prerogatives which attached to it applied. However, the Irish Constitution establishing the State in 1922 expressly repudiated the concept of royalty and declared all powers of Government and all authority, legislative, executive and judicial, to be derived from the People. The enormous implications of this were first spelt in 1972 in the case of *Byrne-v-Ireland* [13]. In that case the Supreme Court held that the common law immunities and prerogatives of the Crown had not survived the Constitution.

4.2.3 Although it had been proposed, Ireland had not, by 1972, legislated for the circumstances in which the State could be sued in negligence. In the *Byrne* case the plaintiff suffered personal injuries when she fell into a trench which had been dug and negligently refilled by employees of the Government Department in charge of telephones. The plaintiff claimed damages for her injuries against the Minister for Posts & Telegraphs. It was argued on behalf of the Minister that since those alleged to have been negligent were employees of the State and the State was immune from claims on the basis of sovereign immunity, that no case lay. The Supreme Court held that Crown immunity from suit had not survived the Constitution and that the State was therefore vicariously liable for the acts of its servants and for the injuries sustained by the plaintiff. The court in that case held that the Constitution had created an entirely new legal order in the State.

4.2.4 After the *Byrne* case no legislation was enacted to regulate the position of the State in civil proceedings. Thus the law as it stands in Ireland at present is that anyone injured by a servant of the State may claim and is entitled to full compensation in the same way as if the State were a private party.

4.2.5 The impact of the decision has been seen in later cases. Thus, in *Webb-v-Ireland* [14] what was at issue was certain ancient gold artefact which had been found by a farmer tilling his field. The State claimed the artefact on the basis of a prerogative in relation to treasure trove. The court, however, held, as it had in the *Byrne* case, that Crown prerogative had not survived the Constitution. However, in that case the court did hold that in certain instances the Constitution substituted new versions of the old prerogative and that in the case of treasure trove, this was the property of the People.

4.2.6 The issue arose again in the *Howard* case [15]. What was at issue was the construction of a cultural centre by the State. The State had not applied for planning permission for this construction. This was challenged and the Supreme Court held that the State, just as much as a private party, is subject to and must comply with legislation. That is not to say that a separate

[13] [1972] IR 136

[14] [1988] IR 353

[15] [1994] 1 IR 101

regime may not be put in place for the State but unless that is stated in legislation, then the State is affected by legislation in the same way as private citizens. The construction could not go ahead at that point because the State had failed to obtain planning permission.

4.2.7 We have yet in Ireland to work out fully the effect of these decisions. Crown prerogatives were part of the system which we inherited and are reflected in our Constitution – the power of the State, for example, to issue passports is based on the prerogative of the Crown. Thus we have mechanisms within our system which derive their authority from Crown prerogative – but now the mechanisms remain but the authority upon which they were established no longer exists.

4.2.8 I mention these matters to you because I believe that the view that the Supreme Court has come to in relation to the status of the State in terms of immunity and its prerogatives is quite different compared to other countries

4.3 Ombudsmen

4.3.1 Turning now to specific items of legislation which have introduced in recognition of the need for transparency in the interaction between State authorities and individual citizens, the first of these was the establishment of an Ombudsman in 1980. The Ombudsman Acts provide that the Ombudsman, who is independent in the performance of his or her functions, may investigate any decision or failure to act which occurs in the performance of administrative functions by a Government Department and a wide range of other State bodies specified in the Acts where such a decision or failure to act may have adversely affected a person. The Ombudsman is empowered to investigate any such decision or failure to act where it is, for example,

- taken without proper authority,
- taken on irrelevant grounds,
- the result of negligence or carelessness,
- based on incomplete information,
- improperly discriminatory,
- based on an undesirable administrative practice, or
- otherwise contrary to fair and sound administration.

4.3.2 The matters which are excluded from the Ombudsman's remit are decisions in respect of which an appeal lies in the courts, decisions connected with national security, including the power of pardon and the administration of prisons and decisions dictated by legislation, i.e. not discretionary [16].

4.3.3 The Ombudsman is empowered to make findings in the case of those decisions which he or she investigates. However, the Ombudsman cannot make binding determinations. Rather, if the Ombudsman finds that a decision has adversely affected a person, he or she may

[16] The Ombudsman's remit does not extend to military matters or to personnel or industrial relations, the administration of prisons and courts and the law relating to aliens or naturalisation. There is a provision that a Minister may request in writing that the Ombudsman should not investigate a particular action. That provision has never been used. In the local government area, the Ombudsman's remit does not extend to the functions reserved to the elected members of the local authority. In the health area, it does not extend to actions taken in the exercise of clinical judgment in connection of illness or the care and treatment of the patient.

recommend that measures be taken to remedy, mitigate or alter the adverse effect of the decision. This regularly involves a recommendation to pay compensation to the person adversely effected. If the response of the body to a finding or recommendation is not satisfactory, the Ombudsman may make a formal report to this effect to our Houses of Parliament.

4.3.4 The Ombudsman does not have the power to sanction other than that of making recommendations and reporting to Parliament. The Ombudsman has made such reports, e.g. in relation to certain practices of the Revenue in not paying interest on repayments. The bodies whom the Ombudsman investigates are State entities and, therefore, the sanction of adverse publicity is perhaps more effective than it might otherwise be thought to be. Were the sanctions of the Ombudsman any more final, then this could result in judicial review of his or her findings which in turn might render the Ombudsman less effective.

