

## Remedies for Breach of EU Law Revisited

### Effective Judicial Protection before National Courts: Lessons from Ireland

1. EU law delegates to the Member States the task of protecting rights which it guarantees. This duty may fall on the government, the legislature or, what is relevant here, the judicial arm of government. Under the principle of national procedural autonomy, it falls to the courts of the Member States to identify from their judicial armoury the most appropriate and effective legal remedy. Depending on the subject-matter, the principles of the law of contract or tort may fill the office. In the case of state liability for damages for failure to implement a directive the High Court chose the law of tort.<sup>1</sup> This was the culmination of the most protracted saga of European litigation involving Ireland. It concerned the failure to implement the directive on equal treatment of men and women in matters of social security. Where, however, the subject-matter is usually given effect by administrative decisions, it is the national law of judicial review of administrative action which is most relevant.
2. Ireland shares the common law heritage of judicial review. To place it in its Irish context one can cite an important judgment of O'Higgins C.J. who spoke of "*the emergence three centuries ago of the means by which the Court of King's Bench controlled the judicial process of lower courts, the remedy of certiorari has been developed and extended to reach far beyond the mere control of judicial process in courts...*"<sup>2</sup> Now, he said, it was "*the great remedy available to citizens, on application to the High Court, when any body or tribunal (be it a court or otherwise), having legal authority to affect their rights and having a duty to act judicially in accordance with the law and the Constitution, acts in excess of*

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<sup>1</sup> *Tate v Minister for Social Welfare*, per Carroll J.

<sup>2</sup> *State (Abenglen Properties) v Corporation of Dublin* [1984] 1 I.R. 381 at page 392.

*legal authority or contrary to its duty.*”

3. The Irish courts have witnessed an explosion in judicial review in the past decade. Principally, of course, the applications have been in asylum cases, running in most years to more than 1000. There are about 50 applications each year in respect of planning decisions and normally about one or two public procurement cases. Needless to say, the task of handling the asylum cases has been difficult. The High Court has had to assign two judges more or less full-time to the job. Moreover, they have given rise to some quite difficult legal questions, highly relevant to the standard of judicial review and thus, of effective judicial protection. While the public procurement cases are few in number, they give rise to significant problems of Union law. One case has been referred to the Court of Justice. It had the benefit of the opinion of Advocate General Jacobs. The Commission has brought a number of infringement actions against Ireland in relation to its planning and environmental laws.
  
4. I am principally interested in speaking about the standard of judicial review, particularly the standard for substantive review of decisions. Irish courts have not followed the English courts down the road of "anxious scrutiny." It is not easy to find an objective standard readily capable of consistent application. One candidate is the principle of proportionality, but it does not receive universal approval. This judge invoked, in one judgment, the notion that a sledgehammer should not be used on a nut, meaning that common sense would often be the best guide. There is constant search for the correct balance between the respective roles of the judiciary and the executive. The courts have build on the foundation of the Constitution a strong respect for principles of separation of powers. A powerful dissent in a recent judgement of the Supreme Court act used the majority of "hiking up judicial activism." It would be desirable to design a consistent standard. But some of the interests at stake must meet the requirements of European Union law; others may be scrutinised by the Court of Human Rights.

## Wednesbury in Ireland

5. Over the past 25 years, the Irish courts have made their own, adapted and refined that legal test which most of this audience will recognise under the name of Wednesbury unreasonableness. The courts will, of course, review and, where appropriate, quash decisions for procedural irregularity or mistakes of law. The substantial justification for a decision will, however, be quashed only if it is so unreasonable that no reasonable decision maker could have made it. The famous decision in *Associated Provincial Picturehouses Limited v Wednesbury Corporation* [1948] I K.B. 223 has generally been taken as the starting point. Although the decision in *Wednesbury* is so famous as to need no introduction, it is, in its own terms rather is strikingly ordinarily. It concerned a condition in a licence for showing films on Sunday that no children under the age of fifteen years should be admitted. It raised no larger issue of individual or human rights. The famous proposition then laid down by Greene M.R., at page 230, was stated without very much theoretical reflection about the nature of the judicial power or the distribution of powers. It was that:

*“It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind.”*

The Supreme Court, in particular, has taken an independent position in a number of respects and has not invariably followed the developments of *Wednesbury* by the English courts. One development, in particular, was not considered by the Supreme Court, to provide a convincing development of *Wednesbury*. Henchy J was not persuaded by Lord Diplock’s references, *Council of Civil Service Unions v. Minister for the Civil Service*,<sup>3</sup> at page 410, to “*defiance of logic or of accepted moral standards*” as tests of

