

XII COLLOQUIUM OF THE STATE COUNCILS AND
THE SUPREME ADMINISTRATIVE COURTS OF THE
EUROPEAN COMMUNITIES MEMBER STATES

SUBJECT: THE SUPREME ADMINISTRATIVE COURTS AND
THE REGULATION OF THE QUANTITY AND
DURATION OF THE PROCEDURES

REPORT OF THE DELEGATION OF IRELAND

PRESENTED BY

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INTRODUCTION

1. On a number of occasions in the past in papers submitted by the delegation of Ireland to other colloques, it was pointed out that there is no separate administrative law system in Ireland in the sense in which it exists in civil law countries, nor is there any structure of administrative courts which are to be found in those countries, and the number of administrative tribunals in existence is comparatively small.

Article 6 of the Constitution of Ireland, 1937 provides for a tripartite division of the powers of government; legislative, executive and judicial. Article 15 provides for the constitution and powers of the National Parliament (the legislature); Article 28 makes provision for the Government (the executive); and Article 34 for the Courts. Article 34 requires that justice shall be administered in courts established by law by judges appointed in the manner provided by the

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Constitution, the Courts to comprise Courts of First Instance, and a Court of Final Appeal. The Courts of First Instance are in 3 tiers: (1) the High Court which is invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal; (2) the Circuit Court and (3) the District Court. The latter two are Courts of local and limited jurisdiction only. The Supreme Court is the Court of Final Appeal and its decision is final and conclusive in all cases (Article 34, s. 6).

Article 37 provides an exception to what may be termed the pure separation of power principle, in that it permits the legislature to vest judicial powers of a limited nature, in non-criminal matters, in persons or bodies who are not judges. The majority of these tribunals operate in the field of public law. Examples of such tribunals are: the Planning Appeal Board, which was established by the Planning Acts 1963/1983 to determine all appeals from the decisions of any planning authority i.e. the local authority in its own administrative area; the Special Commissioners who hear and determine all appeals against assessment to Income Tax; the Censorship of Films Board; the Censorship of Publications Board; the tribunals which resolve disputes as to the entitlement to and the amounts payable in respect of social welfare, the latter including the deciding officers and the appeals officers in the Department of Social

Welfare. In addition, when creating a statutory innovation in the area of private law, the legislature at times vests responsibility for implementing the new scheme in a tribunal rather than in a court. Examples include the Adoption Board; the Labour Court, which (inter alia) investigates and makes recommendations in relation to industrial relations problems, and investigates disputes as to alleged discrimination under the Employment Equality Act, 1977; and the Employment Appeals Tribunal which determines claims by employees for alleged unlawful dismissal by employers under the Unfair Dismissals Act, 1977.

It is in the ordinary courts that most of the remedies against abuses of administrative law or mistakes made in the course of administration are sought. Since the middle of the last century, such remedies took the form of certiorari, prohibition, or mandamus, (the traditional public law remedies), declaratory orders, or injunctions. Certiorari lies to quash a decision of a public body which was arrived at in excess of jurisdiction. Prohibition is sought to restrain a public body from doing something which would be in excess of its jurisdiction. The function of mandamus is to secure the performance of a duty imposed on a public body either by statute or by common law.

However, in some instances, it is not necessary to resort to those remedies, as the statute which confers the power to make the administrative decision provides

expressly for appeals, in some cases on points of law, and in others on points of law and fact, to the High Court, and in rare cases to the Circuit Court. An example of an appeal on a point of law to the High Court is provided by section 21 of the Employment Equality Act, 1977, under which a party to a dispute, in relation to discrimination, determined by the Labour Court, may appeal to the High Court. An example of an appeal to the High Court on questions of law and fact is to be found in the Dangerous Substances Act, 1972, which provides that no person may import, keep, have in his possession, sell or purchase certain dangerous substances without a licence from the Minister for Labour, which the Minister might at his discretion grant or refuse. Where the Minister refuses to grant a licence, section 34 of the Act gives to the person aggrieved a right to appeal to the High Court from the decision of a Minister. An example of one of the rare cases in which an appeal lies to the Circuit Court is contained in section 10 of the Unfair Dismissals Act, 1977. Under that Act an employee who claims to have been unlawfully dismissed may, within 6 months of the date of the dismissal, apply for redress to the Employment Appeals Tribunal, and that Tribunal may make a determination in relation to the claim. Section 10 of the Act gives a right of appeal to the Circuit Court from any determination of the Tribunal, within 6 weeks from the date of the determination. That is a full appeal, heard on oral evidence.

