



Public & Regulatory Law Update

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New test for judicial review?

Case: Meadows v Minister for Justice Equality and Law Reform [2010] IESC 3

Judicial review is the main way that the courts supervise bodies exercising public functions to ensure that they act lawfully and fairly. Judicial review is primarily concerned with the legality of the decision making process, not the merits of the decision. One of the grounds for challenging a decision of a body exercising a public function is that the decision is unreasonable. The concept of unreasonableness is an exception to the rule that a court, in a judicial review, will generally not review the merits of a decision. Prior to the judgment of the Supreme Court in this case, it was a generally held view that the test to be applied in determining the reasonableness of an administrative decision was set out by the Supreme Court in *O'Keeffe v An Bord Pleanála* ([1993] 1 IR 39). In the *O'Keeffe* case the Supreme Court approved the judgment of Henchy J in an earlier decision in *The State (Keegan) v The Stardust Victims Compensation Tribunal* ((1986) IR 642) in which Henchy J identified a number of circumstances in which the courts would intervene to quash the decision of an administrative officer or tribunal on the grounds of unreasonableness or irrationality, namely:

1. it is fundamentally at variance with reason and commonsense;
2. it is indefensible for being in the teeth of plain reason and commonsense;
3. because the court is satisfied that the decision maker has breached his obligation whereby he must not flagrantly reject or disregard fundamental reason or commonsense in reaching his decision.

Finlay CJ in *O'Keeffe* went on to state that:

"The circumstances under which the court can intervene on the basis of irrationality with the decision maker involved in an administrative function are limited and rare."

The Supreme Court in this case had the following question certified to it by the High Court:

"In determining the reasonableness of an administrative decision which affects or concerns constitutional rights or fundamental rights, is it correct to apply the standards set out in O'Keeffe...?"

The appellant, a Nigerian woman, sought to impugn the Minister's decision to deport her on the grounds of the irrationality of that decision. The Supreme Court stated that the courts, in assessing the reasonableness of administrative decisions in cases affecting fundamental rights, are entitled to consider the proportionality of the decision. Fennelly J said the court was not altering the *O'Keeffe* test but explaining the principles "*already implicit*" in the law.

The principle according to Murray CJ requires that the effects on or prejudice to an individual's rights by an administrative decision be proportional to the legitimate objective or purpose of that decision. Application of the principle of proportionality is a means of examining whether the decision meets the test of reasonableness. In applying the principle of proportionality the court may have regard to the degree of discretion conferred on the decision maker.

In his dissenting judgment, Kearns J expressed grave reservations as to the application of the test of proportionality in cases such as the one before the court. He indicated that in his view expanding the criteria for judicial review beyond those stated in *O'Keeffe* would, in the case before the court at least, result in a quite inappropriate encroachment into the decision making functions of the Executive. Kearns J went on to say that:

"If such an expanded view of the role of judges is to extend to all areas of judicial review it will engulf the courts in a greatly increased volume of cases...It will, in my view, render our judicial review system, already struggling in one respect under the vast weight of asylum related court applications, virtually inoperable."

Comment. It is clear from reading the judgments of the judges in the majority and those in the minority that their views on the possible effect and import of this decision diverge greatly. Clearly, only time will tell whether the effect of this decision will be revolutionary or whether what has occurred is merely a clarification of the principles which implicitly applied already.



DCC report published

Bill Shipsey SC was appointed by the High Court as an inspector in 2008 to investigate the acquisition and disposal by DCC plc and its subsidiaries, S&L Investments Ltd and Lotus Green Ltd, of their interests in the ordinary shares of Fyffes plc following the Supreme Court finding of unlawful insider dealing by DCC and Mr Flavin in the Fyffes share sale in 2007.

His detailed report was published on 19 January 2010. It states that the three companies involved took their corporate responsibilities seriously; there was a "good culture of compliance" within the companies by the directors, officers and employees and that effective corporate governance procedures were in place at board level.

The inspector concluded that any breaches of company law which occurred were not made intentionally. The Director of Corporate Enforcement has therefore stated that he does not intend to take any proceedings on foot of the report.

New FÁS Act

On 21 January 2010 the Labour Services (Amendment) Act 2009 which appoints a new board to FÁS, the State's Employment and Training Agency came into force (*for more detail see the Public and Regulatory Law ezines, October and December 2009*). The Act provides for a significantly stronger governance and accountability structure at FÁS and, specifically, provides for:

- a reduction in the Board size from 17 to 11;
- the introduction of a rolling system of appointments to the Board;
- the removal of the automatic right to nominate individuals for appointment to the Board from bodies not directly accountable to the taxpayer;
- making the Director General of FÁS accountable to the Oireachtas;
- requiring the disclosure of conflicts of interest by directors and staff of FÁS;
- banning directors and staff of FÁS from any involvement on matters where they have a conflict;
- providing for the removal of directors or termination of staff contracts where there is a breach in this regard; and
- protection for 'whistleblower' members of staff who report serious wrongdoing in the organisation.

Companies (Miscellaneous Provisions) Act 2009

On 23 December 2009 the Companies (Miscellaneous Provisions) Act 2009 was signed into law (*for more detail see the Public and Regulatory Law ezine, November 2009*). Most of its provisions come into effect immediately. The Act amends company law in a range of areas. It allows certain companies continue on a temporary basis to use US Generally Accepted Accounting Principles (US GAAP) in the preparation of their accounts. This means that the relevant US companies will no longer be required to prepare two sets of accounts and can instead prepare one set in accordance with US GAAP until 2015. The Act also gives the Minister for Enterprise, Trade and Employment the power to prescribe other internationally recognised accounting standards for similar companies for a similar period of time.

NAMA commencement

On 23 December 2009 the Minister for Finance announced the names of the nine members and CEO of the NAMA Board and signed the National Asset Management Agency (Designation of Eligible Bank Assets) Regulations 2009 which set out the classes of bank assets that are prescribed as classes of eligible bank assets for the purposes of the National Asset Management Agency Act 2009 (the Act).

This follows on from the signing of the National Asset Management Agency (Determination of Long-Term Economic Value of Property and Bank Assets) Regulations 2009 on 21 December 2009 and the commencement of the Act on the same date.

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