Toma Adam and Others, Applicants, v. **The Minister for Justice, Equality and Law Reform, Ireland** and **The Attorney General,** Respondents [S.C. No. 341 of 2000]
Florin Iordache, Applicant, v. **The Minister for Justice, Equality and Law Reform, Ireland** and **The Attorney General,** Respondents [S.C. No. 28 of 2001]

Supreme Court 5th April, 2001

Judicial review – Leave to apply – Setting aside – Jurisdiction – Leave granted ex parte – Application to set aside – Absence of mala fides – Frivolous and vexatious – Whether the court has inherent jurisdiction to set aside leave for judicial review granted on ex parte application – Whether proceedings frivolous and vexatious.

In two separate proceedings, on the respondents' motions to set aside orders granting leave to apply for judicial review and dismiss the proceedings as disclosing no reasonable cause of action, the High Court at the respective hearings, held that it had an inherent jurisdiction to set aside such leave granted *ex parte,* and that the proceedings of applicants in respect of whom deportation orders had been either made or threatened, were without substance and that the orders of the High Court were to be set aside.

The High Court (Morris P.) directed that in the event of an appeal, both proceedings should be heard at the same time as both appeals raised similar issues for determination.

At the hearing of the appeal, counsel on behalf of the applicants argued, *inter alia,* that excluding cases of *mala fides* or applications to discharge an injunction granted at the leave stage, the High Court did not have jurisdiction to set aside an order granting leave to apply for judicial review which had been granted by another High Court Judge. It was submitted that was a qualitative distinction between the procedure for judicial review and plenary hearing. Order 19, r. 28 was confined to plenary hearings. At the stage of the *ex parte* application for leave to apply for judicial review, the necessary filtering procedure had taken place and the court had decided that the application had met the test as set out in *G.* v. *Director of Public Prosecutions* [1994] I.R. 374.

Counsel on behalf of the applicants also argued that it was not open to a High Court Judge to set aside the decision of another High Court Judge and to discharge the orders granting leave as this it was submitted, was akin to one High Court Judge acting as an appellate court from the decision of another High Court Judge. It was further submitted that if the respondents wished to challenge the decision, the correct remedy was to appeal the decision to the Supreme Court only.

Held by the Supreme Court (Murray, McGuinness and Hardiman JJ.), in dismissing both appeals and affirming the orders of the High Court, 1, that the High Court and the Supreme Court on appeal, had an inherent jurisdiction to set aside an order granting leave to apply for judicial review that had been made on the basis of an *ex parte* application including cases where there was an absence of *mala fides.*

Adams v. Director of Public Prosecutions [2001] 2 I.L.R.M. 401 considered. *Voluntary Purchasing v. Insurco* [1995] 2 I.L.R.M. 145; *Landers v. Garda Síochána Complaints Board* [1997] 3 I.R. 347; *Re Savages' Application* [1991] N.I. 103; *R. v. Secretary of State for the Home Department, ex p. Chinoy* [1991] C.O.D. 381 approved. *State (Hughes) v. O'Hanarahan* [1986] I.L.R.M. 218 not followed.

2. That leave to apply for judicial review should be set aside where the applicants' proceedings had disclosed no reasonable cause of action, were frivolous and vexatious and doomed to fail and where the applicants had not only failed to put forward a stateable case but they had not put forward any case at all within the confines of judicial review.

R. v. *Secretary of State for the Home Department, ex p. Turgut* [2001] 1 All E.R. 719 distinguished.

3. That it was inappropriate that the claims of several applicants should have been included in one set of proceedings without any attempt to distinguish their individual circumstances or to show any basis on which they could all feature as applicants in a single action.

Per Hardiman J. (Murray J. concurring): that the hearing in the High Court of an application to set aside an order granting leave to apply for judicial review was not in any sense an appeal from the judge of the High Court who granted the original leave. On the contrary, it was a proceeding of an entirely different nature, being *inter partes* rather than *ex parte.* Any order made *ex parte* must be regarded as an order of a provisional nature only.

Per McGuinness J. (Murray J. concurring): that the inherent jurisdiction to set aside an order granting leave, which had been made on the basis of an *ex parte* application, should only be used in exceptional cases.

Cases mentioned in this report:-

Adams v. Director of Public Prosecutions [2001] 1 I.R. 47; [2001] 2 I.L.R.M. 401.

Becker v. Noel [1971] 1 W.L.R. 803; [1971] 2 All E.R. 1248.

Barry v. Buckley [1981] I.R. 306.

Doyle v. *Commissioner of An Garda Síochána* [1999] 1 I.R. 249; [1998] 2 I.L.R.M. 523.

Finucane v. McMahon [1990] 1 I.R. 165; [1990] I.L.R.M. 505.

G. v. Director of Public Prosecutions [1994] 1 I.R. 374.

In re O' Laighléis [1960] I.R. 93; (1957) 95 I.L.T.R. 92.

Irish Permanent Building Society v. *Caldwell* [1979] I.L.R.M. 273.

Landers v. Garda Síochána Complaints Board [1997] 3 I.R. 347.

O'Keeffe v. An Bord Pleanála [1993]1 I.R. 39; [1992] I.L.R.M. 237.

R. v. Secretary of State for the Home Department, ex p. Chinoy [1991] C.O.D. 381.

R. v. Secretary of State for the Home Department, ex p. Sholoha [1992] C.O.D. 226.

R. v. Secretary of State for the Home Department, ex p. Turgut [2001] 1 All E.R. 719.
Re Savage's Application [1991] N.I. 103.
Schmidt v. Home Secretary of Government of the United Kingdom [1995] 1 I.L.R.M. 301.
The State (Hughes) v. *O'Hanrahan* [1986] I.L.R.M. 218.
The State (Keegan) v. *Stardust Compensation Tribunal* [1986] I.R. 642; [1987] I.L.R.M. 202.
Voluntary Purchasing v. *Insurco Ltd*.[1995] 2 I.L.R.M. 145.

Appeal from the High Court.

The facts have been summarised in the headnote and fully set out in the judgments of McGuinness and Hardiman JJ., *infra.*

In the *Toma Adam* proceedings, the applicants were granted leave to apply for judicial review by the High Court (Kinlen J.) on the 24th January, 2000. On the 27th June, 2000, the respondents filed a statement of opposition and on the same day issued a motion seeking to set aside the order granting leave to apply for judicial review and an order dismissing the applicants' claim as disclosing no reasonable cause of action. The respondents' motion was heard by the High Court (O'Donovan J.) on the 2nd October, 2000. On the 16th November, 2000, the High Court (O'Donovan J.) gave a reserved judgment and set aside the order granting leave granted by Kinlen J. The applicants filed a notice of appeal on the 21st December, 2000.

In the *Iordache* proceedings, the applicant was granted leave to apply for judicial review by the High Court (Laffoy J.) on the 5th May, 2000. On the 4th August, 2000, the respondents filed a statement of opposition and on the same day issued a motion seeking to set aside the order granting leave to apply for judicial review and an order dismissing the applicant's claim as disclosing no reasonable cause of action. The respondents' motion was heard by the High Court (Morris P.) on the 23rd January, 2001. On the 30th January, 2001, Morris P. set aside the order granting leave by Laffoy J. The High Court (Morris P.) also directed that in the event of an appeal, both proceedings should be heard at the same time as both appeals raised similar issues for determination. The applicant lodged a notice of appeal on the 7th February, 2001.

Both appeals were hard by the Supreme Court (Murray, McGuinness and Hardiman JJ.) on the 23rd February, 2001.

Bill Shipsey S.C. (with him *Ricardo Dourado)* for the applicants in the *Toma Adam* proceedings.

Patrick Horgan S.C. (with him *Killian McMorrow)* for the applicant in the *Iordache* proceedings.

Donal O'Donnell S.C. (with him *Maurice G. Collins*) for the respondents.

Cur. adv. vult.

Murray J. 5th April, 2001

I agree with the judgments of McGuinness and Hardiman JJ.

McGuinness J.

These are two appeals in judicial review proceedings from orders made by the High Court striking out the proceedings as disclosing no reasonable cause of action and discharging prior orders giving leave to issue the proceedings. The appeals have been heard together in accordance with an order made by Morris P. on the 30th January, 2001. The appeals raise similar issues for determination by this court.

