

***Meadows* and proportionality in judicial review – Where are we now?**

Bar Council CPD – Judicial Review Update

Alan DP Brady BL

In *Meadows v Minister for Justice, Equality and Law Reform*¹ a 3:2 majority of the Supreme Court endorsed the use of a proportionality test in judicial review where the impugned decision engaged fundamental rights. For some time, there had been concern that the use of the 'no relevant material' version of the irrationality test as set out by the Supreme Court in *O'Keefe v An Bord Pleanala*² was too narrow to allow adequate protection for constitutional (and subsequently ECHR) rights in Irish Administrative Law.³ However, after *Meadows* the position shifted.

The nature and extent of that shift has not always been easy or straightforward to discern⁴ and somewhat competing lines of authority on how the proportionality test is to be applied seem to have emerged. The dominant strand has concerned immigration cases, where it seems to be settled that in administrative law cases where constitutional or ECHR rights are in issue, it is for the first instance decision-maker to apply the proportionality test; this is then subject to an irrationality review by the courts, using the *Keegan* standard. Conversely, some outlier cases in non-immigration matter have given an indication that it may be for the courts themselves to apply the proportionality test.

The purpose of this paper is trace these developments and make some tentative suggestions on how *Meadows* proportionality is likely to develop, drawing some lessons from the development of the proportionality test in the UK under the Human Rights Act 1998.

***Meadows* – proportionality as a subset of irrationality**

¹ [2010] 2 IR 701

² [1993] 1 IR 39.

³ See Hogan, G, 'Judicial Review, The Doctrine of Reasonableness and the Immigration Process' (2001) 6 (6) *Bar Review* 329. See also *Camara v Minister for Justice* (Unreported, High Court Kelly J 26 July 2000)

⁴ See *Delany, H and Donnelly C* 'The Irish Supreme Court inches towards proportionality review' [2011] *Public Law* 9; Brady, ADP 'Proportionality, Deference and Rights in Irish Administrative Law: The Aftermath of *Meadows*' (2010) 32 *Dublin University Law Journal* 136; Daly, P 'Standards of Review in Irish Administrative Law After *Meadows v Minister for Justice, Equality & Law Reform*' (2010) 32 *Dublin University Law Journal* 379

All three of the judges in the majority in *Meadows* expressly linked the proportionality requirement to the *dictum* of Henchy J in *State (Keegan) v Stardust Victims Compensation Tribunal*,⁵ in which he stated:

*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

As such, the majority were clearly establishing proportionality as a sub-category of the reasonableness test. However, the majority was also clear that proportionality arises only in circumstances where the impugned decision intrudes upon fundamental rights in some way. The majority differed somewhat in how the fundamental rights issue was to be determined within reasonableness/proportionality. Denham J (as she then was) endorsed a multi-stage proportionality test of the type used in relation to challenges to legislation and expressly cited the test endorsed by Costello J in *Heaney v Ireland*:⁷

*When a decision-maker makes a decision which affects rights then, on reviewing the reasonableness of the decision: (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective.*⁸

Murray CJ set out his conception of the proportionality test as follows:

*The principle 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 in my view a means of examining whether the decision meets the test of reasonableness. I do not find anything in the dicta of the court in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 or *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 which would exclude the court from applying the principle of proportionality in cases where it could be considered to be relevant.*⁹

In developing this test, he also held:

⁵ [1986] IR 642.

⁶ [1986] IR 642, at p.658

⁷ [1994] 3 IR 593.

⁸ [1994] 3 IR 593, at p.607, cited by Denham J in *Meadows* [2010] 2 IR 701, at p.743

⁹ [2010] 2 IR 701, at p.723.