4.3.5 The types of complaints which are typically made to the Ombudsman range from farmers who have been refused headage payments for the cattle, exporters who have been refused credit insurance, residence associations who are seeking planning enforcement, individuals who feel they have been unfairly discriminated against in the allocation of housing, hospital waiting lists, the grant of educational scholarship, refusal of social welfare payments. The Ombudsman has established principles of good administration which include

- the right to be heard,
- the right to have decisions explained,
- the right to be given reasons for decisions,
- the right to be told what remedies are available,
- the avoidance of undue delay,
- the proper use of discretionary powers,

  good administrative practices and procedures, including the maintenance of records.

4.3.6 Examples of actions which run contrary to the principles established by the Ombudsman include rudeness, refusal to answer reasonable questions, knowingly giving misleading or inadequate advice, neglecting to inform a person of his or her rights, unwillingness to treat the person concerned as a person with rights, failure to maintain proper records, failure or the absence of procedures, failure by management to monitor compliance with procedures. In his annual report of 1996 the Ombudsman published a "Guide to Standards of Best Practice for Public Servants" this is available on the Ombudsman website and may be of interest to you. (www.ombudsman.gov.ie)

4.3.7 The success of the Ombudsman is evident in the fact that the establishment of the Office has since led to the creation of similar Ombudsmen in more specific areas. Thus there is now an Insurance Ombudsman, an Ombudsman for Credit institutions, a statutory Ombudsman for Children, a statutory Ombudsman for Pensions and a statutory Ombudsman for the Defence Forces.

4.4 Freedom of Information (FOI)

4.4.1 In 1997 The Freedom of Information Act was enacted for the purpose of enabling the public to have access, to the greatest possible extent consistent with public interest and the right to privacy, to information in the possession of public bodies. The Act entitles members of the public to seek access to information held by the body (including but not limited to, personal information), to have personal information corrected where this is incorrect or misleading and to seek reasons for decisions which affect the individual concerned.

4.4.2 The legislation requires public bodies to respond to requests for information from the public within certain time limits. If the public body does not have the information but knows of another pubic body which does, it must so inform the requester. The requester must be given assistance in making his or her request.

4.4.3 The Act also requires public bodies to publish reference guides setting out the structure of their organisation, the arrangements in place for meeting the requirements of the legislation and the classes of records held by it. The names of staff responsible for fulfilling the functions of the body under the FOI Act must also be given. The guide must set out and any rules and guidance notes on practices which they use in reaching decisions. These guides are available from the public bodies concerned.

4.4.4 A request for non-personal information must identify sufficiently clearly the information sought and the legislation places the public body under an obligation to seek clarification from the requester where it is not clear what information is sought. The information does not need to relate to the requester in any way – the requester does not have to demonstrate an interest or connection with the information save where it is personal data.

4.4.5 A request must be accompanied by a fee of euro 15 (or less in certain circumstances) unless the request relates to personal information. If it is anticipated that there will be significant time spent in searching for and retrieving the information, an additional fee may be charged based on cost – the rates are published.

4.4.6 The Act does provide for certain exceptions. These include records relating to Government meetings, law enforcement and security, confidential and commercially sensitive information, records governed by legal privilege, records relating to the formulation of policies – although once the policy is formulated, the records may be disclosable. Most of the exemptions under the FOI Act are subject to a public interest test. There is no definition given of what is the public interest. The web site of the Information Commissioner contains all the decisions which have been made on review which you may find interesting. (www.oic.gov.ie)

4.4.7 Where a requester is refused information he or she may appeal the decision to the Information Commissioner. Here too there is a fee payable of euro 150. The Information Commissioner is independent in the discharge of his or her functions.

4.4.8 The Information Commissioner not only has the function of reviewing adverse decisions, but also that of keeping the operation of the legislation under review . The Information Commissioner may at any time carry out an investigation into the practices and procedures of public bodies generally or of any particular public body with a view to checking on compliance with the Act.

4.4.9 The Commissioner has power to require any person to hand over records which are relevant to the function of carrying out reviews and carrying out investigations. The Commissioner also has power of entry for the purpose of a review or investigation.

4.5 Data Protection Act

4.5.1Ireland does have in place data protection legislation so as to ensure that personal information is securely retained and used only for the purpose for which it was collected. Organisations which keep personal date are subject to a strict regime which is enforced by the Data Protection Commissioner. Under the Data Protection Acts, 1988 to 2003, individuals have the right to see what data is held on them and to have the information corrected if it is wrong. Data may only be retained for the time necessary to the purpose for which it was taken. Compensation can be sought if a data controller mishandles data about individuals. (See website www.dataprotection.ie)

4.6 Human Rights Commission

4.6.1 The Human Rights Commission was established in 2000 in anticipation of the incorporation of the ECHR into Irish law. The Commission, which is an independent body with representatives from a number of areas of civil society, has a number of different functions, which can be broken down into three categories, namely that of raising human rights awareness, reviewing legislation and policy in the light of the human rights, and case work.

4.6.2 In the second category of reviewing legislation come functions such

- To keep under review the adequacy and effectiveness of law and practice in Ireland relating to the protection of human rights,
- To make recommendations to Government on measures to strength human rights,
- To undertake a review of proposals for legislation referred to the Commission by a member of the Government.

The third category of work includes

- To conduct enquiries, subject to certain conditions,
- To apply to court to appear as *amicus curiae* and offer the courts its expertise in suitable cases,
- To take legal proceedings or to vindicate human rights in the State,
- To grant assistance in connection with legal proceedings involving issues of human rights.

4.6.3 One difference of importance to individuals seeking to assert their rights between the Ombudsman and the Human Rights Commission is that the Human Rights Commission may examine laws and make recommendations on them or, indeed, participate in one way or another in challenges to legislation. The Commission may also investigate complaints about legislation in which the rights of individuals viz a viz the Administration are covered.