The first appeal, in the proceedings *Adam v. Minister for Justice* (referred to for convenience hereafter as the "*Toma Adam* proceedings"), arises from a judgment and order of O'Donovan J. made the 16th November, 2000. The second appeal in the proceedings *Florin Iordache v. Minister for Justice* (the "*Iordache* proceedings") arises from a judgment and order of Morris P. dated the 30th January, 2001.

The proceedings

(i) The Toma Adam proceedings

In the *Toma Adam* proceedings, the High Court (Kinlen J.) granted leave to apply for judicial review by order made the 24th January, 2000. The applicants were stated to be persons who apprehended that they would be deported from the State and they were given leave to seek the following reliefs:-

"1 An order of *certiorari* quashing any deportation orders made by the first respondent as the grounds upon which any such orders were made were in breach of Article 29.3.4° and Article 40.3 of the Constitution of Ireland, 1937, in disregard of the provisions of the European Convention on Human Rights, 1951 and in breach of natural and constitutional justice.

2. An order of *mandamus* directing the respondents to consider the applicants' claims for asylum humanitarian leave to remain in Ireland or refugee status having regard to the European Convention on Human Rights, 1951 and the current status of Romania *vis-à-vis* the said Convention."

At the time the applicants had also sought an order of *mandamus* compelling the second and third respondents to institute proceedings against Romania under the provisions of the European Convention on Human Rights, but the learned High Court Judge refused leave for them to seek this relief.

On the 27th June, 2000, the respondents filed a statement of opposition. At the same time the respondents by motion on notice sought the following orders:-

"1. An order discharging the order of this honourable court made on the 24th January, 2000, whereby the applicants were given leave to apply for judicial review in respect of the reliefs, and on the grounds, set out in the said order;

2. further or in the alternative, an order pursuant to O. 19, r. 28, of the Rules of the Superior Courts, 1986, or, in the alternative, pursuant to the inherent jurisdiction of this honourable court, striking out or dismissing the applicants' proceedings herein on the grounds that the said proceedings disclose no reasonable cause of action against the respondents or any of them, the said proceedings are frivolous and/or vexatious and the said proceedings are doomed to fail."

Both the statement of opposition and the motion on notice were grounded on the affidavit of Mr. Michael Quinn, an assistant principal officer in the Asylum Division of the Department of Justice, Equality and Law Reform, sworn on the 26th June, 2000.

Subsequent to the issue of the respondents' motion on notice the solicitor for the applicants, Mr. Pendred, filed a replying affidavit sworn on the 21st July, 2000. In addition, on dates between the 6th September, 2000, and the 9th October, 2000, each of nine applicants swore affidavits in virtually the same terms setting out in each case that he/she had arrived in Ireland and claimed asylum on the basis that he/she was persecuted in his/her own country, Romania, that he/she suffered breaches of his/her human rights there, and that as a result of those breaches and the persecu-

tion that he/she had a well founded fear of persecution should he/she return to that country. There is no averment in any of the affidavits as to the details of the alleged breaches of human rights or persecution or of the foundation of the fears which the deponents suffer. Each deponent exhibits documents relevant to his/her application for asylum and the processing of his/her claim for asylum by the relevant authorities.

The respondents' motion was heard by the High Court (O'Donovan J.) in October, 2000. On the 16th November, 2000, O'Donovan J. delivered a reserved judgment and made the consequent orders.

For the reasons set out in his judgment the learned High Court Judge held:-

(i) the court had jurisdiction to review the order granting leave. This jurisdiction did not arise under O. 19 of the Rules of the Superior Courts, 1986, but was part of the inherent jurisdiction of the court. In this context the learned judge referred to the judgment of McCracken J. in *Voluntary Purchasing* v. *Insurco Limited* [1995] 2 I.L.R.M. 145, and adopted the reasoning contained in that judgment;

(ii) the proceedings had been brought by a disparate group of persons, some of whom had already been granted refugee status, others of whom had been permitted to remain in this country on humanitarian or other relevant grounds, and others whose applications for asylum had not been finally determined and whose proceedings were therefore premature. It was wholly inappropriate that the claims of the several applicants should have been included in one set of proceedings;

(iii) the European Convention on Human Rights was not a part of Irish domestic law and, accordingly the Minister for Justice, Equality and Law Reform was not obliged to take account of its provisions in exercising his statutory functions;

(iv) there was no evidence before the court that the Minister for Justice, Equality and Law Reform had failed to have regard to the situation in Romania when considering the position of the applicants nor was there any evidence that appropriate procedures had not been complied with or of any breach of the principles of natural or constitutional justice.

The applicants have appealed against the judgment and order of the learned High Court Judge on the following grounds:-

> "The applicants contend that the learned High Court Judge erred in law or in respect of a mixed question of law and fact on the following grounds in holding:-

"(1) that the High Court had an inherent jurisdiction to set aside the grant of leave to apply for judicial review (even in the absence of *mala fides)* and in failing to hold that the proper remedy for the respondents was to appeal the grant of leave to apply for judicial review;
(2) that, in considering the applicants' applications for refugee status the first respondent was not obliged to take account of any provisions, criteria and standards set down by the European Convention on Human Rights or that the State was not obliged to have any further regard to the European Convention on Human Rights in its legislation and administrative rules pertaining to refugees and asylum seekers;
(3) that there was no evidence that the appropriate procedures regarding the processing of the applicants' asylum applications were not followed;
(4) that the applications of those applicants in respect of whom orders of deportation had been either made or threatened were without substance and in further holding that the order of the High Court dated the 24th January, 2000, granting such applicants leave ought to be set aside;
(5) that the within judicial review proceedings disclose no reasonable cause of action against the respondents and ought to be set aside."

(ii) The Iordache proceedings

In these proceedings the applicant was by order made by the High Court (Laffoy J.) on the 5th May, 2000, given leave to seek the following reliefs by way of an application for judicial review:-

"(1) an order of *certiorari* quashing any deportation order made by the first respondent as the grounds upon which any such order was made in breach of s. 3 of the Immigration Act, 1999, and Article 29.3.4º and Article 40.3 of the Constitution of Ireland, 1937, in disregarding the provisions of the European Convention on Human Rights, 1951 and in breach of natural and constitutional justice;
(2) an order of *mandamus* directing the respondents to consider the applicant's claim for asylum, humanitarian leave to remain in Ireland or refugee status having regard to the European Convention on Human Rights, 1951 and the current status of Romania *vis-à-vis* the said Convention;
(3) an order of *mandamus* compelling the second and third respondents to institute proceedings against Romania under the provisions of the aforementioned Convention;

(4) an order for damages."

In addition Laffoy J. ordered that the efficacy of the deportation order which had been served on the applicant should be stayed until the determination of his application for judicial review.

The applicant's statement of grounds for judicial review was accompanied by an affidavit of his solicitor, Mr. Pendred, in which he averred that the applicant was a Romanian national who sought asylum and refugee status in this State

> "as he is subject to persecution and violations of his fundamental human rights in Romania on grounds of *inter alia* political opinions, inhuman treatment, violations of liberty and freedom of conscience, abuse of rights, lack of an effective remedy and discrimination on grounds of belonging to a social and religious minority."

The bulk of Mr. Pendred's affidavit sets out general accusations against the regime in Romania and what are basically legal submissions in connection with the European Convention on Human Rights. No specific details are given of the various abuses suffered by the applicant.

On the 4th August, 2000, a statement of opposition was filed by the respondents grounded on an affidavit of Mr. Noel Waters, principal officer in the Department of Justice, Equality and Law Reform, sworn on the 31st July, 2000. As in the *Toma Adam* proceedings the respondents also issued a motion on notice dated the 4th August, 2000, seeking similar orders discharging the order granting leave and/or an order striking out or dismissing the applicants proceedings on the grounds that they disclose no reasonable cause of action, were frivolous and/or vexatious and were doomed to fail.