It is inherent in the principle of proportionality that where there are grave or serious limitations on the rights and in particular the fundamental rights of individuals as a consequence of an administrative decision the more substantial must be the countervailing considerations that justify it. The respondents acknowledge this in their written submissions where it was stated:- "Where fundamental rights are at stake, the courts may and will subject administrative decisions to particularly careful and thorough review, but within the parameters of O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39 reasonableness review¹⁰

This appears to be an endorsement of something like the 'anxious scrutiny' version of unreasonableness that was applied in the UK prior to the entry into force of the Human Rights Act 1998,¹¹ but which was subsequently rejected by both the House of Lords¹² and the European Court of Human Rights.¹³ Fennelly J, drawing on that Strasbourg jurisprudence, rejected any use of 'anxious scrutiny', but also rejected the suggestion that there should be any formal change in the Keegan/O'Keeffe test in order to accommodate proportionality:

I do not consider it necessary to change the test. Properly understood, it is capable of according an appropriate level of protection of fundamental rights. The test as enunciated by Henchy J. and as explained by Finlay C.J. in O'Keeffe v. An Bord Pleanála lays down a correct rule for the relationship between the courts and administrative bodies. Properly interpreted and applied, it is sufficiently flexible to provide an appropriate level of judicial review of all types of decision.¹⁴

However, his rejection of a change in the test cannot be taken to be an endorsement of an approach which overlooks fundamental rights. He went on to state:

It seems to me that the principle of proportionality, more fully developed in the judgments which have been delivered by the Chief Justice and of Denham J, 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 case¹⁵

¹⁰ [2010] 2 IR 701, at p.724.

¹¹ See R v Ministry of Defence, ex parte Smith [1996] QB 517.

¹² R (Daly) v. Secretary of State for the Home Department [2001] 2 AC 532.

¹³ Smith and Grady v. United Kingdom (1999) 29 EHRR 493.

¹⁴ [2010] 2 IR 701, at p.825.

¹⁵ [2010] 2 IR 701, at p.826.

The position in *Meadows* appears to be that the irrationality test remains, but it now incorporated the proportionality test within it. Unfortunately the *Meadows* decision itself gives minimal guidance on precisely how that is to be applied in a case in which Constitutional or ECHR rights are intruded upon by an administrative decision-maker.

Some degree of clarification as to what is *not* included in the irrationality test after *Meadows* was given in *Efe v Minister for Justice Equality and Law Reform*.¹⁶ Hogan J accepted that the decision in *Meadows* did not 'drop out of the sky'¹⁷ and that there had been disquiet with the O'Keefe 'no relevant material' test for some time. Hogan J held that the 'no relevant material' standard would be unconstitutional if applied in a case involving constitutional rights. He held:

[T]hese decisions engage fundamental rights under Article 41 of the Constitution, the protection of which is the solemn duty of this Court. Any rule of law which purported to constrain this Court from protecting these rights in circumstances where it could only interfere where there was 'no evidence' to justify a factual conclusion reached would simply be at odds with these constitutional obligations. A test of this nature in the sphere of constitutional rights would thus fall to be condemned as unconstitutional in the light of the obligations imposed on the State by Article 40.3.1 and Article 40.3.2 to vindicate these constitutional rights.¹⁸

Clearly, therefore, something changed after *Meadows*, but the precise nature and scope of that change is still not entirely clear. It may be that we have merely returned to the *Keegan* standard of unreasonableness (ie that a decision flies in the face of fundamental reason and common sense) and that the 'no relevant material' test from *O'Keefe* has been dispensed with, at least in fundamental rights cases. However, the terms of the *Meadows* judgment would seem to suggest that something more significant than that was intended.

Who 'does' proportionality?

A core difficulty with the decisions in *Meadows* and *Efe* is that they are cases about what the standard of review in fundamental rights cases should be that do not entail an application of that standard to the specific case. *Meadows* concerned a point of law certified from the High Court seeking guidance on a leave application. *Efe* was a challenge to judicial review as providing an effective remedy.

In the cases where the proportionality test is actually applied a key question arises; who 'does' proportionality? Is it the decision-maker or

¹⁶ [2011] 2 IR 798

¹⁷ [2011] 2 IR 798, at p.813.

¹⁸ [2011] 2 IR 798, at p.813.

the court? If it is the decision-maker, then the requirement is that proportionality be applied by the decision-maker at the time of making the decision. That application of proportionality would then be subject to an irrationality test if challenged by judicial review. Alternatively, if it is the court that applies proportionality, then there would be no absolute obligation on the decision-maker to reference fundamental rights or the proportionality test; what would be required would be that the Court was satisfied that the decision was proportionate in its effects on the fundamental right in question.