4.6.4 The Commission has power to require individuals to furnish it with information and this power can, if necessary, be enforced by the courts.

4.6.5 As the Human Rights Commission is relatively new, it is not yet clear what its impact will be in the area of administrative law. (See its website www.ihrc.ie)

4.7 Attorney General and public interest role

4.7.1 It might be worth mentioning here that in Ireland the Attorney General, who is the legal adviser to the Government, also has a role in respect of the public interest. The Attorney General has a function in representing the public in all proceedings for the assertion or protection of a public right. The function arises, for example, where the Attorney General seeks an injunction to restrain an anticipated breach of the law, e.g. where the naming of a witness in a witness protection programme is threatened by a newspaper or where there is an anticipated interference with a public right of way.

4.7.2 Where a member of the public wishes to enforce a right which belongs to the public as a whole rather than a right of a private character or in which the member of the pubic has an insufficient private interest, he or she can apply to the Attorney General to join in the proceedings which are then know as a relator action. The proceedings then are brought by the Attorney General "at the relation" of a member of the public. In such cases the Attorney General not only lends his name to the proceedings but he or she actually becomes the plaintiff with the right to decide how to conduct the case. (Further information at www.attorneygeneral.ie)

4.8 Customer charters

4.8.1 I mentioned earlier the innovations introduced as part of the modernisation of the public service, many of which impact upon how the Administration interacts with individuals. One innovation which has to do with service to the public is the introduction of "customer charters" for public bodies. The purpose of customer charters is to enhance the quality and accountability of service provided to the public. Charters set out the public body's commitments in the provision of services to its customers – these would typically be members of the pubic using the services of the Department, say social welfare recipients in the case of the Department of Social Welfare. The charters set out commitments which constitute service standards. They also explain how a complaint can be made.

4.8.2 Interestingly, the courts have given status to these customer charters (and annual reports) by finding that members of the public are entitled to rely on the standards set in the charter as the standard applicable to their dealings with the public body concerned. Thus in the case of *TK v. CAB* [17] the Supreme Court found that a commitment given in the Revenue Charter of Rights to give full information to customers about their rights created an obligation to give information to the taxpayer about his or her entitlement to appeal and that failure in giving that information amounted to a breach of fair procedures such as invalidated the actions of the Revenue.

4.9 Better Regulation

4.9.1 As part of the drive towards regulatory reform the Irish Government has introduced guidance as to the principles applicable to legislation and regulations with a view not only to improving the competitiveness of the country through the least amount of regulation but also to improve accessibility of the law to the public.

[17] Unreported, Supreme Court, 17 May 2004

4.9.2 The Government has proposed that it will make better use of evidence based policy making and a Regulatory Impact Analysis approach to legislation. Systematic reviews of the regulation of key areas is to be carried out. It is also proposed to introduce a programme of statute law revision. Proposals are to be made for consistent mechanisms to be included in legislation for appealing regulatory decisions. Explanatory guides are to be introduced to accompany legislation. The principles which are to be applied in assessing the impact of legislation and its accessibility to the public are necessity, effectiveness, proportionality, transparency, accountability and consistency.

5. JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS

5.1 Introduction

5.1.1 As I have already explained, administrative law in Ireland has, for historical reasons, developed in a very haphazard way. We do not have statutes which set out the procedures applicable to administrative decisions and a generalised system of appeals from administrative decisions. Nor do we have a system of administrative courts and a cohesive jurisprudence. When we legislate and thereby establish a tribunal – say an appeals tribunal for a decision covered in the legislation - the legislation provides an individual system of procedures. As a result there a plethora of different mechanisms for administrative procedures and appeals. Further, there are no established mechanisms for bodies which are not created by statute or which would apply where the statute fails to designate procedures and appeal mechanisms. Not only is the system somewhat unstructured, there are also areas which are not covered by statute.

5.1.2 The courts have a major role in developing administrative law and the system of justice between individuals and Government. Judge made law has, as I have explained, since the independence of the State, taken into account constitutional principles. Our system of judicial review depends, therefore, not only on original common law remedies, but also constitutional principles. These constitutional principles deal not only with the individual's substantive rights; constitutional justice is used to supplement the fair procedures which are required in administrative decisions.

5.1.3 Judicial review of administrative action is founded in Ireland, as it is in the United Kingdom, on the doctrine of *ultra vires*. This doctrine requires that a body or person on whom the law confers a power may not, in exercising that power, go beyond the limits (*vires*) fixed by the empowering law. The doctrine of *ultra vires* covers all aspects of judicial review : it covers jurisdictional defects, unreasonableness because decisions makers are acting outside their power if they flagrantly reject or disregard fundamental reason or common sense, and it covers fairness in procedures because these are precondition to jurisdiction to make the decision at all.

5.1.4 Judicial review of administrative actions can be categorised into cases dealing with jurisdictional error, the abuse or non use of discretionary powers, the application of fair procedures, legitimate expectation and the application of constitutional principles in judicial review. While the Constitution affects all areas of judicial review, there are some matters dealt within judicial review which are solely derived from constitutional considerations.

5.1.5 Judicial review is not the same as an appeal. Judicial review is concerned not with the merits of the decision – that is a matter for an appeal – but rather with the legality of the decision. There is a challenge to whether Irish judicial review satisfies the requirements of

Article 6 of the European Convention on Human Rights in a case before the court in Strasbourg[18].