With his affidavit, Mr. Waters exhibits a considerable amount of documentation concerning Mr. Iordache's application for refugee status. From these documents a certain amount of the factual background concerning the applicant can be ascertained. The applicant arrived in Ireland in September, 1997. He is a Romanian national. He applied for refugee status on his arrival in Ireland. His application was processed by an officer of the Department of Justice, Equality and Law Reform and was refused on the 25th May, 1999. Mr. Iordache appealed against this refusal on the 3rd June, 1999. At this stage he had the assistance of his then solicitors Messrs. James Watters and Company, who carried out considerable correspondence on his behalf with the asylum authorities. The various documents involved in the appeal proceedings were processed. The appeal was heard by Mr. Eamonn Cahill B.L. on the 25th November, 1999. Mr. Cahill issued a decision on the 21st December, 1999.

From a perusal of the papers exhibited by Mr. Noel Watters in his affidavit it appears that at both hearings the applicant claimed that he had been

persecuted for political reasons in Romania, in particular by the mayor of the local town and his family. He also claimed that he was homosexual and was likely to be persecuted for his sexual orientation if he returned to Romania.

In his decision Mr. Cahill stated:-

> "There had been numerous inconsistencies in the applicant's evidence. Initially, he claimed that he had been raped. In reply to cross-examination by Ms. Gibney he then said that his girlfriend had been raped and that it had not been him who had suffered. There was no evidence that he had ever been persecuted for his sexual orientation and the applicant stated that he had no fears about returning to Romania. He was saddened that the Orthodox church had refused to forgive him for his feelings. He was not aware that there had been a major amendment to the criminal law in Romania in March, 1999, (it appears that this is a reference to a change in the criminal law in regard to homosexuality).
>
> The applicant has not produced any proof to suggest that he has a well founded fear of persecution for any of the Convention reasons. Therefore, I recommend that his appeal be dismissed."

The applicant and his solicitor were notified of the decision on the appeal on the 20th January, 1999. Through his solicitor the applicant appealed to the Minister for Justice, Equality and Law Reform to allow him to remain in Ireland on humanitarian grounds. It appears that this also was refused since a deportation order was made by the first respondent on the 12th April, 2000. The making of this deportation order was notified to the applicant on the 28th April, 2000, and his judicial review proceedings were issued, with Mr. Pendred as solicitor, on the 5th May, 2000.

The applicant himself swore an affidavit on the 6th October, 2000, subsequent to the issue of the respondents' motion on notice and statement of opposition, in which he avers that he suffered persecution because he practised homosexuality and for political reasons. He goes on to state:-

> "I say my life was threatened and I was beaten up. The police refused to investigate my complaints. I was refused employment because of my orientation. I say that the Romanian Penal Code includes article 200 which prohibits homosexual relations which produce 'public scandal' or the promotion of homosexuality and these carry a five year sentence on conviction. I say I am advised by my legal representatives of a person serving a three year jail sentence under the article for 'seducing' another adult of the same sex. I say this article is used to justify discrimination against those whose homosexuality becomes known. I say that intergovernmental and non-governmental organisa-

tions have recommended the reform of this law but none that has occurred."

It would appear from this affidavit that the applicant's major ground for fearing to return to Romania is that he will be persecuted for his homosexuality. This ground was not even mentioned in the original grounding affidavit of his application for judicial review which was sworn by Mr. Pendred.

The respondents' motion came on for hearing before Morris P. on the 23rd January, 2001. The President of the High Court delivered his reserved judgment and made the consequent orders on the 30th January, 2001. For the reasons set out in his judgment the learned President of the High Court held that:-

(1) the court had jurisdiction to review the order granting leave. It is clear from the judgment of the President of the High Court that he was aware of the judgment of O'Donovan J. in the *Toma Adam* proceedings but was informed that that judgment was under appeal. He therefore himself considered the issue of jurisdiction and reached the same conclusion as had O'Donovan J.;

(2) the European Convention on Human Rights was not a part of Irish law and accordingly the first respondent was not obliged to take account of its provisions in exercising his statutory functions;

(3) there was no evidence that the deportation order had been made in contravention of the requirements of s. 3 of the Immigration Act, 1999;

(4) the applicant's claim for an order of *mandamus* compelling the State to bring proceedings against Romania under the European Convention was doomed to fail because such an order would constitute an improper interference by the court with functions entrusted to the Government by Article 29.4.1° of the Constitution of Ireland, 1937.

As a consequence of his judgment the learned President of the High Court ordered that the applicant's proceedings be struck out on the grounds that they disclose no reasonable cause of action and were frivolous and vexatious and also ordered the discharge of the order of the High Court dated the 5th May, 2000. Morris P. also directed that in the event of an appeal of his order to the Supreme Court that the same should be heard at the same time as the *Toma Adam* proceedings. Morris P. also refused a stay on his order.

On the 7th February, 2001, the applicant filed a notice of appeal, setting out a single ground of appeal as follows:-

"The learned President of the High Court erred in fact and law in refusing the applicant a stay on the order of the High Court pending

appeal to this honourable court which said refusal would in effect deprive the applicant of the right of appeal."

The issues

Two issues arose on the hearing of these appeals by this court. The first was whether a judge of the High Court has jurisdiction to discharge the order of another judge of the High Court granting leave to an applicant, on the basis of an *ex parte* application, to issue judicial review proceedings.

The second was whether, in both the *Toma Adam* and the *Iordache* proceedings, the applicants had in their original statement of grounds and affidavits made out a stateable or arguable case for the relief they sought by way of judicial review.

In their written submissions to this court, counsel for both sides also dealt with issues concerning the status and effect of the European Convention on Human Rights, 1951 in Irish law, but this aspect of the matter was not fully argued at the hearing before the court.

Submissions of counsel

Counsel for the applicants in the *Toma Adam* proceedings, submitted that the entire scheme of judicial review proceedings, as governed by O. 84 of the Rules of the Superior Courts, 1986, was radically different from that of ordinary plenary proceedings. The approach of the court in *Barry* v. *Buckley* [1981] I.R. 306, was not suitable for judicial review proceedings and was not applicable to them. In ordinary plenary proceedings the originating pleadings – plenary summons, statement of claim – were produced solely by the plaintiff and as such were governed by O. 19, r. 28 of the Rules of the Superior Courts, 1986, which enabled the court to order any pleading to be struck out on the ground that it disclosed no reasonable cause of action. This provided a necessary "filtering mechanism" whereby the court could prevent cases with no rational basis coming to hearing.

In the case of judicial review, however, this "filtering mechanism" was already in place. Order 84 of the Rules of the Superior Courts, 1986, set out the necessity for the applicant in judicial review proceedings to obtain leave from the High Court before his proceedings could be issued. Leave would not be granted in the first place if the proceedings were baseless, vexatious or frivolous. The test to be applied by the court in granting leave had been set out by the court in *G.* v. *Director of Public Prosecutions* [1994] 1 I.R. 374. In his judgment in that case Finlay C.J. had set out the test as follows at p. 377:-

"An applicant must satisfy the court in a *prima facie* manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:-

(a) that he has a sufficient interest in the matter to which the application relates to comply with rule 20(4).
(b) that the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.
(c) that on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.
(d) that the application has been made promptly and in any event within the three months or six months time limits provided for in O. 84, r. 21(1), or that the court is satisfied that there is a good reason for extending the time limit …
(e) that the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure."

In the same case Denham J. had referred to the burden of proof in an application for leave to issue judicial review proceedings as follows at p. 381:-

"The burden of proof on an applicant to obtain liberty to apply for judicial review under the Rules of the Superior Courts O. 84, r. 20 is light. The applicant is required to establish that he has made out a stateable case, an arguable case in law. The application is made *ex parte* to a judge of the High Court as a judicial screening process, a preliminary hearing to determine if the applicant has such a stateable case."

In the *Toma Adam* proceedings the applicants' application for leave had been carefully considered by Kinlen J. The learned judge had obviously considered the matter fully, since he had permitted only a portion of the reliefs sought by the applicants in their statement of grounds. O'Donovan J. in his judgment in the High Court had accepted that this process of evaluation and filtering had been carried out by Kinlen J. This being so, counsel argued, it could not be open to a second High Court Judge to set aside the decision of Kinlen J. and to discharge the leave granted by him. This was akin to one High Court Judge acting as an appellate court from the decision of another High Court Judge. The proper route would be for the respondents to appeal to this court against the grant of leave.