This issue goes to the heart of the relationship between proportionality and *Keegan /O'Keeffe* unreasonableness. If a disproportionate interference with fundamental rights gives rise to unreasonableness, then proportionality is a substantive legal matter requiring determination by the Courts. Conversely, if proportionality is a matter to be included by a decision-maker in reaching a decision, then it is one of a range of matters dealt with by decision-makers to which *Keegan/O'Keeffe* reasonableness is to be applied.

However, the nature of judicial review is such that the Superior Courts have always been vigilant to avoid becoming an appellate court for all administrative action. The dreaded spectre of 'merits review' looms large over any radical shift in the irrationality test, which is notoriously malleable. Biehler suggests that *Meadows* relied more substantially on notions of institutional competence than democratic legitimacy as a basis for its conceptual justification:

*The emphasis on expertise and institutional competence rather than on democratic legitimacy by the majority of the Supreme Court in Meadows v Minister for Justice, Equality and Law Reform may also have represented an attempt to respond to the criticisms of the minority, who cited the constitutional principle of separation of powers and institutional qualifications as an element of their objection to the majority's decision to allow judicial review in the circumstances of the case.*¹⁹

This brings with it a greater desire for a hands-off approach than might arise if there was less expectation of specialist decision-making by the bodies being reviewed.

The bulk of the post-*Meadows* jurisprudence has been in the area of immigration and in that field, it has been established that it is for the Minister to apply proportionality, subject to an irrationality review by the court. There have been some limited examples of non-immigration cases in which a different approach, whereby the court 'does' proportionality has been taken. Although *Meadows* itself is an immigration case, the findings clearly have implications for any administrative decision which

¹⁹ Biehler, H. 'Curial Deference in the Context of Judicial Review of Administrative Action Post-Meadows' (2013) 49(1) *Irish Jurist* 29, at p.38.

intrudes upon fundamental rights. The divergent authorities will require to be synthesised at some juncture.

Proportionality as a procedural step – Immigration cases

Relatively soon after the *Meadows* judgment, Cooke J gave a detailed consideration of how it was to be applied in immigration matters in *F(ISO) v Minister for Justice Equality and Law Reform*.²⁰ He held that:

The duty to balance proportionately the opposing rights and interests of the family on the one hand and the interests the State seeks to safeguard on the other, lies with the Minister. It is the Minister who must assess and decide by reference to all of the matters he is required to consider under the statutes and in light of all of the information and representations put before him, whether the latter interests should prevail or not. Contrary to the implication of the argument made by counsel for the applicants, the High Court is not entitled or obliged to re-examine the case with a view to deciding whether, in its own view, the correct balance has been struck. To do so would be substitute its own appraisal of the facts, representations and circumstances for that of the Minister

*"Does the conclusion to deport the applicant flow from the premise upon which it is based; or does it, by reason of some flaw or failure in the way in which the balancing exercise was apparently approached, result in a conclusion which 'plainly and unambiguously flies in the face of fundamental reason and common sense?'"*²¹

The approach set out by Cooke J unambiguously endorses proportionality as a procedural requirement for decision-makers. The test to be applied by the Court is the standard irrationality test. A similar approach was outlined by Cooke J in *Lofinmakin v. Minister for Justice Equality and Law Reform*.²² He set out the relationship between proportionality and reasonableness:

*While the High Court on judicial review does not substitute its own view as to whether a deportation order ought to be made or not, it can consider its lawfulness by reference to that test and set it aside if the result achieved in balancing those considerations is so clearly lacking in proportionality as to render it unreasonable or irrational. The so called "common law constraints" do not therefore preclude the High Court in the exercise of its judicial review function from assessing the substantive lawfulness of the decision in that regard.*²³

He further stated:

²⁰ [2010] IEHC 386.

²¹ [2010] IEHC 386, at paragraph 12.

²² [2011] IEHC 38

²³ [2011] IEHC 38, at paragraph 21.