5.1.6 The remedies available on judicial review are what were known as the prerogative writs of

- *certiorari* which is an order directing a court or administrative authority to justify its decision,
- *mandamus*, an order compelling a person or body to perform a legally imposed duty,
- *prohibition*, an order preventing or prohibiting a body from exceeding its powers,
- *quo warranto*, an order requiring the individual or body exercising powers to justify its jurisdiction, and, finally,
- *habeas corpus*, that is to say an order requiring a person detaining an individual to justify the detention.

5.1.7 I should also say a word about the procedure in obtaining judicial review. The first step is to obtain an order from the High Court judge granting leave to bring judicial review. That application is made to a High Court *ex parte,* that is to say, with only the moving party represented. The applicant will have sworn an affidavit and the judge must consider there is a case to answer before he or she grants leave to bring judicial review. As you will see from the cases I am about to mention, the proceedings are entitled "The State" with the name of the moving party given in brackets. This stems from the fact that the form of the proceedings is a prerogative writ. In other words, it is the State (the Crown before independence) or a higher court calling the inferior court or administrative body to account.

5.2 Duty to give reasons

5.2.1 It used to be that an administrative body was under no obligation to give reasons for its final decision. In recent times, however, inroads have been made to that proposition. Certainly, where judicial review proceedings are brought the court may compel reasons to be given to allow the court to determine whether or not a power has been validly exercised. As I have mentioned, the Freedom of Information Act also provides for reasons to be given to those affected by an administrative decision.

5.3 The subjects of Administrative Law

5.3.1 It is clear, on the one hand, that every individual citizen – indeed every individual present in the State as we have a territorial concept of law – is the subject of administrative justice. This applies equally to individual persons and legal persons. It is not, however, as clear who - on the other side – is the Administration. For the purposes of this paper I am treating as the "Administration" the Government, including each Minister of the Government, the Departments of which Ministers are in charge, State sponsored bodies, that is to say, bodies fully funded by the State and local authorities, public bodies which operate effectively as part of the Executive, that is to say, universities, the police, the defence forces. There are then are other quasi – public bodies such as trade unions or professional associations which have been

[18] *Panevskii v. Ireland*

categorised as "domestic governments". The principles of judicial review apply to them too.

5.4 Jurisdictional error

5.4.1 Where an individual body is empowered to make an administrative decision, the courts will ensure that the decision is only made following the requirements of the law. The requirements can be express or implied. Of course decision makers will not usually disregard the law, but, rather, they may mistake what the requirements – expressed or implied – of the statute are. Thus most challenges to a decision will involve an interpretation of the empowering law. Here too we encounter the Constitution: the presumption of constitutionality means that an constitutional interpretation must be given to any challenged statute provisions if this is at all possible.

5.4.2 Let me give you some examples of where a decision was quashed because of a failure to act within jurisdiction. In the case of *Reidy-v-Minister for Agriculture*[19] a civil servant was for reason of discipline prohibited from competing for any other civil service post – including promotion – for a two year period. The High Court set aside this decision saying that the governing legislation did not allow for such a disciplinary penalty. Another example is *Devitt-v-Minister for Education*[20] which concerned a statutory requirement for the Minister concerned to approve any appointment submitted to her by the relevant education committee. The committee submitted to the Minister a name for approval to a permanent position. The Minister, instead, approved the appointment to a temporary post. The court here too quashed the decision as the enabling legislation allowed the Minister to approve or disapprove of the appointment submitted to her, it did not allow her to approve the appointment of the candidate to a different type of post.

5.4.3 I mentioned that in some cases the point at issue is an implied power and here too principles of statutory interpretation are applied. For example in *Dublin Corporation-v-Raso*[21] the court held that a local authority was entitled to impose restrictions on the opening hours of a café under its powers under the planning code because conditions restricting the amount of noise and preserving the residential character of the neighbourhood were reasonably incidental to the authority's powers to impose conditions for the "proper planning and development" of the area in question. Another example is the case of *Minister for Transport-v-Trans World Airlines*[22] where the question arose as to whether the Minister was entitled to prescribe landing charges for an airport. The Supreme Court found that the power to prescribe landing charges was impliedly authorised by the power the Minister had to establish and operate an airport as that power carried with it an inherent right to determine the conditions under which aircraft would be permitted to use the airport and this would include charges.

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[19] Unreported June 9 1989

[20] [1989] ILRM696

[21] [1976-1977] ILRM139

[22] Unreported, Supreme Court, March 6, 1974

5.4.4 As against those cases where powers were implied, there is the case of *An Blascaod Mor-v-Commissioners of Public Works*[23] where the court refused to imply a power to make regulations. The Minister had the power to make regulations as regards different aspects of the establishment of this particular national park. The Minister was also empowered to make compulsory purchase orders to acquire land for the park. However, as regards the power to acquire land, the Minister was not given a power to make regulations. As other provisions in the legislation did include a regulation making power, the court held that it must infer from the absence of the regulation making power in relation to compulsory purchase, that the Legislature had not intended such a power to be available.

5.4.5 While in the *An Blascaod Mor* case the court applied the principle statutory interpretation *expressio unio, exclusio alterius*, in other cases they have used other rules of statutory interpretation such as, for example, the principle that a statutory provision should not be interpreted in a manner which renders it did not be interpreted in a manner which renders it largely ineffective. For example, in *McGlinchey-v-Governor of Portlaoise Prison*[24] the legislation enabling the Government to establish the Special Criminal Court – that is to say, a court sitting without a jury to try persons charged with terrorists offences, went into considerable detail describing the composition, jurisdiction and procedure of the court. However, the legislation did not specify by whom the members of the court would be appointed. The principle of effectiveness was invoked by the court in order to uphold the validity of the appointment of members of the court by the Government.