Counsel on behalf of the applicants in the *Toma Adam* proceedings conceded that the High Court had an inherent jurisdiction to set aside the grant of leave in judicial review proceedings where there had been material non-disclosure or other conduct which was akin to lack of *bona fides* on the part of the applicant, and in this connection he referred to the judgment of Kelly J. in *Adams* v. *Director of Public Prosecutions* [2001] 2 I.L.R.M. 401. This, he said, was an exception to the general rule and there was no suggestion of lack of *bona fides* in connection with the present application. In his judgment in the instant case O'Donovan J. had accepted that the case was not covered by O. 19, r. 28 of the Rules of the Superior Courts, 1986, but had held that the court had a wide ranging inherent jurisdiction to set aside the grant of leave and, indeed, to strike out the entire proceedings. In so doing the learned trial judge had relied on the judgment of McCracken J. in *Voluntary Purchasing* v. *Insurco Ltd.* [1995] 2 I.L.R.M. 145. That case was not, however, a judicial review case and there had been no comparable filtering and evaluation procedure applied to it. It did not, therefore, provide an authority for the proposition that the court had an inherent jurisdiction to set aside the leave already granted in judicial review proceedings. Indeed there was no authority for such a proposition.

Counsel on behalf of the applicants in the *Toma Adam* proceedings also argued that, if this court held that there was an inherent jurisdiction to set aside leave which had already been granted, this should be done only in extreme circumstances, where it was crystal clear that the application did not meet the test set out in *G.* v. *Director of Public Prosecutions* [1994] 1 I.R. 374. Order 84 of the Rules of the Superior Courts, 1986, already provided a number of protections for public authorities who were likely to be subject to judicial review. The filtering process of seeking leave existed to prevent undue and unnecessary harrying of public authorities.

As far as the second issue was concerned, counsel on behalf of the applicants in the *Toma Adam* proceedings submitted that the application as set out in the pleadings met the tests set out in *G.* v. *Director of Public Prosecutions* [1994] 1 I.R. 374. He referred to the decision of Keane J. (as he then was) in *Irish Permanent Building Society* v. *Caldwell* [1979] I.L.R.M. 273, where the learned judge held that the jurisdiction to strike out proceedings ought not to be exercised in cases raising complex and novel issues of law. Counsel on behalf of the applicants in the *Toma Adam* proceedings submitted that in the instant case important new issues of law were raised in regard to the relationship between Irish law, the Treaty of European Union, and the European Convention on Human Rights, 1951. He accepted that the averments of the applicants' solicitor, Mr. Pendred, in his original grounding affidavit were somewhat bare, but submitted that the

pleadings were open to amendment and that further affidavits could be filed.

Counsel for Mr. Iordache adopted the arguments of counsel on behalf of the applicants in the *Toma Adam* proceedings. He went on to refer to the judgment of Kelly J. in *Landers* v. *Garda Síochána Complaints Board* [1997] 3 I.R. 347, where the learned judge had accepted that the applicants' judicial review proceedings could be amended and that their departure from the procedure provided in O. 84 of the Rules of the Superior Courts, 1986, was not fatal to their claim in circumstances where the procedure actually adopted did not amount to abuse of process of the High Court. Kelly J. had held that an action should not be dismissed if the statement of claim admitted of an amendment which might save it. Counsel on behalf of Mr. Iordache submitted that undue obstacles should not be put in the way of an applicant seeking leave to issue judicial review proceedings; amendments of the pleadings should be permitted and there was power to extend time where necessary. Counsel went on to argue that by virtue of its ratification of the Treaty of the European Union the State was estopped from asserting that the Irish courts had no part in the enforcement of the provisions of the European Convention on Human Rights. The jurisprudence of the European Court of Justice together with the provisions of Title 1 of the Treaty of the European Union contradicted the proposition that an argument on behalf of the applicant that the State had violated his rights under the European Convention was doomed to failure before an Irish court. It was open to an Irish court to draw inspiration from the European Convention in order to determine whether an applicants' right to fair procedures had been violated.

In the *Iordache* proceedings the order granting leave had permitted the applicant to seek an order of *mandamus* compelling the second and third respondents to institute proceedings against Romania under the provisions of the European Convention on Human Rights. Counsel on behalf of Mr. Iordache stated that this relief was no longer sought by the applicant.

Counsel for the respondents in both cases dealt first with the issue of the jurisdiction of the High Court Judges to discharge leave to issue judicial review proceedings which had already been granted by the High Court. He submitted that the conclusions reached by O'Donovan J. and Morris P. in their judgments were justified by fundamental principle, as well as by the authorities referred to in the judgments. It had been suggested that where a respondent in judicial review proceedings was aggrieved by the making of an order granting leave the correct remedy was to bring an appeal to this court. In practice such an appeal would raise serious difficulty and would necessarily involve this court considering arguments in evidence that had never been considered by the High Court. In such

circumstances this court would effectively be acting as a court of first instance rather than a court of appeal, a role which the court had repeatedly and empathetically rejected.

Counsel for the applicants had conceded that the High Court had jurisdiction to discharge the order giving leave where there was a lack of *uberrima fides* in the original *ex parte* application. Once the principle of inherent jurisdiction was accepted it must extend to other situations where the case made at the *ex-parte* stage could be shown, on application by the respondent, to be unstateable, without basis, or vexatious. He agreed with counsel on behalf of the applicants in the *Toma Adam* proceedings that this course should only be taken in a very clear case but he was in no doubt that the jurisdiction existed.

As far as the *Toma Adam* and *Iordache* proceedings were concerned, counsel for the respondents submitted that it was entirely suitable for the High Court to exercise its inherent jurisdiction to discharge the leave and strike out the proceedings. These were judicial review proceedings, not appeal proceedings; it was the method whereby the asylum authorities had reached their decisions that was under challenge rather than the decisions themselves. In the pleadings in both cases no attempt at all had been made to identify particular defects in the procedure used; there was no assertion that unfair procedures had been used; there was no suggestion that the decisions were unreasonable in the sense defined in *The State (Keegan)* v. *Stardust Compensation Tribunal* [1986] I.R. 642, and *O'Keeffe* v. *An Bord Pleanála* [1993] 1 I.R. 39 and no concrete evidence was provided to establish the danger of persecution (as defined by the Geneva Convention) which would be faced by the applicants if they were returned to Romania.

The essential complaint made by the applicants in the proceedings was that the first respondent was obliged to take into account the provisions of the European Convention on Human Rights, 1951 in exercising his powers in regard to asylum seekers and refugees. It was common case that the European Convention on Human Rights, 1951 had not as yet been incorporated into domestic law in this State. Counsel on behalf of the respondents referred to the decision of this court in *In re Ó Laighléis* [1960] I.R. 93 and to the judgment of Barrington J. in *Doyle* v. *Commissioner of An Garda Síochána* [1999] 1 I.R. 249. Barrington J. stated at p. 268:-

> "Ireland is a signatory of the European Convention on Human Rights and accepts the right of individual petition. But Ireland takes the dualistic approach to its international obligations and the European Convention is not part of the domestic law of Ireland. The Convention may overlap with certain provisions of Irish constitutional law and it may be helpful to an Irish court to look at the Convention when it is attempting to identify unspecified rights guaranteed by Article 40.3 of

the Constitution. Alternatively, the Convention may, in certain circumstances influence Irish law through European community law. But the Convention is not part of Irish domestic law and the Irish court has no part in its enforcement."

Counsel on behalf of the respondents accepted that both this court and the High Court had had recourse to European Convention jurisprudence in, for example, constitutional proceedings, but such recourse to the Convention did not involve its enforcement by an Irish court as was sought in the present proceedings.

As far as counsel for Mr. Iordache's argument on the effect of Title 1 of the Treaty on European Union was concerned, counsel for the respondents did not accept that Article F.2 of the Treaty had the effect of incorporating the European Convention into the domestic law of the State. In particular it could not do so in relation to an area of law such as immigration policy which fell outside the field of community law.

The law and conclusions

Through their counsel, the applicants in both sets of proceedings argued that, once leave to issue judicial review proceedings has been granted, the High Court has no jurisdiction to discharge that leave. At the stage of the *ex parte* application for leave the necessary filtering procedure has taken place, and the court has decided that the application has met the tests set out in *G.* v. *Director of Public Prosecutions* [1994] 1 I.R. 374, which I have quoted above. If the respondents wish to challenge this decision, the correct remedy is to appeal to this court.