If the material facts upon which the stated reasons for a deportation order are based are disputed by the deportee as wrong, the High Court can try that issue and if it finds in the applicant's favour it can quash the decision upon the basis that the mistake of fact has led the Minister to make an order which could not have been made intra vires. If the material facts are not disputed but it is demonstrated that, correctly appraised, they establish a violation of a Convention protection, the Court can quash the decision for irrationality on the basis that the conclusion reached did not follow from the factual premise.²⁴

An approach of this type would suggest that in a judicial review challenge to a decision encroaching on fundamental rights, the court's assessment of the fundamental rights issue takes place at one remove from the right itself, rather than being fully within the court's competence. That is not to suggest that this approach cannot give rise to a robust review of immigration decisions in sufficiently serious cases. For example, in *PS & BE v. Minister for Justice, Equality and Law Reform*²⁵, Hogan J applied the *ISO*F approach and examined the manner in which proportionality had been considered by the Respondent. The case concerned a married couple: the husband was an Irish national with substantial intellectual disabilities and the wife was a Nigerian national. The genuineness of the marriage had not been disputed, but the Minister had sought to rely on correspondence from the husband's solicitors which stated that he "lives independently" and "travels freely", which appeared to be a reference to his ability to manage his affairs in a rural town. This was taken by the Minister to mean that he could travel to Nigeria to visit his wife after she was deported. Hogan J took the view that this application of proportionality by the Minister was unreasonable.

Hogan J Held:

In this regard, the task of the Minister is to balance potentially competing interests in a proportionate and fair manner. It is true that there is a considerable public interest in deterring illegal immigration and the Minister must naturally be prepared to act to ensure that the asylum system is not manipulated and circumvented. Nevertheless, the requirement that the Minister must balance competing rights necessarily involves a recognition that, important as the principle of maintaining the integrity of the asylum system undoubtedly is, it must sometimes yield - if only, perhaps, in unusual and exceptional cases - to countervailing and competing values, one of which is the importance of protecting the institution of marriage. The rights conferred by Article 41 of the Constitution are nevertheless real rights and must be regarded as such by the Minister. They cannot be treated as if, so to speak, they were mere

²⁴ [2011] IEHC 38, at paragraph 40.

²⁵ [2011] IEHC 92.

*discards from dummy in a game of bridge in which the Minister as declarer has nominated the integrity of the asylum system as the trump suit.*²⁶

An attempt to contend that the *Meadows* decision required something more than *Keegan* unreasonableness was roundly rejected by McDermott J in *FE v Minister for Justice*²⁷

*It is clear that Cooke J. considered the law in the matter to be settled and, indeed, had refused to certify a similar point in the I.S.O.F. case. Furthermore, his certification predates the decision of the Supreme Court in Donegan which effectively affirmed the decision in Meadows and, in my view, supports the approach in the various decisions of the High Court on this issue which have sought to apply the Meadows decision in the asylum immigration area. In my view the continued assertion that the High Court has a jurisdiction and obligation to examine the substantive merits of a challenged decision and effectively substitute its own deportation decision when the court considers the Minister's decision to be disproportionate is, in the light of present authorities, incorrect*²⁸

Although this is couched in terms of a rejection of merits review, it leaves little doubt as to the position in immigration cases: ie that the courts are not conducting a proportionality analysis of their own.

The approach of leaving proportionality to be 'done' by the Minister for Justice in immigration decisions was subsequently endorsed by the Supreme Court in *AMS v. Minister for Justice*.²⁹ Clarke J summarised the approach as follows:

*The Minister must, of course, as pointed out, enjoy some reasonable margin of appreciation in weighing the factors which favour and oppose the grant of discretionary family reunification. The Court should only interfere where the Minister's consideration of that balancing exercise is clearly wrong so that it is demonstrated that the Minister could not reasonably have come to the view that the balance should be proportionately exercised in the way in which it was. However, I am satisfied that the Minister's balancing exercise in this case was clearly wrong.*³⁰

This would suggest that, for the purposes of immigration decisions at least, proportionality is a matter which the decision maker must have regard to and then, if the manner in which the proportionality assessment is conducted by the decision-maker has some frailty, a *Keegan* irrationality test can be applied by the courts.

²⁶ [2011] IEHC 92, at paragraph 23.

²⁷ [2014] IEHC 62

²⁸ [2014] IEHC 62, at paragraph 34.