5.4.6 Another case in which the question of implied powers arose was which I have already mentioned which led to a decision that the State just as a private parties, was subject to statute. In *Howard-v-Commissioner of Public Works*[25] it was held that the Commissioners of Public Works had no implied power to build the cultural centre they proposed building as the power to build such a centre was neither incidental to nor consequential upon the power to construct public works such as roads, bridges and to maintain public monuments.

5.5 Errors of law and of a fact

5.5.1 It used to be the case that an error of law or fact which was made by the lower court or the administrative authority within its own jurisdiction was not reviewable. For example in *The State (Batchelor) v O'Flynn* [26] the court refused to interfere with the issue of a search warrant which was claimed to have been issued with insufficient evidence to justify its issue. More recently, however, there have been developments which would suggest that, depending on the decision in question, an error of fact or of law can ground an order of quashing that decision.

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[23] Unreported, December, 1996

[24] [1988] IR671

[25] [1994] IR101

[26] [1958] IR155

5.5.2 As sometimes happens in shared common law jurisdictions, in Ireland we followed a development in this area in the United Kingdom [27]. In the case of *The State (Holland)-v-Kennedy* [28] the order under review was an order sentencing a youth under the age of 17 to imprisonment. The law provides that a young person between the ages of 15 and 17 if he or she is to be detained, should be detained in an approved place of detention – that is, a place for detaining young people - and only imprisoned in an adult prison if he is of such "unruly character" that he cannot be detained in an approved place of detention. The judge made the decision to imprison the young man on the evidence only on the offence for which he had been convicted, namely a serious assault. The Supreme Court held that evidence of one conviction – even a serious one – was not sufficient evidence to decide that the boy was of such an unruly character that he could not be detained in an approved place of detention, in other words, the court made a determination based on the sufficiency of the evidence before the judge who made the decision.

5.5.3 A more nuanced position on the question on whether a mistake of law or fact can lead to a quashing of the decision is to be found in the case of *Killeen-v-DPP* [29] which now represents the law in Ireland. In that case certain individuals were arrested and brought before the District Judge. The function of the judge at that point was to decide whether there was sufficient evidence to return the accused for trial – whether there was a *prima facie* case. The judge held that the arrest of the individuals was invalid and on that basis refused to return them for trial. The Supreme Court held that while there are circumstances in which an error made within jurisdiction cannot result in judicial review, that in the circumstances here, where the result of the error led to the judge making an order without jurisdiction that the Superior Courts could quash such an order.

5.6 Error on the face of the record

5.6.1 There is a common law rule that all court orders, official decisions and statutory instruments must show jurisdiction on their face. Thus deportation orders, extradition orders search warrants and compulsory purchase orders have all been held invalid because they have not shown on their face from where they derive jurisdiction. Error on the face of the record is a ground for judicial review. A "record" has been described as including all the pleadings of a case as well as the court order. What constitutes a "record" may be defined by statute and changes depending on the type of decision in question. Where there is an error in the face of the record, *certiorari* will lie.

5.7 Abuse and non exercise of discretionary powers

5.7.1 The classic passage setting out the principles as to when the Higher Courts will intervene to restrain the abuse of powers is the English case of *Associated Provincial Picture Houses Ltd.-v-Wednesbury Corporation* [30] which sets what are knows as the Wednesbury principles. In that

[27] Anisminic Ltd.-v-Foreign Compensation Commission [1959] 2AC

[28] [1977] IR193

[29] [1998] 1ILRM1

[30] [1948] 1KB223

case it was said that the court will intervene where there is bad faith or dishonesty and where there is "unreasonable" attention given to relevant circumstances and disregard of public policy. The courts in Ireland have been quite happy to quash decisions where the deciding authority has declined to give reasons for the decision. [31]

Bad faith

5.7.2 Bad faith includes, not only the concept of malice which applies when the person or body empowered makes a decision motivated by personal animosity, but also where a public body uses a power to achieve an object other than that to which the power has been conferred. Cases in which bad faith is established are very rare. Indeed it is seldom that bad faith has been alleged, never mind established.

Irrelevant considerations

5.7.3 In order to deduce the considerations which the public authority should have borne in mind in making the decision a court first determines what the proper purposes of the power was. For example, in *The State (Kugan)-v-Station Sergeant* [32] a police officer sought to refuse leave to land to a non-national on the basis of the non-nationals inadequate knowledge of English. This was held to be an irrelevant factor in the decision as to whether or not to allow a non-national leave to land in the State. On the other hand, in *The State (Bouzagou)-v-Station Sergeant* [33] a decision to refuse leave to land on the ground that the Immigration Officer believed that the applicant would be unable to support himself was upheld on the grounds that was a relevant consideration.

Reasonableness

5.7.4 Unreasonableness or irrationality are often described as the "Wednesbury" test. In Ireland unreasonableness or irrationality has been held to lie where the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense [34].

5.7.5 The test of unreasonableness in Ireland is that it must be shown that the decision maker acted plainly and unambiguously in the face of reason and common sense. An interesting case is that of *Matthews v. Irish Coursing Club Ltd*.[35] In which the respondents, who have statutory responsibility for greyhound meetings – that is to say races of dogs – found that the winning dog at a meeting had been drugged. Having found the owner of the winning dog guilty of drugging, the club simply imposed a fine on the owner but allowed the owner to keep the trophy. The owner of the dog who came second was successful in his application to have this decision set aside as being unreasonable. The court found that in its desire to be kind towards the owner of the drugged dog, the club had been manifestly unjust in relation to the owner of the runner up dog and had lost sight of its obligations.