When there is no such statutory right of appeal to the courts the remedies to which reference has already been

made arise. Although the High Court possesses an inherent jurisdiction to supervise the activities of inferior tribunals and other public authorities, it is a cardinal principle that this power of review may only be exercised in circumstances in which the inferior tribunal has exceeded its jurisdiction. It is not the function of the ordinary courts to entertain appeals from administrative bodies, but it is their function to ensure that administrative actions and decisions are taken in accordance with law. In other words, the High Court when exercising its powers of Judicial Review is not concerned with the merits but rather with the legality of the decision under review. The one recognised exception to that rule is that the Court may quash a decision, which is otherwise made within jurisdiction, if that decision contains a patent error of law.

The aggrieved citizen who contests the legality of an administrative decision must therefore have access to the ordinary courts to litigate his claim. Articles 40 to 44 of the Constitution contains a large body of provisions collectively entitled "Fundamental Rights". Article 40 provides for "personal rights". The specified personal rights include (inter alia) equality before the law, the right to personal liberty and provisions for obtaining Habeas Corpus when that right is infringed, the inviolability of the dwelling of the citizen, and the right of citizens to express freely their convictions

and opinions, to assemble peacefully and without arms, and to form associations and unions. The Courts have, however, held that the personal rights specified in Article 40 are not exclusive, and that every citizen has unspecified personal rights which are equally guaranteed by the Constitution. In Macauley v. The Minister for Posts and Telegraphs, 1966 I.R. 345, it was held that a right to have recourse to the High Court to assert and vindicate a legal right is one of the unspecified personal rights of the citizen contained in Article 40.

Due, no doubt in part at least, to the citizen's right of access to the courts, there have been many decisions in recent years in which the courts have demonstrated their ability to intervene for the protection of the citizen over a very wide field. For the purpose of this colloquium, a few examples will suffice - (1) limitations have been placed on administrative discretion; the courts assume that the legislature did not intend to confer a discretionary power on public authorities which would enable them to act in an unreasonable or arbitrary fashion, in consequence of which discretionary powers must be exercised reasonably and bona fide; (2) a judicial power to compel disclosure of administrative files has been established; (3) the right to a fair hearing and to basic fairness of procedures has been vindicated in very many different contexts.

THE QUESTIONNAIRE

2.1 Quality and duration of proceedings

In common with all western countries, the number of proceedings brought before the High Court in Ireland and on appeal to the Supreme Court has escalated to a degree which would have been inconceivable 20 years ago. This is the case not only in respect of claims for judicial review, with which this colloquium is concerned, but also in respect of constitutional actions and actions in tort, in contract, and in chancery. To meet the ever increasing demand the number of judges in the High Court has been consistently increased, so that it is now 250% of what it was 20 years ago, whilst the number of Supreme Court judges has remained static. Article 34, s. 4(3) of the Constitution provides that the Supreme Court (with certain exceptions which are not at present material hereto) shall have appellate jurisdiction from all decisions of the High Court. Every litigant in the High Court, therefore, however hopeless or unmeritorious his claim may be, has a constitutional right to appeal to the Supreme Court, not only in respect of the determination of the action itself, but in respect of every interlocutory application made in the course of the proceedings. In the result, by reason of the very large number of appeals now being brought to the Supreme Court, a period of approximately 18 months must necessarily elapse between the time when the appeal documents are ready and the hearing of the appeal. Twenty years ago that period was only a few months.