In the instant cases both O'Donovan J. in the *Toma Adam* proceedings and Morris P. in the *Iordache* proceedings held that the High Court had an inherent jurisdiction to discharge the order giving leave and to strike out the proceedings. Both judges relied in the main on the decision of McCracken J. in *Voluntary Purchasing* v. *Insurco Limited* [1995] 2 I.L.R.M. 145, and in particular on the passage at p. 147 of the report where the learned judge stated:-

"In my view, however, quite apart from the provisions of any rules or statute, there is an inherent jurisdiction in the courts in the absence of an express statutory provision to the contrary, to set aside an order made *ex parte* on the application of any party affected by that order. An *ex parte* order is made by a judge who has only heard one party to the proceedings. He may not have had the full facts before him or he may even have been misled, although I should make it clear that that is not suggested in the present case. However, in the interests of justice it is essential that an *ex parte* order may be reviewed and an opportunity

given to the parties affected by it to present their side of the case or to correct errors in the original evidence or submissions before the court. It would be quite unjust that an order could be made against the party in its absence and without notice to it which could not be reviewed on the application of the party affected."

Both counsel for the applicants correctly point out that *Voluntary Purchasing* v. *Insurco Ltd.* [1995] 2 I.L.R.M. 145, is not a judicial review case, and that the pleadings in that case had not been subjected to the filtering process of the application for leave. So far as I am aware they are also correct in saying that there is no specific Irish authority prior to the present cases which establishes that the High Court has jurisdiction to discharge an order for leave already given.

Even if it is true that the jurisdiction point has not specifically been argued and decided, there are, however, cases where the inherent jurisdiction of the court to discharge leave has been assumed and put into effect. Counsel on behalf of the applicants in *Toma Adam* himself has referred to the judgment of Kelly J. in *Adams* v. *Director of Public Prosecutions* [2001] 2 I.L.R.M. 401 where the learned trial judge discharged the leave earlier granted by O'Neill J. as against the third respondent, described in the pleadings as *"Her Majesty's Secretary of State for Home Affairs"*. Counsel on behalf of the applicants in the *Toma Adam* proceedings distinguished *Adams* v. *Director of Public Prosecutions* as being a case where there was material non-disclosure or other conduct akin to a lack of *bona fides* on the part of the applicant. He accepted that the court had jurisdiction to discharge the leave in such circumstances.

In the first place, in my view, Kelly J's decision in *Adams* v. *Director of Public Prosecutions* [2001] 2 I.L.R.M. 401 was by no means solely dependent on material nondisclosure or lack of *bona fides*. In his judgment he dealt in detail with the lack of any proper service of the proceedings and the nature of the proceedings themselves before turning to consider what he saw as lack of *bona fides*. Secondly, the decision in *Adams* v. *Director of Public Prosecutions* was under appeal at the time when the instant cases were heard before this court. Judgment has now issued on the appeal and is reported at [2001] 1 I.R. 47; this court upheld the learned High Court Judge. However, this court dealt with the matter as being one where the court lacked basic jurisdiction and where the case was unstateable; it did not deal, other than by a passing reference, to the matter of *bona fides*.

In the earlier case of *Landers v. Garda Síochána Complaints Board* [1997] 3 I.R. 347, which was also a judicial review case in origin, the third defendant applied to have the claim against him struck out, relying on the inherent jurisdiction of the court. While the circumstances were not the same, and in the event Kelly J. refused to strike out the proceedings, it does

not appear to have been suggested that the court had no jurisdiction to strike out what were basically judicial review proceedings.

In their book *Administrative Law in Ireland* (3rd ed.), Hogan and Morgan discussed this question at pp. 708 to 709 under the heading "Appealing or setting aside the grant of leave", as follows:-

> "But is it also the case that a putative respondent could appeal the grant of leave? The existence of such a right of appeal is more doubtful and not supported by present practice. In this regard we may note the comments of McCarthy J. in *State (Hughes)* v. *O'Hanrahan* [1986] I.L.R.M. 218 at p. 211 where he doubted though without giving any reason whether anyone (other than the applicants) can appeal against an order *ex parte*. The proper course of action for a respondent who objects to the grant of leave would seem to be to bring a motion seeking to have it set aside. The existence of such a jurisdiction was recognised by Carswell J. (as he then was) in *Re Savage's Application* [1991] N.I. 103 at p. 107. While recognising that the burden on a respondent who moved the court to have the grant of leave set aside was a 'heavy one', nevertheless:-
>
> > 'If on mature consideration of the facts, and with the benefit of the arguments presented to me by both sides, I now accept that there is not an arguable case on the facts, then I think the leave should be set aside.'
>
> In effect, therefore, this jurisdiction to set aside is but an example in this particular context of a more general power to strike out on the ground that the proceedings are 'clearly unsustainable'. If anything, however, this jurisdiction to set aside must be even more sparingly exercised, in that the granting of leave by the High Court presupposes - in a way that the mere issuing of a plenary summons does not - that the case is at least an arguable one."

In England the rules governing the application for leave to issue judicial review proceedings differ considerably from the Irish rules; nevertheless the issue of the discharging of leave once given has also arisen for consideration. In the most recent edition of Lewis, *Judicial Remedies in Public Law*, the author states at p. 283 para. 9-060:-

> "There is an inherent jurisdiction in the court to set aside orders made without notice having been given to the other party, including the grant of permission to apply for judicial review. That is the appropriate and usual method for challenging the grant of permission. The courts have emphasised, however, that the jurisdiction is to be exercised sparingly and that they will only set aside permission in a very plain case."

In De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, the question is dealt with at p. 667 para. 15.025 as follows:-

> "Where leave has been granted, a respondent may apply to set aside a grant of leave on the grounds that the application discloses absolutely no arguable case or that there has not been frank disclosure by the applicant of all material matters both of fact and law. However except in very clear cases such applications are not looked on with favour by the courts."

Both English authors refer to *R.* v. *Secretary of State for the Home Department ex p. Chinoy* [1991] C.O.D. 381. In that case the applicant sought to judicially review the decision of the British Home Secretary to surrender him to the United States authorities. Leave was granted by Simon Brown J. and the Home Secretary subsequently sought to set aside that leave. His application was heard by two judges of the Queens Bench Division. In the course of his judgment Bingham L.J. referred to the argument made by counsel on behalf of the applicant, who had submitted that if there was any jurisdiction to set aside the order giving leave it was a jurisdiction which might only be exercised in the case of nondisclosure or in the case of new factual developments since the date of the grant of leave. The learned judge commented:-

> "I would unhesitatingly accept that those are grounds upon which the court could exercise its discretion to set aside leave previously given. But I would not accept the suggestion that the court's jurisdiction may only be exercised where nondisclosure or new factual developments are demonstrated. It seems to me that it is a jurisdiction which exists and which the court may exercise if it is satisfied on *inter partes* argument that the leave is one that plainly should not have been granted.
>
> I would, however, wish to emphasise that the procedure to set aside is one that should be invoked very sparingly. It would be an entirely unfortunate development if the grant of leave *ex parte* were to be followed by applications to set aside *inter partes* which would then be followed, if the leave were not set aside, by a full hearing. The only purpose would be to increase costs and lengthen delays, both of which would be regrettable results. I stress therefore that the procedure is one to be invoked very sparingly and it is an order which the court will only grant in a very plain case. I am, however, satisfied, as I have indicated, that the court does have discretion to grant such an order if satisfied that it is a proper order in all the circumstances."

In my view the learned trial judges in the instant cases, O'Donovan J. and Morris P., were correct in deciding that this court has a jurisdiction to set aside an order granting leave which has been made on the basis of an *ex*

parte application. However, I would accept the submission of counsel on behalf of the applicants in *Toma Adam*, with which counsel on behalf of the respondents agrees, that this jurisdiction should only be exercised very sparingly and in a very plain case. The danger outlined by Bingham L.J. in the passage quoted above would be equally applicable in this jurisdiction. One could envisage the growth of a new list of applications to discharge leave to be added to the already lengthy list of applications for leave. Each application would probably require considerable argument - perhaps with further affidavits and/or discovery. Where leave was discharged, an appeal would lie to this court. If that appeal succeeded, the matter would return to the High Court for full hearing followed, in all probability, by a further appeal to this court. Such a procedure would result in a wasteful expenditure of court time and an unnecessary expenditure in legal costs; it could be hardly said to serve the interests of justice. The exercise of the court's inherent jurisdiction to discharge orders giving leave should, therefore, be used only in exceptional cases.