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[31] *Brennan-v-Minister for Justice* [1995] 1IR 612

[32] [1986] ILRM95,

[33] [1985] IR426

[34] *State (Keegan)-v-Stardust Victims, Compensation Tribunal* [1986] IR 642

[35] [1999] 1 IR 346

5.7.6 Another interesting example is that of *The La Lavia* [36] where the High Court quashed as unreasonable the refusal of Commissioners of Public Work to grant an excavation licence to a group of expert divers and marine historians who had discovered wrecks from the Spanish Armada off the Irish coast.

5.7.7 Another example is that of *Farrell-v-Attorney General* [37] where the Supreme Court quashed a decision of the Attorney General to direct a new inquest where he was reversing his own original decision not direct a new inquest. The Supreme Court held that as there was no evidence whatsoever that anything new had come to light to justify the Attorney General reversing of the earlier decision, that the decision was irrational.

5.8 Constitutional fair procedures

5.8.1 Fair procedures are required in the decision making process to ensure that the public bodies concerned have available all of the information they require in order to make an objective decision. A good decision takes into account all relevant matters.

5.8.2 The common law has always required the application of two principles in natural justice, namely, the principles *nemo iudex in causa sua* (no man should be judged in his own cause and *audi alterem partem* (hear the other side). In Ireland it has been held that in the context of the Constitution, natural justice it more appropriately termed constitutional justice and, further, that constitutional justice goes beyond the two established principles of natural justice mentioned. A number of principles of constitutional justice have emerged, for example a judge is not entitled to disregard the corroborated and unquestioned evidence of witnesses , tribunals should generally sit in public [38], the right to a reasonable prompt decision [39], the right, in certain circumstances, to some form of administrative appeal against a decision [40], the right to free legal aid for certain types of administrative decisions [41] the right – in a criminal trial - to confront your accusers [42].

5.8.3 The importance of constitutional justice over natural justice is that constitutional cannot be overridden in a statute. Whereas in the United Kingdom legislation may expressly refute the principles of natural justice, this cannot happen in Ireland as such a law would be found to be unconstitutional.

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[36] Unreported, 26 July 1994

[37] Unreported, Supreme Court 21 November 1997

[38] Barry-v- Medical Council High Court, 11 February 1997

[39] Bosbhorus Hava Yollari Turism-v-Minister for Transport, unreported High Court 22 January 1996,

[40] Carroll-v-Minister for Agriculture [1991] 1IR230

[41] *Kirwan-v-Minister for Justice* [1994] 1 ILRM 333

[42] *White-v-Ireland* unreported 21 December 1993

5.8.4 In this context it is also worth mentioning again the principle of the presumption of unconstitutionality. This presumption means that all legislation enacted since the Constitution is presumed to be constitutional so that where it is open to interpretation, the interpretation which favours the Constitution is that applied. But beyond that, the presumption of unconstitutionality means that it is presumed that legislation intends its administration to be carried out in accordance with the Constitution, that is to say, in accordance with constitutional justice. Thus where a statute is silent as to a procedure, constitutional principles may be drawn to fill in the procedures applicable.

5.8.5 Examples of the application of constitutional justice will help to explain the position. In *O'Domhaill v Merrick* [43] the Supreme Court held that despite the fixing of precise time limits for the bringing of proceedings in the Statute of Limitations, the Court retained in addition, an inherent constitutionally derived power to stay proceedings where the passage of time created an injustice. Another case arose in the context of the procedures before the District Court – our lowest level court. Persons being tried similarly for what is an indictable offence (an offence carrying more that 12 months sentence) are not, under the applicable legislation, entitled to receive the "book of evidence" which comprised statements of the witnesses who will be called against the accused. Despite this, the Supreme Court held in *DPP v. Doyle* [44] that in some circumstances constitutional justice requires that an accused is entitled, despite the legislation, to advance sight of the witness statements.

5.8.6 Another case involved the Government's removal of the Garda Commissioner, namely the Chief of Police [45]. Mr. Garvey argued that his removal from office was invalid because it had been taken without prior notice to him, without telling him the reasons for his removal and without giving him an opportunity of making representations on his own behalf. The Supreme Court held that even though the legislation in question did not set out the procedures applicable, that procedures must be read into the legislation and that in accordance with constitutional guarantees, Mr. Garvey had the right to know the reasons for his removal and also right to be heard.

5.9 No person should be judged in their own cause

5.9.1 This principle is fundamental to good public administration. There are a number of situations where bias may arise. Firstly there is the case of actual bias where the decision maker deliberately sets out to hold against one party irrespective of the other for him or her. The second is where bias is presumed because the decision maker has a personal interest in the outcome or a personal relationship which might affect the outcome.

5.9.2 In applying the principle that no one should be judged in his own cause, the court does not require there to be evidence of actual bias but, rather, where there is a reasonable apprehension of suspicion that there might be bias, then the court will set aside the decision. It is the appearance rather than the existence of bias which determines the issue.

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[43] [1984] IR 151

[44] [1994] 2 IR 286

[45] Garvey v. Ireland [1981] IR 75

5.9.3 The possible sources of bias are financial, personal attitudes, relationships or beliefs, loyalty to the institution, pre-involvement or prejudgement of the issues [46]. A few examples will give a flavour of how this principle is applied. In *R (Donoghue) v Cork County Council* [47] a conviction which was imposed by a magistrate who had been heard to say shortly after the case he would not leave any member of the accused's family in the district, was quashed on those grounds. In *Dublin Well Woman Centre Ltd. V Ireland* [48] the Supreme Court overruled the decision of a High Court judge who had not discharged herself from hearing the action where the judge herself, as Chairwoman of the Commission for Status of Women, had in common with others, made a written submission to the Government regarding the matter at issue namely, the availability of information regarding abortion.