²⁹ [2014] IESC 65

³⁰ [2014] IESC 65, at paragraph 7.12

Proportionality as a substantive outcome

One difficulty with the approach taken in the immigration cases is that it raises the possibility that little changed after *Meadows*. In light of *Efe*, it would seem that *Meadows* had the effect of restoring the *Keegan* standard of irrationality and dispensing with *O'Keeffe* in fundamental rights cases. However, apart from that, what arises in the immigration cases is an additional task for the Minister but apart from that, matters remain much as they were: only where irrationality can be shown will a decision be quashed. This does little to change the approach in fundamental rights cases as far as the role of the court is concerned. Pre-*Meadows* an immigration decision that was irrational could be quashed whether the irrationality related to fundamental rights or not. There is little in the immigration cases to indicate that the courts themselves are doing anything substantially different as regards fundamental rights than was the case previously.

It is certainly the case that *Meadows* could not have been intended to bring about some sort of full-strength 'correctness' or 'merits' review. This was conclusively addressed in *Donegan and Gallagher v Dublin City Council*³¹ in which the issue of whether judicial review post-*Meadows* would allow for the determination of a factual dispute. McKechnie J held:

[A]lthough some extension of judicial review for reasonableness is envisaged so as to take account of the proportionality of the action, it is to be done on the basis of The State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642 and O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39, rather than as an entirely novel criterion.

...

Thus although some consideration of fundamental rights may be entered into in judicial review, this in no way affects the traditional position that such remedy cannot be used as a rehearing or otherwise to determine conflicts of fact.

However, there are some indications in non-immigration cases of a willingness by the High Court to conduct its own proportionality analysis.

Prior to *Meadows* in *Pullen v Dublin City Council (No 1)*³² the High Court took a quite robust approach on the need for the courts to conduct their own proportionality analysis in cases involving ECHR rights, specifically Article 8 in that case. Irvine J held:

In assessing whether or not an interference is "necessary in democratic society", the courts must apply the principal of proportionality to assess whether a particular measure can be

³¹ [2012] 3 IR 600.

³² [2008] IEHC 379.

justified. A public authority seeking to show that an interference is proportionate must, on the authorities, satisfy the Court regarding four matters namely:-

- (a) That the objective of restricting the right is so pressing and substantial that it is sufficiently important to justify interfering with a fundamental right;*
- (b) That the restriction is suitable: it must be rationally connected to the objective in mind so that the limitation is not arbitrary, unfair or based on irrational considerations;*
- (c) That the restriction is necessary to accomplish the objective intended. In this respect the public authority must adopt the least drastic means of attaining the objective in mind, provided the means suggested are not fanciful; and*
- (d) That the restriction is not disproportionate. The restriction must not impose burdens or cause harm which is excessive when compared to the importance of the objective to be achieved.*

Finally, in relation to the doctrine of proportionality, significant reliance has been placed by the defendant on the doctrine of the "margin of appreciation", which the European Court of Human Rights affords to national authorities when exercising its supervisory jurisdiction over the conduct of individual States. In doing so that Court recognises that the Convention, as a living instrument, cannot be applied uniformly to all States and that its application may have to vary depending upon local needs and conditions and it presupposes that the relevant governments know what is necessary in their own countries. However, there is a significant body of legal opinion that suggests that the doctrine of the "margin of appreciation" has no role to play when a domestic court is considering the doctrine of proportionality for the purpose of deciding whether or not an organ of the State has complied with its obligations under the Convention. I believe this is a correct statement of the law and that the doctrine of the "margin of appreciation" is, principally, a tool which assists an international court in exercising a supervisory jurisdiction over a number of States who may have different pressures and different social needs and that it is not a technique which is available to this Court, it being a domestic court, to in some way ameliorate the obligations of an organ of the State from compliance with its Convention obligations.

This pre-Meadows approach is an indication that there is willingness on the part of the Courts to conduct their own proportionality analysis in certain instances.