Having regard to the number of appeals now awaiting hearing and to the number of appeals likely to arise in the future, the period of 18 months must necessarily lengthen with the passage of time. However, it should be stated that in cases of hardship, such as, for example, those involving social welfare claims, dismissals from employment, or the right to earn a livelihood, such appeals receive preferential treatment and the hearing of those appeals is considerably advanced.

As it is not constitutionally possible to restrict the litigant's right of appeal, a possible solution to alleviate the delay in hearing appeals would appear to be the establishment of an intermediate Court of Appeal. Such a court, if and when established, should, within its jurisdiction, be a Court of Final Appeal, unless it certifies that a question of law of public importance was involved in its decision, and give liberty to the unsuccessful party the right to appeal to the Supreme Court. It would also be necessary to identify the type of case which should be heard as a first and final appeal by the Supreme Court. It is to be hoped that one day such a court of appeal will be established.

2.2 LOCUS STANDI

At common law, by reason of the fact that certiorari and prohibition were public law remedies, it was theoretically open to anyone, even a stranger to the proceedings, to apply for certiorari or prohibition.

In practice however relief was given only to a "person aggrieved". In *Cahill v. Sutton* 1980 I.R. 269 the Supreme Court adverted to the practical considerations which justified the adoption of standing rules. There was, it was said, the danger that unrestricted access to the courts might lead to a possible abuse of the power of judicial review. The primary rule was that the litigant must show "that the impact of the impugned law on his personal situation discloses an injury or prejudice which he has either suffered or is in imminent danger of suffering". The rule of standing may however be relaxed if there are "sufficient countervailing considerations" to justify this.

- 2.3 The remedies are discretionary remedies, and this discretion is to be exercised according to settled principles. Thus, relief may be refused if there has been a lack of good faith and failure to make a full disclosure of all material facts; where there has been a failure to make the application "promptly" and in any case within 3 months from the date when the grounds for the application first arose, or within 6 months when the relief sought is certiorari (although the Court has a discretion to extend the time limit when there *is* good reason for doing so); where there has been acquiescence or waiver on the party seeking to challenge the decision of the tribunal; and where no useful purpose would be served - for example, where the order cannot be implemented

or would be illegal or where the relief would confer no practical benefit on the applicant.

3. PROCEDURAL SOLUTIONS

- 3.1 Prior to October 1986, a person aggrieved by a decision of an administrative body had a multiplicity of remedies available to him. In addition to certiorari, prohibition and mandamus, the private law remedies of the declaration and injunction could also have been invoked. While some of these remedies overlapped doubts frequently arose as to the appropriate one to choose. That choice could be critical, because if one applied for the wrong remedy no relief could be granted to him and the suit would be dismissed on that ground alone. Furthermore, although damages might be sought together with an injunction, it was not always possible to join a claim for damages with an application for prohibition or certiorari. Thus it was necessary in certain cases to apply for certiorari to quash the decision and to institute separate proceedings for damages.

In October 1986 new Rules of the Superior Courts came into force, the principle features of which was to create a single comprehensive procedure, known as an "application for judicial Review", which enables an aggrieved party to test the legality of administrative action in the High Court. The individual remedies have all been retained, and it is still necessary to choose amongst them, but the Court is now empowered to grant

the appropriate relief whatever be the remedy claimed, and in addition the Court may award damages. The procedure requires that no application for Judicial Review shall be made unless the prior leave of the High Court to make the application has been granted. An application for leave is made *ex parte* by a notice containing details of the relief sought and the grounds on which it is sought and an affidavit verifying the facts relied on. Leave will not be granted unless the applicant has a "sufficient interest in the matter" to which the application relates.

The requirement as to obtaining leave of the Court to make the application for Judicial Review is an important "filtering" process, and guards against unmeritorious claims that a particular decision is invalid.

3.2 In appeals involving claims for Judicial Review it is almost invariable that both parties will be represented by experienced lawyers. Occasionally, however, a personal litigant will present his own case, and this he is entitled, as of right, to do.