5.9.4 In *Flanagan v UCD* [49] the Registrar of the University in a disciplinary case acted as prosecutor before a three member committee of discipline. The Registrar stayed on at the discussion of the committee, although the student concerned was required to withdraw. The committee decided that the paper which the student had been alleged to have plagiarised would be sent to an independent expert and the choice of independent expert was left to the Registrar. The involvement of the Register not only as prosecutor, but as advisor to the committee was considered to constitute potential bias.

5.10 *Audi alteram partem*

5.10.1 There are a number of different aspects to this rule. Firstly, the
person to be affected by the decision must have notice of the fact a decision may be made and given details of it. He or she must also be allowed to make a reply. Of course, in order to make a reply he or she must know what the allegations and evidence are. This may involve a right to an oral hearing and the right to cross examine witnesses to give evidence against the person to be affected.

5.10.2The seminal decision in Ireland was *In Re Haughey* [50]. In that case the applicant had been called before a Committee of the Upper House of Parliament to give evidence. The report of the enquiry would not have resulted in any liability or penalties on any person. However, the applicant's conduct and reputation were at the heart of the investigation. The Supreme Court held that in that situation the applicant had the same rights as a person facing trial and the basic fairness and procedure demanded that he be entitled to cross examine witnesses, to call rebutting evidence and to make submissions.

5.10.3Another case involving one of the houses of our Legislature, the Seanad, occurred in 1991. The Committee on Procedures and Privileges recommended to the Seanad that Senator Norris be disciplined by being suspended for one week. The basis of Senator Norris offences was an allegation he had made against the chairman of the Seanad. The same person was also chairman of the Committee which imposed the suspension. The Committee refused the

[46] Headings drawn form Hogan and Morgan "Administrative Law in Ireland", 3rd Ed.

[47] [1910] IR 271

[48] [1995] 1 ILRM 408

[49] [1986] ILRM 225

[50] [1971] IR 217

Senator's request to be allowed legal representation to call witnesses etc. The High Court ordered the Senator re-instated and quashed the decision on the grounds of violation of rules of constitutional justice.

Habeas corpus

5.11.1I should finally mention the last of the state side orders. The
old writ of *habeas corpus* is now a constitutional remedy. As most detention occurs at the behest of courts rather than pursuant to an administrative decision I will not deal in detail with what is a very active area of law in Ireland. Where a court orders detention, the writ of *habeas corpus* is, of course, also available. What we are looking at here is, however, administrative detention.

5.11.2Administrative detention occurs in Ireland only under the Mental Health Acts, in relation to non-nationals in limited circumstances and under the legislation dealing with infectious diseases. There are other times when detention occurs, say where a child is found alone or where a warrant has been issued for the arrest of an individual, but in these cases the requirement is that the individual be brought before the court "as soon as may be". Thus, as the individual is brought before the court almost immediately, I am not including such instances in the concept of administrative detention. Individuals are also detained when they are held for number of hours for questioning in relation to criminal proceedings but perhaps because of the nature of that detention – its very limited time spans – it has not given rise to many cases.

5.11.3In the case of detention under the Mental Health Acts, this is now subject to various kinds of review, including an automatic, regular review as to the need to continue the detention of the patient. This was introduced following the *Croke* [51] case which was ruled admissible before the European Court of Human Rights and which was then settled by the State.

5.11.4 There is a form of detention under the Refugee Act which allows a police officer to detain where the non-national concerned has been in breach of a direction given by the police. In the case of deportation also, persons are detained with a view to removing them from the State. Here too we have seen a very great number of *habeas corpus* applications. Some of these attack the actual grounds of detention but others operate as a mechanism to seek to re-open the question of whether the person concerned should be deported.

5.11.5 Section 38 of the health Act 1947 allows for detention of individuals on the order of the State's Chief Medical Officer where this is necessary to avoid the spread of infectious diseases. The power has not been used for many years. However, you can see how it might be used when you think back to the public concern there was in relation to SARS.

5.11.6No one can be deprived of the right to seek *habeas corpus* as it is a constitutional remedy. Under Irish law a person may bring any number of *habeas corpus* applications. The liberty of the subject is – as I have indicated – a constitutional principle of considerable importance as evidenced by the inclusion of habeas corpus in the Constitution. In order to justify detention, the State must have all its documentation in order to meet such a challenge.

[51] Application No. 33267/96

5. 12 Legitimate expectation

5.12.1The concept of legitimate expectation was first adopted into Irish law in 1988. The principle has come into the common law from mainland Europe. While the common law had a similar principle – that of equitable estopple – that principle did not apply unless the persons concerned had acted to their detriment.

5.12.2It is still not clear how the doctrine of legitimate expectation will develop in Ireland. In the main, it seems to be limited to procedural matters. In *Waterford Harbour Commissioners v. British Railway Board* [52], however, the defendants were under a statutory duty to provide a ferry service between Ireland and Wales. Political considerations, commercial trends and war all combine to undermine any possibility of such a service. In 1939 the parties reached an agreement for a three times a week service and the plaintiffs agreed not to sue for damages. In 1977 the defendants gave notice of their intention to discontinue the service and the plaintiffs sued for breach of statutory duty and breach of contract. The Supreme Court held in that case that the defendants had a legitimate expectation that their statutory obligations were moribund because of the conduct of plaintiff.