More recently in *McSorley v. Minister for Education*³³ Hedigan J described the nature of the question a court must address in a disproportionality/unreasonableness action. The case concerned a decision to dismiss a school principal on foot of historical complaints regarding her conduct. In quashing the decision of the Minister on the grounds that it was disproportionate Hedigan J held:

*Clearly the circumstances under which the Court can intervene with a decision maker involved in an administrative function such as herein are limited. However as stated above the Court must have regard to the implied constitutional limitation of jurisdiction in all decision-making which affects rights. Any effect on rights should be within constitutional limitations and should be proportionate to the objective to be achieved. If the effect is disproportionate this justifies the court setting aside the decision. Clearly the Minister's decision has a profound effect upon the applicant's rights. Thus the Court must ask was the decision reached in this case disproportionate? ... It seems to me that bearing in mind the inordinate length of time since the events in question and balancing that with her apparently very satisfactory performance of her duties as principal in the time between, there is in the decision to now remove her from her post, a manifest disproportionality that requires the Court to intervene*³⁴

This approach is entirely at odds with the line taken in the immigration cases. It involves the court in examining the real effect of a decision on fundamental rights, not merely the rationality of the decision-maker's consideration of those rights.

A similar approach was taken in *Lattimore v Dublin City Council*.³⁵ Ó Néill J was prepared to conduct an analysis of proportionality in the High Court rather than apply a rationality test to the proportionality test that had been conducted by the decision-maker. As with *Pullen (No.1)* the requirements of Article 8 to an independent decision on proportionality were part of the analysis. However, Ó Néill J expressly grounded his application of proportionality in *Meadows*. He held:

In light of the judgments of the Supreme Court in Meadows, it now falls to me to determine the issue of proportionality as that was discussed in the judgment in the Meadows case and also by Hedigan J. in McSorley v. The Minister for Education and Skills [2012] IEHC 201.

³³ [2012] IEHC 201

³⁴ [2012] IEHC 201, at paragraph 7.7

³⁵ [2014] IEHC 233.

In that context, it would seem to me that what I have to do, having regard to what has been described in the words of Henchy J. as the "implied constitutional limitation of jurisdiction", is to consider whether or not the decision made in this case by [the Council official] was proportionate to the objective to be achieved, and if disproportionate, to set it aside.

All of the relevant material was before [the Council official] and, I am satisfied, considered by her, and in the balancing exercise she was required to do, she had to make a decision which was either favourable to the applicant or adverse to him. There was no middle ground, although in this context, the fact that a one-bedroom apartment was offered to the applicant, in close proximity to [his current home], ensured that in the decisions that were made, the respondent was fulfilling its obligation to the applicant to provide him with suitable housing, whilst at the same time, accommodating the needs of a family requiring a 3-bedroomed house. I am quite satisfied that the decision that was made by [the Council official], as reflected in her letter of 23rd April 2013, was not in any sense disproportionate. I am also satisfied that the correct application of the proportionality principle in this case also means that there has been no breach of the applicant's rights under Article 40.5 of Bunreacht na hÉireann.³⁶

Ó Néill J went on to conduct a proportionality analysis of the decision made by Dublin City Council and satisfied himself that it was proportionate. He engaged with the specific facts and looked at the balance as between them. He referenced the fact that the decision-maker had conducted her own balancing exercise, but explicitly dealt with it on the basis that the Court was doing a balancing exercise of its own.

*In Corbally v The Medical Council*³⁷

It seems to me that the question for consideration in a judicial review context can only now be resolved in the light of the Supreme Court decision in the case of Meadows v. the Minister for Justice Equality & Law Reform [2010] 2 I.R. 701 where the assessment necessarily involves asking the question whether the findings and sanction were proportionate on the facts of the particular case.³⁸

He subsequently went on to apply that test to the facts of the case and

In my view the unique and special circumstances of this individual case, including the serious consequences for the applicant and the absence of any right of appeal, do not pass a proportionality test

³⁶ [2014] IEHC 233, at paragraphs 55-57

³⁷ [2013] IEHC 500.

³⁸ [2013] IEHC 500, at p. 42 of the unreported judgment.

*which would support the imposition of the sanction in respect of allegation number 1.*³⁹

The approach taken in *Corbally* is, like *Lattimore*, an unambiguous application of proportionality as a substantive outcome to be achieved. It is of note that the decision of Kearns P was upheld by the Supreme Court⁴⁰ although the thrust of the Supreme Court's analysis was concerned with the interpretation of the relevant terms in the legislative scheme.