Should, then, the inherent jurisdiction be used in the instant cases? I would accept that counsel on behalf of the applicants in the *Toma Adam* proceedings is correct in referring the court to the tests set out by Finlay C.J. in *G.* v. *Director of Public Prosecutions* [1994] 1 I.R. 374, and to the burden of proof as set out by Denham J. in the same case. The first test is whether the applicants have "a sufficient interest in the matter". In the *Toma Adam* proceedings it is established by the affidavit of Mr. Michael Quinn that quite a number of the listed applicants either no longer have a proper interest in the proceedings because they have been permitted to remain in this country, or have not yet acquired such an interest, since their applications for refugee status have not yet been decided. Even if one considers the remaining applicants, they have in common the fact that they are Romanian nationals; that they are now, one presumes, in this country; and that they do not wish to return to Romania. These simple facts do not go far enough to show, in the case of each applicant, what is his or her specific "interest" in the proceedings. I would be in agreement with O'Donovan J. in this case in holding that it is a most unsuitable procedure to have the applications of a large number of applicants grouped together in one set of pleadings, grounded on one non-specific affidavit, as they are here.

However, the most serious difficulties for the applicants in both cases arise under tests (b) and (c) as set out in *G.* v. *Director of Public Prosecutions* [1994] 1 I.R. 374, that the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review and that on those facts an arguable case in

law could be made that the applicant was entitled to the relief which he sought.

In the present cases the applications were initially grounded on the affidavits of Mr. Pendred, solicitor, which are couched in the most general terms. He avers that the applicants are subject to persecution in Romania in various ways which reflect the wording of articles of the European Convention. Subsequent to the granting of leave a number of further affidavits were sworn by individual applicants. Again these were in very general terms, simply expressing a fear that if the deponent is returned to Romania he or she will suffer persecution and abuse of his or her human rights. The affidavits exhibit in each case the documents relevant to the applicants' application for refugee status and its rejection by the authorities. It is, it seems, left to the court itself to peruse these documents and to extract from them what might be actual grounds for judicial review. This is in no way a satisfactory procedure. It cannot be too often said that judicial review is not a further appeal against a decision which the applicant wishes to overturn. It is a review of the manner and method whereby that decision was reached to ascertain whether correct procedures were used which were *intra vires* the decision maker and in accordance with natural and constitutional justice, and, in some cases, whether the decision was "reasonable" in the sense defined in *The State (Keegan)* v. *Stardust Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe* v. *An Bord Pleanála* [1993] 1 I.R. 39. In an application for leave to issue judicial review proceedings in regard to a decision made by a public authority the applicant must set out on affidavit at least sufficient detail to establish the manner in which he claims the decision making procedure was flawed or in error.

In the instant cases I am not to be taken as saying that grounds for judicial review could not in any circumstances be made out by any or all of the applicants. Coincidentally, very shortly after the hearing of the present appeals by this court, a judgment of the English Court of Appeal in an asylum case was reported – *R.* v. *Secretary of State for the Home Department, ex p. Turgut* [2001] 1 All E.R. 719. This case concerned a Turkish Kurd who had entered the United Kingdom illegally and claimed asylum. His claim was rejected by the Secretary of State and on appeal by the special adjudicator. After the Immigration Appeal Tribunal had refused him leave to appeal, Mr. Turgut applied to the Secretary of State for exceptional leave to remain. This too was refused. The applicant challenged these decisions on the grounds of irrationality and the judgments of Simon Brown and Schiemann L.JJ. (with both of whom Thorpe L.J. agreed) contain a most interesting and far reaching consideration of the approach of the courts to the rationality or otherwise of decisions in asylum cases in the light of the European Convention on Human Rights, 1951. In

that case some 1500 pages of specific evidence were submitted to the court relating to the danger that the applicant's human rights would be abused if he was returned to Turkey, and the challenge to the rationality of the respondent's decision was fully pleaded.

On the pleadings in the instant cases, however, there is no way in which either this court or the court below could assess whether the facts support a stateable ground for the relief sought, because in neither the *Toma Adam* proceedings nor the *Iordache* proceedings did the pleadings set out any specific evidence that the first respondent had failed to have regard to the situation in Romania when considering the position of the applicants. Nor was there any evidence that appropriate procedures had not been complied with or that there was any breach of the principles of natural or constitutional justice. It is not so much that the applicants have not put forward a stateable case as that they have not put forward any case at all within the confines of judicial review proceedings.

For these reasons I would dismiss both appeals and affirm the orders of the learned High Court Judges. In the circumstances it is unnecessary to consider such arguments as were made concerning the European Convention on Human Rights and the Treaty of European Union.

Hardiman J.

These two cases were heard together and, I am satisfied, raise issues so similar that they can be dealt with in a single judgment.

In the first set of proceedings there are 48 applicants. I shall refer to these for the sake of brevity as *"Adam"*. All of the applicants are stated in the proceedings to be persons who apprehend being deported from the State. On the 24th January, 2000, the High Court (Kinlen J.) gave them leave to apply for judicial review. Specifically they were given leave to seek the following reliefs:-

"(1) an order of *certiorari* quashing any deportation order made by the Minister for Justice, Equality and Law Reform, as the grounds upon which any such orders were made were in breach of Article 29.3.4° and Article 40.3 of the Constitution of Ireland, 1937, and in disregard of the European Convention on Human Rights, 1951 and in breach of natural and constitutional justice;

(2) an order *of mandamus* directing the respondents to consider the applicants' claims for asylum, humanitarian leave to remain, or refugee status, having regard to the European Convention on Human Rights, 1951 and the status of Romania *vis-à-vis* the said Convention."

The relief which Mr. Adam and others were given leave to seek comprised part only of the relief sought in the statement grounding their application for judicial review.

On the 5th May, 2000, Mr. Iordache was granted leave by the High Court (Laffoy J.) to seek the following reliefs by way of application for judicial review:-

"(1) an order of *certiorari* quashing a deportation order made by the Minister for Justice, Equality and Law Reform in respect of him on the 12th April, 2000;

(2) an order of *mandamus* directing the respondents to consider the applicant's claim for asylum, humanitarian leave to remain or refugee status having regard to the European Convention on Human Rights, 1951 and the status of Romania *vis-à-vis* the said convention;

(3) an order of *mandamus* compelling Ireland and the Attorney General to institute proceedings against Romania under the European Convention on Human Rights, 1951;

(4) damages."

Mr. Iordache's claimed reliefs were identical to those claimed by Mr. Adam and others. Mr. Iordache was, however, granted leave to seek two reliefs which was refused to Mr. Toma and his fellow applicants.

On the 27th June, 2000, the respondents issued, in the *Adam* proceedings, motion on notice seeking:-

"(a) an order discharging the order of the 24th January, 2000, or

(b) in the alternative an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts 1986, or in the further alternative, pursuant to the inherent jurisdiction of the courts, striking out or dismissing the proceedings herein on the grounds that the said proceedings disclosed no reasonable cause of action against the respondents or any of them, and that they are frivolous and/or vexatious and doomed to failure."

At the same time as this motion on notice was issued, a statement of opposition was filed.

The motion was heard on the 2nd October, 2000, by O'Donovan J. who delivered judgment on the 16th November, 2000. The learned judge held that:-

(i) the court had jurisdiction to discharge the order of the 24th January, 2000;

(ii) the European Convention was not part of Irish law and the first respondent was not obliged to take account of its provisions in exercising its statutory functions;

(iii) there was no evidence that the first respondent had failed to have regard to the situation in Romania when considering the position of the applicants, nor was there any evidence that appropriate procedures had not been complied with or of any breach of the principles of natural or constitutional justice;
(iv) the proceedings are premature in respect of a large number of the applicants whose applications for asylum have not been finally determined;
(v) it was wholly inappropriate that the claims of the several applicants should have been included in one set of proceedings.