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<sup>3</sup> [1985] A.C. 374.

unreasonableness. The major Irish pronouncement of the Wednesbury principle was propounded in a definitive passage in the judgment of Henchy J in *State (Keegan) v. Stardust Compensation Tribunal*<sup>4</sup> at page 658:

*“I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted ultra vires, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision.”*

6. The government, through the legislature, has intervened by enacting very significant restrictions on the right to apply for judicial review in the two very important subject matters of asylum and planning. These limits are imposed under four headings:
  - a. Strict time limits on the making of an application for leave to apply for judicial review: 14 days from the notification of an asylum or immigration decision;<sup>5</sup> eight weeks from the date of a planning decision;<sup>6</sup>
  - b. applications for leave may not be made *ex parte*, but must be made on notice;
  - c. leave may not be granted except on a showing that "*there are substantial grounds for contending that the decision..... is invalid or ought to be quashed;*"<sup>7</sup> the Supreme Court has interpreted the standard

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<sup>4</sup> [1986] I.R. 642.

<sup>5</sup> Section 5(2) of the Illegal Immigrants (Trafficking) Act, 2000

<sup>6</sup> Section 50(4)(a)(i) of the Planning and Development Act, 2000.

<sup>7</sup> Sections 5 and 50 of the respective acts of 2000 mentioned in the preceding footnote contain very similar provisions.

as requiring that the grounds be "*reasonable*", "*arguable*" and "*weighty*" and "*must not be trivial or tenuous*."<sup>8</sup>

d. no appeal to the Supreme Court is permitted against a decision of the High Court save with the leave of the High Court on a certificate that its decision "*involves a point of law of exceptional public importance*..."<sup>9</sup>

7. I have mentioned the explosion of judicial review in the Irish courts. The courts have not hesitated to quash decisions on *certiorari* on grounds of lack of respect for fair procedures. Natural justice has been taken to "*encompass the concept of justice under the Constitution, or constitutional justice*..."<sup>10</sup> In the leading case of *In Re Haughey*,<sup>11</sup> the Supreme Court laid down procedural guarantees for anyone faced with a tribunal implicating charges likely to cast doubt on his good name. These included a right to be furnished with the evidence proposed to be given against him, to be allowed to cross-examine by counsel of his choice and to address the tribunal through counsel. The courts have equally been willing to review decisions for errors of law, which, as it happens, was the first of the headings mentioned by Greene M.R. in *Wednesbury*.

8. On the other hand the application of the *Wednesbury* test has made it extremely difficult to succeed in obtaining judicial review of decisions on substantive grounds. Judges have, as a matter of deep principle, applied a principle of deference to the judgment of the decision-maker, a principle which respects the separation of powers ordained by the Constitution.

### **Wednesbury questioned**

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<sup>8</sup> Per Keane C.J. *In the Matter of Article 26 of the Constitution and...the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360 at page 394

<sup>9</sup> *Ibid.*

<sup>10</sup> *State (Healy) v. Donoghue* [1976] I.R. 325.

<sup>11</sup> *In Re Haughey* [1971] I.R. 217.

9. Earlier this year, in the *Meadows* case, the Supreme Court has reconsidered the appropriateness of the unqualified *Wednesbury* test where fundamental rights are involved.<sup>12</sup> *Meadows* was an immigration concerning an allegation of fear of subjection to FGM if the appellant were returned to Nigeria. The Court declined unanimously the invitation to adopt the standard of “anxious scrutiny,” proposed in such cases as *R v Minister for Defence, ex parte Smith, Re (Mahmood) v Secretary for State for the Home Department*,<sup>13</sup> and *Regina v. Lord Saville of Newdigate and others*.<sup>14</sup> The Irish courts have, of course, for many years been required to ensure the protection of fundamental rights of whose protection is guaranteed by the Constitution and have not found it necessary, even where the protection of such rights is involved, to modify the test for judicial review. The court was not persuaded that it would be possible to devise consistent but different standards of judicial review depending on the subject matter of the administrative decisions under review. In particular, it did not appear possible to devise a consistent and fair distinction between legal and constitutional rights. The majority judgements in *Meadows* proposed, however, that the existing judicial review jurisprudence be interpreted in a manner more appropriate to the facts of individual cases. A modified version of the proportionality test was proposed. The following was the conclusion of one of the judges:

*”If we were to adopt the criterion of “anxious scrutiny,” it would follow that different standards of review would apply depending on whether the case was concerned with the protection of different types of right. That is the English “sliding scale” of review. In my view, it is neither appropriate nor necessary to have a different standard of review for cases involving an interference with fundamental, constitutional or other personal rights. For example, it would be wrong and confusing to have two different standards of judicial review for planning decisions depending on whether the review was being sought by the applicant for permission (the owner of the land with constitutionally protected rights) or a third-party objector (with a merely legal right to object,.....). The*

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<sup>12</sup> *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3.

<sup>13</sup> [2001] 1 WLR 840.

<sup>14</sup> [2000] 1WLR 1855.

*holder of a licence may have a mere legal right, but still be entitled to expect not only fairness in any decision affecting his right to hold it but, in addition, that it will not be taken from him for trifling reasons. It seems to me that the principle of proportionality,..... , can provide a sufficient and more consistent standard of review, without resort to vaguer notions of anxious scrutiny. The underlying facts and circumstances of cases can and do vary infinitely. The single standard of review laid down in Keegan and O’Keeffe is sufficiently responsive to the needs of any particular case.”*

### **What EU law requires**

10. Turning then to the requirements of EU law with regard to the judicial protection of rights which Member States are required to protect, there is a general principle, mentioned above, and some more specific requirements. The courts are required to exercise their function of judicial review of planning or public procurement decisions so as to meet the obligations imposed by the relevant European directives.

- a. in the case of planning decisions, Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, requires that:

*‘Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:*

*(a) having a sufficient interest, or alternatively*

*(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,*

*have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.*

Any such procedure is required to be “*fair, equitable, timely and not prohibitively expensive.*”

In the case of public procurement, the essential obligation is stated in the following terms in the Remedies Directive:

*Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public*  
*b. procurement or national rules transposing that law.*<sup>15</sup>

11. The law of the European Union, therefore, requires the Member States, in this context the courts, to provide an effective legal remedy capable of protecting the rights, guaranteed by community law, of persons affected by decisions which they wish to challenge. However, in accordance with the principle of national procedural autonomy, it is left to the courts of the Member States to provide effective and rapid remedies and to interpret and apply the principles of public procurement law in particular the guarantees of transparency and non-discrimination.

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<sup>15</sup> Article 1 of Directive 2007/66/EC of the European Parliament and of the Council of 11<sup>th</sup> December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts. This Article replaces Article 1 of Directive 89/665/EC.

### **SIAC: Irish and EU angles**

12. The principal Irish experience with the application of these principles was in the *SIAC* case<sup>16</sup> in 2002. It provides some useful insights into the scope of judicial review of tender decisions.
- a. *SIAC* concerned a tender for a large sewerage contract in Co Mayo. The award was, as advertised, to go to the "most economically advantageous" tender and not to be made on the basis of "lowest price only." These are the two alternative bases for advertising public works contracts under the procurement rules. The notified award criteria provided that the contract was to be awarded to "*the tender which is Adjudged to be the most advantageous to the council*[Mayo County Council] *in respect of cost and technical merit...*"
  - b. *SIAC* had submitted the lowest tender, but was not awarded the contract. The contract was awarded to another company, because the awarding authority's consulting engineer, having made a number of criticisms of *SIAC*'s pricing methods, advised that, ultimately, the tender of another contractor might prove "at the end of the day to be the lowest."
  - c. *SIAC* initially challenged the right of the County Council to make its award on this basis. It claimed that it was not permissible to take into account the likely ultimate out-turn of the cost of the contract. The applicant's tender, being the mathematically adjusted lowest, had to be accepted. This question was the subject of a reference for preliminary ruling to the Court of Justice, which heard in favour of the Council. That Court held that the criterion of the the most economically advantageous tender was not incompatible with the public procurement

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<sup>16</sup> *SIAC Construction Limited v Mayo County Council* [2002] 3 I.R. 148.

directives..<sup>17</sup> It was, of course, necessary that criterion in question be mentioned in the contract documents or contract notice. The court explained that: *"The mere fact that an award criterion relates to a factual element which will be known precisely only after the contract has been awarded cannot be regarded as conferring any such restricted freedom on the adjudicating authority."*

