

RAPPORT IRLANDAIS

rapporteur

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ANSWERS

1. (a) The appropriate court in which to contest the administrative decision is the High Court. Article 34.3.1. of the Constitution of Ireland provides as follows :

"The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal"

The relief sought would be an order of certiorari quashing the decision of the Prefect, and probably also an order of mandamus directing the Prefect to grant to the alien a residence permit for ten years. The form of the proceedings would be an application for judicial review of the decision of the Prefect.

(b) The appeal would be to the Supreme Court. Article 34.4.3. of the Constitution provides as follows :

"The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law."

2. (a) It is not necessary for the alien to have legal representation. He would be entitled to represent himself but having no knowledge either of the relevant law or of the procedure it would in practice be extremely difficult for him to do so. He would need to be represented at least by a solicitor, but preferably by both solicitor and counsel.

(b) The total cost of being represented in the High Court by solicitor and counsel would come to between £8,000 and £12,000. For persons who have not the means to pay for legal representation, there is a special legal aid scheme, known as the Attorney General's Scheme, under which the professional fees of solicitor and counsel retained by the applicant will be paid by the State on the same scale as fees paid in criminal cases.

3. (a) There are two stages in the proceedings. The first stage is an application ex parte for leave to apply for judicial review. At this stage, if the Court grants leave to apply for judicial review, it has a discretion to direct that the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders. (O. 84, r. 20(7)(a) of the Rules of the Superior Courts). The mere granting of leave to apply for judicial review does not of itself have suspensive effect. It is necessary that there should be an express order to this effect.

(b) In deciding whether in exercise of its discretion the Court will direct that the grant of leave shall operate as a stay of the proceedings, the Court's principal concern is to make whatever order will be just in the circumstances. In this hypothetical case, since the alien could be deported if the Prefect is not restrained from acting on his refusal to grant the residence permit, it would be most unlikely that the High Court judge, if he were to grant leave to bring the application, would not also direct that the grant should operate as a stay of the proceedings.

(c) As the application for leave to apply for judicial review is made ex parte, so that no notice has to be given to anyone, it can be made immediately that the need for it arises. And as it is at this stage that the stay on the contested proceedings is also sought, it follows that it likewise can be applied for immediately. The judgment on the merits is not given until the opposing party, in this case the Prefect, has been served with notice of the alien's claim, has been given time to put in his defence, and there has been a full hearing of the case. This hearing would probably take place within two to six months of the initial order giving the alien leave to apply for judicial review.

4. There are no provisions in Irish law, other than principles relating to the manner in which the Prefect should have arrived at his decision, on which the applicant could rely for protection. The position is governed by the Aliens Act, 1935, the Aliens Order, 1946 (S.R.O. 395 of 1946) and the Aliens (Amendment) Order, 1975 (S.I. No. 128). The constitutionality of this Act and of the two orders was challenged in the case of **Oshoku v. Ireland** 1986 I.R. 733 but the challenge failed. In the course of his judgment in that case Gannon J. said at p.746:

"The control of aliens which is the purpose of the Aliens Act, 1935, is an aspect of the common good related to the definition, recognition, and the protection of the boundaries of the State. That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within the State is and has been recognized universally and from earliest times. There are fundamental rights of the State as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter. "

There are no relevant international conventions on which the applicant could rely in our courts.

5. (a) There could be no question of the High Court judge censuring the administrative authorities. It would be no part of his function to do so.

(b) In deciding whether or not the Prefect's order should be quashed, the judge would not form his own appreciation of the bona fide nature or otherwise of the marriage. All he would be concerned with is whether the manner in which the Prefect reached his decision was correct, i.e., did he observe the rules of natural and constitutional justice? Did he understand correctly the law that he had to apply? Did he exclude from his consideration all matters which were not relevant? Did he take into account all matters which he ought to have considered? and finally, could it be said that his decision lacked rationality? An application for judicial review is not an appeal from the decision which is contested. It is an attempt to have that decision quashed on the ground that there was some defect in the manner in which it was reached.

(c) The High Court judge would not submit the matter to another jurisdiction - there is no other jurisdiction which would be competent in the matter.

6. (a) It would not necessarily follow that, if the refusal were quashed, the authorities would have to issue the residence permit. For example, if the decision were quashed because the applicant had not been given a proper opportunity to present his case before the Prefect, the probability is that the matter would be sent back to the Prefect to be considered anew by him.

(b) If after a full hearing on oral evidence the Court was satisfied not merely that the decision of the Prefect should be quashed, but that the alien was entitled to the residence permit he had applied for, the Court could make an order of mandamus directing the Prefect to grant the permit. If such an order was made, and the Prefect failed to comply with it, he would be in contempt of court and could be committed to prison. However, it is rarely necessary in such circumstances to go as far as making an actual order of mandamus. Once the Court has decided that an applicant is entitled to something which it is in the power of the administration to grant, unless the administration appeals against the decision, it will always comply with the ruling of the Court.

SECOND CASE**ASYLUM-SEEKER WHOSE REFUGEE STATUS IS CONTESTED AND WHOM THE ADMINISTRATIVE AUTHORITIES WISH TO DEPORT****ANSWERS**

1. (a) The alien's request for refugee status will be dealt with in the first instance by the Minister for Justice. There is an informal appeal from the decision of the Minister to a retired judge who was formerly President of the Circuit Court. There is no further appeal from his decision.

(b) The decision to deport the alien is taken by the Minister for Justice under powers contained in section 5 of the Aliens Act, 1935. There is no appeal from the decision of the Minister. It would, however, be open to the alien to apply to the High Court by way of judicial review to quash the decision of the Minister on the ground that there had been some defect in the manner in which it was arrived at. I am informed by the Department of Justice that the Government is at the moment considering introducing a right of appeal from the decision of the Minister.

2. It is not necessary for the alien to be represented by legal counsel in making his application to the Minister for Justice though it appears that the practice usually is that they are so represented. It appears that the United Nations office for refugees in London has a pool of lawyers in Dublin which it makes available on behalf of aliens seeking refugee status.

It is not necessary for the request to be submitted in Interpreters are the language of the host country. Interpreters are provided by the Department of Justice.

I can only speculate as to what the cost would be. It could be between about £3,000 and £5,000.

3. (a) The application for refugee status will automatically suspend the effect of the Minister (or the judge who heard the appeal from her decision) observe the rules of natural and constitutional justice ? Did she understand correctly the law that had to be applied ? Did she exclude from her consideration all matters that were not relevant ? Did she take into account all matters which she ought to have considered ? and finally, could it be said that her decision lacked rationality ?

(b) The repeated or manifestly dilatory nature of the request would not be taken into account as the High Court judge would not be dealing with the merits of the case.

4. In assessing the legality of the deportation order, the judge would not take account of the situation pertaining in the country of destination. He would not be hearing an appeal from the decision of the Minister but would only be considering whether there was any defect in the manner in which the decision was reached.

5. I am informed by the Department of Justice that if an alien refuses to provide information in regard to his civil status or country of origin, or claims to have lost his identity papers, the attitude of the Department for the most part is to permit the alien to remain in this country. Even if the Department were aware of the correct nationality of the alien, he would still be allowed to remain by reason of the fact that he would be refused entry into his own country because of not having the correct papers.