The course of the *Iordache* proceedings was similar. The respondents filed a statement of opposition and a similar motion on notice. This was heard by Morris P. on the 23rd January, 2001, and he delivered a reserved judgment on the 30th January, 2001. He made similar findings in relation to points (i),(ii) and (iii) above and further held that the applicant's claim for an order of *mandamus* compelling the State to bring proceedings against Romania was doomed to fail because such an order would constitute an improper interference by the court with functions entrusted to the government under Article 29.4.1° of the Constitution of Ireland, 1937.

Issues on appeal

The issues argued on the hearing of this appeal are as follows:-
(1) Whether the High Court or this court on appeal has jurisdiction to set aside an order giving leave to seek judicial review?
(2) Whether the learned High Court Judge was correct in finding that the first respondent was not obliged to have regard to the provisions of the European Convention on Human Rights?
(3) Whether the proceedings brought by the applicants disclosed any reasonable cause of action against the respondents, were frivolous or vexatious or doomed to fail?

Jurisdiction to set aside the orders granting leave

This was by far the issue most emphasised on the hearing of the appeal. It is argued for the applicants that, save in very narrow circumstances, there was no jurisdiction in a judge of the High Court to set aside an order granting leave to apply for judicial review which had been granted by another judge of that court. It was conceded that such a power existed in the case of demonstrated nondisclosure. It was further conceded in argument on behalf of the applicants in the *Adam* proceedings that there might be a power to grant an order discharging an injunction given at the

leave stage. In general, however, it was contended that no such power existed. The power conferred by O. 19 of the Rules of the Superior Courts, 1986, it was submitted, was confined to plenary proceedings. This distinction was a justifiable one, it was said, because judicial review proceedings were already subject to a filter in the form of the need to apply to a judge of the High Court for leave. This, it was submitted, was a qualitative difference from plenary proceedings. It was further submitted that since the legislature has in some cases required applications for judicial review to be made on notice, the court should not entertain an application to vacate leave in any other cases, because this would tend unwarrantedly to assimilate the majority of cases where no notice was required to the exceptional cases where it was. Moreover, it was contended, the relatively rapid disposal envisaged by O. 84 of the Rules of the Superior Courts, 1986, for judicial review cases removed the need for the existence of a jurisdiction such as is claimed by the respondents.

It was submitted that a respondent aggrieved by the very grant of leave had a remedy in the form of an appeal to this court, but no other.

In my view, any order made *ex parte* must be regarded as an order of a provisional nature only. In certain types of proceedings, either the apparent requirements of justice or the requirements of its administration mean that a person will be affected in one way or another by an order made without notice to him and therefore without his having been heard. This state of affairs may, depending on the facts, constitute a grave injustice to the defendant or respondent. In the context of an injunction, only a very short time will normally elapse before the defendant has some opportunity of putting his side of the case. In judicial review proceedings the time before this can occur will normally be much longer. This clearly has the scope to work an injustice at least in some cases.

Considerations such as those mentioned above led to the observations of McCracken J. in *Voluntary Purchasing* v. *Insurco Limited* [1995] 2 I.L.R.M. 145 at p. 147:-

> "… Quite apart from the provisions of any rules or statute, there is an inherent jurisdiction of the courts in the absence of an express statutory provision to the contrary, to set aside an order made *ex parte* on the application of any party affected by that order. An *ex parte* order is made by a judge who has only heard one part to the proceedings. He may not have had the full facts before him or he may even have been misled, although I should make it clear that that is not suggested in the present case. However, in the interest of justice it is essential that an *ex parte* order may be reviewed and an opportunity given to the parties affected by it to present their side of the case or to correct errors in the original evidence or submissions before the court. It would be

quite unjust that an order could be made against a party in its absence and without notice to it which could not be reviewed on the application of the party affected."

On the present application, it was sought to distinguish the observations of McCracken J. on the basis that they were inapplicable to judicial review proceedings and were irrelevant to an application such as the present. In fact, however, the passage cited above was followed by Kelly J. in *Adams* v. *Director of Public Prosecutions* [2001] 2 I.L.R.M. 401. This was a judicial review case and the learned judge applied precisely the same principles. He also referred to another case, *Schmidt* v. *Home Secretary of the Government of the United Kingdom* [1995] 1 I.L.R.M. 301, where a similar jurisdiction had been exercised.

The same view was taken in Northern Ireland in *Re Savages Application* [1991] N.I. 103. In that case, Carswell J. said at p. 107:-

> "If on mature consideration of the facts, and with the benefit of the arguments presented to me by both sides, I now accept that there is not an arguable case on the facts, then I think the leave should be set aside."

The last mentioned case was decided before the rules of court applicable in the United Kingdom changed to provide specifically for the type of application which is now made. That change followed a report of the English Law Reform Commission entitled *Administrative Law: Judicial Review and Statutory Appeals* (1994). At para. 9.4 of the report, describing the English practice as it then was, the commissioners said:-

> "At present a respondent may apply to have the grant of leave to move for judicial review set aside. The grant of leave will only be set aside if the respondent can show that the judge's decision that the case was fit for further consideration and a substantive judicial review was plainly wrong."

The report cites a number of English cases where this step had been taken, in the inherent jurisdiction of the court: see *R. v. Secretary of State for the Home Department, ex p. Sholola* [1992] C.O.D. 226, and *R* v. *Secretary of State for the Home Department, ex p. Chinoy* [1991] C.O.D. 381.

The amended English rules which followed the report of the Law Reform Commission was the first regulation by rules of court of the jurisdiction to set aside a grant of leave to seek judicial review. There had however, been a practice direction in the early 1970s to regulate the inherent discretion of the English Courts to set aside an order made *ex parte*: see *Becker* v. *Noel* (Practice Note) [1971] 1 W.L.R. 803.

Accordingly, it appears that both in this jurisdiction, and in the neighbouring jurisdictions (while their rules of court in relation to judicial

review were virtually identical to those now obtaining here) the inherent jurisdiction to strike out an order giving leave to seek judicial review, was recognised. Indeed, even the applicants in the present case do not seek wholly to deny the existence of the jurisdiction: both counsel on behalf of the applicants conceded it to exist in the case of bad faith and counsel on behalf of the applicants in the *Toma Adam* proceedings, at any rate, in a case where an injunction had been granted at the leave stage. Towards the end of the argument I understood counsel for both applicants to emphasise an alternative approach: that the fact that the applicants for judicial review had to go through a filtering process in the form of the *ex parte* application should put them in some respect in a stronger position than a plaintiff faced with an application to dismiss his case as disclosing no reasonable form of action.

In my view, once it is accepted that the jurisdiction invoked here by the respondents exists, it is difficult to justify any hard and fast restrictions on it. It was submitted that the respondents here, being public authorities, are incapable of suffering the sort of loss that an individual or even a corporate defendant might. The present case was contrasted with the circumstances obtaining in *Barry* v. *Buckley* [1981] I.R. 306, where Costello J. observed at p. 307:-

> "A disappointed purchaser, by instituting proceedings for specific performance and by registering a *lis pendens* against the land which he alleges he has purchased, can effectively prevent a re-sale for a considerable time - perhaps extending over several years. Obviously, substantial injustice could thereby result, both to the owner of the land and to a subsequent innocent purchaser."

It is certainly true that public authorities such as those who are the respondents in the present cases cannot suffer certain types of damage which an individual or corporate defendant can. They are immune to the risks of commercial disaster and mental distress. But I do not accept that, because of that characteristic, the orders granted have no effect upon them. The applicants in the present case have secured a stay on the orders, actual or potential, for their deportation: the authorities are unable to discharge their functions in accordance with law. Moreover, I would accept the submission made on their behalf on the hearing of this appeal that the pendency of the proceedings is in itself an effect. In every case a grant of leave will give rise to the incurring of costs and to a certain generalised doubt or "chilling effect" in relation to the discharge of the functions in question. There is a public interest in the due and rapid discharge of public duties, including duties of enforcement, which includes but is not limited to an interest in those duties being discharged fairly.