- d. It then fell to the Supreme Court to apply the decision to the facts of the case, which entailed, in the end, something close to a substantive review of the decision of the awarding authority. In simple terms, SIAC had submitted the lowest tender. There was a 2 to 3% difference in the tender prices. The decision of the County Council was finely balanced. The ambit of the entire debate in the High Court had been as to whether the engineer was correct in his conclusion that the applicant's tender, though the lowest arithmetically, might ultimately prove to be less advantageous: note, he said "might."
- e. I digress to recall that, in the High Court, Laffoy J applied to the exercise of judicial review might be called a pure *Wednesbury* test. She held that *"the court's function [was] to determine whether the [the Council's] decision was unreasonable in the sense that it plainly and unambiguously flew in the face of fundamental reason and common sense, or not."* Advocate General Jacobs, in his opinion in the reference had expressed the view that the "test for objectivity should be ... rather less extreme" (para. 53) than that applied by the trial judge. It remained for the Supreme Court to devise an appropriate test.
- f. if the decision of the awarding authority was, as I have said, finely balanced, so necessarily was the decision of the Supreme Court. It noted, in particular, the not insignificant difference between the tender prices and the fact that the opinion of the consulting engineer was qualified: the successful tender "might" ultimately turn out to be

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<sup>17</sup> Case C-19/00 *SIAC v. Mayo County Council* [2001] E.C.R. I-7725

economically more advantageous.

g. referring to the requirement of the Remedies Directive that the member states had to provide an "effective" judicial remedy, it said that: "*The two classic principles applicable to that situation are those of: equivalence, i.e. , the remedy must be at least as favourable as that available in national law for a similar complaint, and effectiveness, i.e. , as the Remedies Directive itself makes clear, a remedy which will offer appropriate and sufficient protection for the community law rights in question.*"

h. The Court then referred to a number of decisions of the Court of First Instance relating to the award of contracts by Community Institutions. It cited as follows from a decision concerning the award of a public service contract for the supply of passenger transport at the European Parliament's premises at Strasbourg:<sup>18</sup>

*"Like the other institutions, the Parliament has a wide discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court's review should be limited to checking that there has been no serious and manifest error [(see Agence Européenne d'Intérims v. Commission (Case 56/77) [1978] E.C.R. 2215, para. 20, Adia Interim S.A. v. Commission (Case T-19/95) [1996] E.C.R. II-321, para. 49, and Embassy Limousines & Services v. Parliament (Case T-203/96) [1998] E.C.R. II-4239, para. 56)]."*

i. The Court reasoned that the Community Institutions enjoy "a wide discretion" as to the criteria by which they judge tenders and that its decisions will be annulled only on a finding of "manifest error." It

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<sup>18</sup> *AICS v. Parliament (Case T-139/99)* [2000] E.C.R. II-2849

stated that it was not conceivable that the courts of the member states are required to apply a different standard of judicial review to their own awarding authorities.<sup>19</sup>

- j. it concluded that a wide margin of discretion must be allowed to awarding authorities. The courts must, on the other hand be ready to render effective the general principles of the public procurement. Thus, where a failure to respect the principles of equality, transparency or objectivity is clearly made out, there is no question of permitting a margin of discretion. Moreover, the margin of discretion does not absolve an awarding authority from explaining a choice, such as was made in the present case, of a tender other than the lowest. Finally:
  
- k. *“The courts, while recognising that awarding authorities have a wide margin of discretion, must recognise that this cannot be unlimited. The courts must exercise their function of judicial review so as to make the principles of the public procurement directives effective. In the case of clearly established error, they must exercise their powers. The application of these principles may not, in practice, lead to any real difference in result between the judicial review of purely national decisions and of those which require the application of community law principles.”*

13. In subsequent cases, the courts have succeeded, without to much controversy, in applying these principles by endeavouring to reconcile the principle of respect for the autonomy of the decision maker with the necessity for an effective review mechanism. In effect, the review must mean more than simply establishing that the decision maker was wrong in the sense that the judge takes a different view. According to one judge,<sup>20</sup> *“it must be shown that the decision or step taken which gives rise to complaint was plainly, unambiguously, or unarguably wrong.”* Given the complexity of civil

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<sup>19</sup> It also referred to Case C-120/97 *Upjohn v. Licensing Authority* [1999] E.C.R. I-223 although that case did not concern public procurement.