5.12.3In another case *Conroy v Garda Commissioner* [53] the plaintiff, who had been injured in his duties as member of the police, commenced proceedings under a statutory scheme for police compensation. It was agreed between the parties that a case would proceed on the bases that the plaintiff would retire on a 100 % disability pension and an award was made on that basis. Subsequently, it was determined that under the legislation the plaintiff was actually only entitled to a 66% pension and he then commenced proceedings claiming he had legitimate expectation that he would receive a 100% pension. The Court upheld the legitimate expectation of the plaintiff.

5.12.4A recent case of legitimate expectation is *TK v. CAB* which I have already mentioned in the context of customer charters. In that case the Supreme Court held that a tax payer had a legitimate expectation that the procedures set out in the Revenue Commissioners Charter of Rights would be applied. Similarly, in *Eviston v DPP* [54] the Supreme Court relied on a description in the Director of Public Prosecution annual report of the circumstances in which a prosecution would be brought.

5.13 Proportionality

5.13.1Another concept which has come to us from continental Europe is that of proportionality. In fact, this concept sits very well with our constitutional tradition. However, the Supreme Court in Ireland has been unwilling to say that the principle applies as a basis for challenging administrative decisions but has viewed the principle effectively as a form of "reasonableness" test.

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[52] [1979] ILRM 296

[53] [1989] IR 140

[54] [2002] IR 260

5.13.2An interesting case in this context is that of *Bhosphorus Hava Yollari v. The Minister for Transport* [55] in which the court struck down a decision by the Minister to impound an aircraft pursuant to EC regulation introducing sanctions on Serbia. The evidence showed that the aircraft, owned by Yugoslavia Airlines, had been leased to a Turkish airline. The lease was *bona fide* and the court struck down the Minister's action on the grounds of proportionality. In fact, the question was then referred to the European Court of Justice which had no difficulty in finding that the Minister's action in interfering with the airline operator's property rights was entirely proportionate. The case is awaiting hearing before the Strasbourg Court.

5.14 Constitutional Review

5.14.1In addition to the doctrine of *ultra vires* which grounds judicial review of administrative actions, there is also in Ireland review based the Constitution.

5.14.2I have already explained that in Ireland the Government is accountable to be Legislature, being elected by them. The Parliament legislates and the Executive acts to give effect to the legislation. Parliament may, in legislation, empower the Government or a Minister to enact delegated legislation to give effect to the primary legislation. However, the Constitution reserves to Parliament the sole and exclusive power of making laws, save for subordinate legislatures such as local authorities.

5.14.3Because the power to legislate is solely and exclusively vested in the Legislature, the Courts have held that all that the Government or Ministers may do in terms of delegated legislation is to legislate to give effect to the principles and policies set out in the parent legislation. Where delegated legislation goes beyond the principles and policies set out in the primary legislation - or, indeed, where the primary legislation does not set out principles and policies - then the delegated legislation will be found to be *ultra vires* the primary legislation and struck down as the purported unconstitutional exercise by the Government or the Minister of the power to legislate.

5.14.4This has been found to be quite a fruitful area for a challenge. For example, in the case of *Laurentiu* [56] the Supreme Court found that delegated legislation which empowered the Minister to make a deportation order was *ultra vires* the primary legislation. More recently in *Vincent Browne v. Minister for the Marine* [57] the Supreme Court held that a power to make regulations for domestic purposes did not empower the Minister to make regulations to give effect to EC law.

5.14.5Where an item of delegated legislation is found to be *ultra vires* the parent legislation then that item of delegated legislation falls. The effect of such a finding is, therefore, very dramatic. In certain circumstances the statutes authorise bodies other than a Minister to make regulations and bylaws. Thus the possibility of challenge to delegated legislation in one form or another is quite a substantial area of law for us in Ireland.

[55] [1994] 2 ILRM 551

[56] Supreme Court, 20 May 1999

[57] [2003] 3 IR 205

6. CABINET CONFEDENTIALITY

6.1 Given the title of the seminar I think it may be of interest if I deviate for a moment to tell you about Cabinet Confidentiality which I have mentioned in the context of the collective responsibility of the Government. A Tribunal of Inquiry was established because of public disquiet following a television programme which alleged abuses and malpractice in the beef processing industry by a certain named company. One of the issues which was investigated was the granting to that individual of export insurance by the State. One of the issues which the Tribunal sought to examine was the question of what had transpired at a Government meeting. The Attorney General immediately sought an order prohibiting the Tribunal from requiring that evidence to be given and the matter was ultimately referred to the Supreme Court. The Supreme Court found that the provisions of the Constitution requiring the Government to meet and act as a collective authority and the collective responsibility for acts and decisions of the Government and of Departments of State thereby imposed, required frank discussions amongst members of the Government prior to making decisions. This, in turn required the complete confidentiality of those discussions as otherwise they might not be as frank. The court went on to find that notwithstanding the absence of any express words in the Constitution itself providing for such confidentiality, the separation of powers and collective responsibility of Government envisaged in the Constitution meant that discussion at Cabinet must be confidential in order to uphold those two principles.

6.2 In order to cater for this decision by the Supreme Court an amendment of the Constitution was moved whereby the principle of Cabinet Confidentiality is expressly stated but the power is given to the High Court in certain limited circumstances to decide to release information regarding discussions at Cabinet.

6.3 You will see, therefore, that on the basis of the title of this seminar there is really very little which Ireland can contribute. Communications amongst Ministers in relation to Cabinet decision must be kept confidential save for very limited circumstances where the High Court can order disclosure. Other communications between Government Departments, however, subject to certain exceptions, are obtainable by members of the public through the Freedom of Information Act.

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