I cannot accept the submission that, because the proceedings in question are judicial review proceedings, they would be rapidly disposed of with a comparatively slight degree of delay and interference with the discharge of statutory functions. Judicial review proceedings, especially in recent times, are not necessarily more rapid than any other form of proceedings and can be less so. In the *Toma Adam* proceedings, several months were apparently occupied simply in checking the up-to-date status of the 50 odd applicants, a process which led to some 14 of them being struck out of the proceedings by consent. If the proceedings are not struck out at the present stage, there will predictably be a lengthy process of discovery, and considerable expense in the conduct of the opposition to the substantive application. For all these reasons, I consider that the grant of the leave to seek judicial review, especially when coupled with a stay, is quite sufficient to constitute the respondents as parties affected by an order. This in my view gives rise to the corollary that they must in a suitable case be entitled to attack the grant of leave.

Alleged right to appeal

The applicants conceded in the course of arguments that the respondents were entitled to appeal against the grant of leave. I do not consider that this would have been an appropriate course, or indeed that it is necessarily open to the respondents at all. If the respondents had appealed against the orders granting leave, the hearing of the appeal would necessarily have involved this court in considering arguments and perhaps evidence (that of the respondents on affidavit) which had never been considered by the High Court. This does not appear appropriate in an appellate court. In *The State (Hughes*) *v. O'Hanrahan* [1986] I.L.R.M. 218, McCarthy J. doubted whether any party other than the applicant could appeal against an order *ex parte*, no doubt on the basis just indicated.

I do not consider that the hearing in the High Court of an application to strike out a grant of leave is in any sense an appeal from the judge who granted the original leave. On the contrary, it is a proceeding of an entirely different nature, being *inter partes* rather than *ex parte.* Moreover, as the existence of the present appeal demonstrates, the decision on such an application is itself subject to the right of appeal to this court. On the hearing of such an appeal, unlike an appeal from the grant of an order *ex parte*, the court is manifestly exercising an exclusively appellate jurisdiction in relation to an order of the High Court made after both parties have been heard.

The European Convention on Human Rights

It was frankly conceded by counsel on behalf of the applicant in the *Iordache* proceedings that his arguments based on the European Convention required him to establish as a preliminary that the decision of this court in *Doyle v. Commissioner of An Garda Síochána* [1999] 1 I.R. 249, was wrong. Specifically, he would have to circumvent the holding, at p. 269:-

> "But the Convention is not part of Irish domestic law and the Irish court has no part in its enforcement. So far as Ireland is concerned the institutions to enforce the provisions of the Convention are the European Court of Human Rights and its Commission."

In my view, no argument was addressed to the court on the hearing of this appeal which provided any basis for a departure from that recent and authoritative decision. In fact, no argument whatever was advanced for the proposition that *Doyle v. Commissioner of An Garda Síochána* [1999] 1 I.R. 249, was wrongly decided: that proposition was merely asserted.

In the circumstances there is no need to do more, on this aspect of the case, than respectfully to follow the decision of Barrington J. in *Doyle v. Commissioner of An Garda Síochána* [1999] 1 I.R. 249. I wish to emphasise, however, that I am far from holding that the result of this case in any of its aspects would have been different had it been appropriate to consider the provisions of the Convention.

The merits of the application

I turn now to the merits of the application: whether, indeed, either set of proceedings discloses a reasonable cause of action or whether the proceedings are frivolous or vexatious or doomed to fail.

Both sets of proceedings are extraordinary in their form. All of the applicants are persons who had been unsuccessful at each stage of the statutory procedures which they have gone through. That is, they have been found to have no personal fear of persecution. They do not challenge these decisions on any recognised judicial review basis but instead mount a challenge substantially based on the proposition that Romania is a country to which deportation should not be permitted. This, in turn, is based not on evidence in any recognisable form but merely on "counsel's advice". In relation to the *Toma Adam* proceedings, there is no reference to the individual circumstances of the respective applicants. These proceedings have correctly been stigmatised in argument to this court as "single transferable proceedings", that is to say proceedings to which any person faced with a prospect of deportation to Romania could subscribe. Mr.

Iordache, whose proceedings are somewhat more specific to his individual circumstances in so far as he complains of the law of Romania relating to homosexual practices and of certain non-political disagreements he has had with people who hold or have held minor local office, are nevertheless both vague and contradictory. Although this applicant was granted broader relief in the High Court than his compatriots in the *Toma Adam* proceedings, his real position, as far as evidence goes, is indistinguishable. In no case has any serious effort been made to establish, as opposed to assert, what is alleged about the Romanian State. No applicant has made out a credible case that he or she has an individual fear of persecution. And no applicant has made out any case at all, even the barest, capable of sustaining an attack on the procedures which have led to their liability to deportation.

This situation is in dramatic contrast with that obtained in the well known case of *Finucane v. McMahon* [1990] 1 I.R. 165. There, the plaintiff, who was a person whose extradition to Northern Ireland was sought, established by specific and detailed evidence that he and others in his position had already been subjected to brutal treatment at the hands of certain State authorities in the jurisdiction requesting his extradition and had a well founded fear of being again so subjected. Here, no demonstrated individual apprehension of any sort has been demonstrated or even (except for Mr. Iordache) sought to be demonstrated. The proceedings in part relate to complaints of a sort which are appropriate to a political rather than a legal forum. They are scarcely recognisable as legal proceedings at all and are totally deficient in their failure to provide any basis, even the vaguest, for challenging the decisions of the Irish authorities to which they relate.

Mr. Iordache has been given leave to seek an order compelling the Irish state to institute proceedings against Romania. I consider that no court has jurisdiction to direct any such order to the executive. In the words of Article 29.4.1° of the Constitution of Ireland, 1937:-

> "The executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government."

In my view, it would fly in the face of this unambiguous provision if the courts were to take it upon themselves to issue a mandatory order to the State, the Government or the Attorney General directing the institution of proceedings under the European Convention on Human Rights against another sovereign State. To do so would be very specifically to usurp a function which the Constitution reserves to the Government. Any such step would be gravely subversive of the constitutional separation of powers and it would be wrong of the court to contemplate it.

The applicants' proceedings are of the baldest kind, without any basis in law or fact, and, with the exception of Mr. Iordache's case, without any

attempt to rely on proved individual circumstances either in relation to attacking the decisions taken in respect of the individual applicants or on the broader aspects of their claim. In my view they are all frivolous, vexatious and doomed to fail: indeed they are scarcely recognisable as legal proceedings at all.

So to hold is not to exclude the possibility that an applicant might, in proper proceedings, challenge a decision to deport him to a particular country. The very recent English case of *R.* v. *Secretary of State for the Home Department, ex p. Turgut* [2001] 1 All E.R. 719, is an example of such proceedings. It is clear from the report that the proceedings were properly constituted as a challenge, on the basis of irrationality, to a decision of the Home Secretary that there were no substantial grounds for believing that the applicant would be at real risk of ill treatment if returned to Turkey. The report also illustrates the painstaking assembling of a formidable body of evidence and the focusing of such evidence on the applicant's personal circumstances. In referring to this case I am not ignoring the somewhat different context of *R.* v. *Secretary of State for the Home Department, ex p. Turgut* arising from differences between Irish and English law. Nor am I holding that a case precisely modelled on that one would necessarily pass muster in this jurisdiction. The application in *R. v. Secretary of State for the Home Department, ex p. Turgut* was unsuccessful in the event but it was a case pleaded in a recognisable legal form, directly focused on individual circumstances, and supported by evidence in a form acceptable to the English court. In all these respects it is starkly in contrast with either of the present proceedings.

The applicants' final point in relation to these matters was that the court should not strike out the proceedings if they were capable of being saved by amendment. In my view, nothing which could properly be described as amendment could save these proceedings. If, hypothetically, the applicants or any of them have any statable cause of action, it would require to be expressed in proceedings in which bear no resemblance whatever to those presently under consideration.

I would only add that I entirely agree with the observations of O'Donovan J. in the first of these cases in relation to the impropriety of the joinder in one set of proceedings of a large number of applicants without any attempt to distinguish their individual circumstances or to show any basis on which they could all feature as applicants in a single action.

I would dismiss the appeal in each case and affirm the order of the learned High Court Judge.

Solicitors for the applicants in both proceedings: *A.C. Pendred & Co.*

Solicitor for the respondents: *The Chief State Solicitor*.

Tara Madden, Barrister

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