<sup>20</sup> O’Neill J in *Clare Civil Engineering v Mayo County Council* [2004] IEHC 135 of 9<sup>th</sup> July 2004.

engineering contracts, this may and does involve the judge in intense and detailed analysis of contract documents, specifications, engineers reports and Bills of Quantities. In the particular case, he ruled that the awarding authority had wrongly excluded a tenderer based on a legally mistaken interpretation of the contract documents.

14. Thus, the Irish courts provide an effective remedy of review of public procurement decisions. A hybrid system of review has emerged. The remedy is judicial review in accordance with national law. The courts respect the principles of non-discrimination, transparency and objectivity.<sup>21</sup> In one judgment the Supreme Court,<sup>22</sup> held that a tender procedure had been not respected the necessary degree of transparency.
  
15. There remains a somewhat imprecise formulation of the standard of substantive review. Respect, to the extent appropriate, is paid to the discretion of the awarding authority. Nonetheless, the cases show that the intensity of scrutiny is greater than in traditional cases, where judges have been very slow to substitute their own evaluation of the facts for that of the decision-maker. In tendering, it is natural, other things being equal, to expect the contract to be awarded to the lowest price. Even where the criterion adopted is the “most economically advantageous,” there will usually be an identifiable lowest price. It will normally be incumbent on the authority to claim that other things are not equal and to show why. Thus, the substantial justification for the decision shades into the adequacy of the reasons, even if sufficiency of reasons is usually treated as a separate ground of judicial review.
  
16. Since it is EU law which demands an effective remedy in judicial review, the question arises as to the level of scrutiny which may be expected of the Court of Justice, presumably in the context of an infringement action. In Case C-427/07 *Commission v Ireland*,<sup>23</sup> the Commission made some complaints about the adequacy of the Irish system of judicial review on the grounds, *inter*

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<sup>21</sup> See *Danninger v Bus Atha Cliath* [2007] 29.

<sup>22</sup> *Advanced Totes Ltd v Bord na gCon* [2006] 3 I.R. 77.

<sup>23</sup> Judgment 16<sup>th</sup> July 2009, nyr.

*alia*, that Ireland had not transposed “*the requirement that an applicant must be able to challenge the substantive legality of decisions, acts or omissions subject to the public participation provisions [of the directives]...*” It pointed to two High Court judgments in particular. The Court dismissed the complaint. It noted the applicable Irish legal provisions and considered that they enable applicants “*to challenge the substantive or procedural legality of such acts or omissions.*” (paragraph 88) It declined, on procedural grounds to entertain arguments of the Commission regarding the extent of the review actually carried out by the courts. At first sight, Ireland appears to have defended successfully any complaint regarding the adequacy of its judicial review procedures. There remains the possibility that the Commission will move again based on a more circumstantial complaint regarding the actual operation of the system and standard of judicial review.

17. It may be instructive to draw an analogy with the way in which the Convention on Human Rights has been invoked against the standard of judicial review in the United Kingdom. The European Court of Human Rights has, in a number of its decisions considered the adequacy of judicial review scrutiny in the English courts, in the light of the requirement of “*an effective remedy before a national authority,*” contained in Article 13 of the Convention. the European Court was persuaded in a some cases to accept the effectiveness of judicial review in English law specifically because it accepted that the English courts applied “*anxious scrutiny*” to decisions “*where an applicant’s life or liberty may be at risk...*” For example, in *Vilvarajah v United Kingdom*<sup>24</sup> (at paragraph 125), that court observed:

“*Indeed the[English] courts have stressed their special responsibility to subject administrative decisions in this area to the most anxious scrutiny where an applicant’s life or liberty may be at risk...*” (*emphasis added*).

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<sup>24</sup> (1992) 14 EHRR 248

18. On the other hand in *Smith and Grady v United Kingdom*,<sup>25</sup> found the standard of judicial review that had been applied by the Court of Appeal in that case and found it wanting in the following passage:

*”the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention.”*

19. There is in force, in Ireland, an active and effective system of judicial review in Ireland. It performs its intended function of scrutiny of official decision-making. Its popularity is the best proof of its recognised value. The Irish Courts perform their assigned task of protecting rights guaranteed by EU law. The most intractable problem is the search for a standard of review which meets the due requirements of protection of fundamental rights and respect for the proper role of the executive.

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<sup>25</sup> (1999) 29 EHRR 493