In *Fortune v Wicklow County Council v Fortune (No 2)*⁴¹, Hogan J endorsed a requirement of proportionality for a court considering a planning enforcement application under section 160 of the Planning and Development Act 2000. He held:

*It is manifest from a series of decisions ranging from Heaney v. Ireland [1994] 3 I.R. 590 to Meadows v. Minister for Justice, Equality and Law Reform [2010] IESC 3, [2010] 2 I.R. 701 that the exercise of any such judicial power would also have to satisfy a proportionality test, not least given that the making of such an order would, at least, in the context of a case such as the present one significantly affect constitutional rights, not least the inviolability of the dwelling (Article 40.5) and the protection of property (Article 40.3.2). Of course, the proportionality at issue here is not simply proportionality in the narrow sense understood by Henchy J. in Morris v. Garvey of whether the breach of the planning laws is so insignificant that the demolition of the property would represent an excessive response to such a technical infraction, but rather proportionality in a broader sense of that term, namely, the whether, in the circumstances of any given case, the policy objectives of legislative compliance and environmental protection can be said to justify such a far-reaching interference with property rights and the inviolability of the dwelling.*⁴²

The position in *Fortune* was substantially rolled back by Kearns P in *Wicklow County Council v Kinsella*.⁴³ However, the rationale in the *Kinsella* judgment was concerned primarily with whether fundamental rights issues and proportionality arose at all in the context of a s.160 case. Kearns P did not dispute that a proportionality assessment could be required in an appropriate case. He held:

³⁹ [2013] IEHC 500, at p. 42 of the unreported judgment.

⁴⁰ [2015] IESC 9.

⁴¹ [2013] IEHC 255

⁴² [2013] IEHC 255, at paragraph 5.

⁴³ [2015] IEHC 229

This Court has no difficulty in acknowledging that any statutory discretionary power bestowed on the courts under s. 160 must be exercised constitutionally (See East Donegal Co-Operative Livestock Mart Ltd v. Attorney General[1970] I.R. 317), which in turn means that the court must act proportionately with regard to the particular transgression in respect of which sanction is being sought. (See Meadows v. Minister for Justice, Equality and Law Reform [2010] 2 I.R.70).⁴⁴

The non-immigration cases therefore seem to provide support for the view that proportionality is a substantive outcome, rather than a procedural step to be taken and then subjected to Keegan unreasonableness.

A brief lesson from the UK Human Rights Act

In *R (SB) v Governors of Denbigh High School*⁴⁵ the House of Lords overturned the ruling of the Court of Appeal in a proportionality case involving a school uniform policy. The argument that had been successfully made in the Court of Appeal was that the Respondent's failure to consider proportionality was a basis for overturning the decision. It must be stressed that the argument made here was entirely procedural. The argument was not about whether the outcome of the decision constituted a disproportionate interference with human rights. The finding of the court was that the failure to consider those legal rights was a basis for a successful challenge *without the court considering whether the rights were in fact disproportionately interfered with*. The House of Lords rejected this position and focused on the outcome of a decision and its effects on human rights. Lord Bingham, having noted that there was no Strasbourg jurisprudence to support that procedural approach, held that it:

would introduce "a new formalism" and be "a recipe for judicialisation on an unprecedented scale". The Court of Appeal's decision-making prescription would be admirable guidance to a lower court or legal tribunal, but cannot be required of a head teacher and governors, even with a solicitor to help them. If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it.⁴⁶

⁴⁴ [2015] IEHC 229, at p.55 of the unreported judgment.

⁴⁵ [2006] UKHL 15; [2007] 1 AC 100.

⁴⁶ [2006] UKHL 15; [2007] 1 AC 100, at 116. (emphasis added)

Lord Hoffmann echoed this in holding that Article 9 of the Convention was “concerned with substance, not with procedure” and that “what matters is the result

In *Belfast City Council v Miss Behavin’ Ltd*⁴⁷ the House of Lords also took the view that regardless of the manner by which the appellant Council had reached its decision, the fact that the outcome was proportionate meant that the decision was lawful. Lord Hoffmann stated:

*A construction of the 1998 Act which requires ordinary citizens in local government to produce such formulaic incantations would make it ridiculous. Either the refusal infringed the applicant’s Convention rights or it did not. If it did, no display of human rights learning by the Belfast City Council would have made the decision lawful. If it did not, it would not matter if the councillors had never heard of article 10 or the First Protocol.*⁴⁸

These two judgments provide something of a cautionary tale for a model of proportionality that sees it as a procedural step. If that is all it is, then its presence can insulate a decision from challenge quite substantially, even where there is an argument to be made that it is disproportionate in its outcome. Where that disproportionality is very substantial, the *Keegan* test will no doubt kick in and *certiorari* will lie. However, coming at it from the other end of the telescope, if that procedural step is absent, then a substantively proportionate decision could be the subject of a successful application for *certiorari*. Indeed, based on the procedural model, it is unlikely that a court would be called upon to consider the proportionality or otherwise of a decision itself.

Where are we now?

The divergent High Court jurisprudence in the immigration and non-immigration cases does not yet appear to have been reconciled. In the recent case of *NM (DRC) v Minister for Justice*⁴⁹ Hogan J sought to explain the enduring significance of *Meadows*:

The importance of *Meadows* is nonetheless really two-fold. First, it is plain that a majority of the court was prepared to apply a general proportionality test in respect of all decisions affecting fundamental rights. Second, it is equally clear that the O’Keeffe test has been re-interpreted and clarified to take fuller account of the earlier judgment of Henchy J. in *State (Keegan) v Stardust Compensation Tribunal* [1986] I.R. 642; [1987] I.L.R.M. 202.⁵⁰

Although this was an immigration case which post-dated *AMS*, the reference to proportionality appears to be more in line with the more

⁴⁷ [2007] UKHL 19 [2007] 1 WLR 1420.

⁴⁸ [2007] UKHL 19 [2007] 1 WLR 1420, at 1425.

⁴⁹ [2016] IECA 217; [2016] 2 ILRM 369

⁵⁰ [2016] IECA 217; [2016] 2 ILRM 369, at paragraph 46

robust non-immigration line of jurisprudence. Of note is the fact that *NM(DRC)* was a challenge to the compatibility of the JR system with Council Directive 2005/85/EC. As such, like *Meadows* and *Efe*, it is a case about overall systems in judicial review, rather than the application of the test in a specific case.

However, the proposition from Hogan J that 'a general proportionality test' is to be applied in all cases affecting fundamental rights suggests that the more restrictive approach seen in cases such as *FE* may not continue indefinitely. In the recent decision in *O'Brien v Moriarty Tribunal*⁵¹ the Supreme Court dismissed an appeal against a decision of Hedigan J in the High Court.⁵² Hedigan J had refused to accept the argument that a limitation on cross-examination of a particular witness was unlawful. He decided the issue expressly on *Meadows* proportionality grounds, stating '*Thus the proportionality of the interference with this right falls to be considered as per Meadows v Minister for Justice [2010] IESC 3*'. Hedigan J then went on to balance the competing issues in respect of cross-examination himself and was satisfied that the approach was acceptable.⁵³

Conclusion

The importance of the *Meadows* decision has been oft-stated, but its actual effect on judicial review remains somewhat uncertain. It is submitted that this difficulty is in large part due to the confusion as to who is responsible for applying the proportionality test. The immigration case law has conclusively found that it is for the Minister for Justice to do so and this is subject to review by the courts on irrationality grounds. Conversely, some of the non-immigration cases indicate a willingness by the Superior Courts to conduct their own analysis of proportionality and look at the substantive effects of decisions on fundamental rights. The tentative submission of this paper is that the approach taken in immigration cases is a flawed model for judicial review as a whole. The Minister for Justice is a decision-maker with specific institutional resources in respect of the consideration of human rights issues. This does not apply to a vast swathe of decision-makers to whom judicial review applies. Expecting all such decision-makers to conduct their own balancing of rights is to set them up for failure. An approach that allows the courts to look at the outcomes as they effect fundamental rights (but not the overall merits of all aspects of the decision) is to be preferred.

⁵¹ [2016] IESC 36.

⁵² [2011] IEHC 30.

⁵³ [2011] IEHC 30, at paragraphs 6.5-8.