THE SUPREME COURT

Keane C.J.
Murphy, J.
Murray, J.
McGuinness, J.
Geoghegan, J.

IN THE MATTER OF ARTICLE 26 OF THE CONSTITUTION AND SECTION 5 AND SECTION 10 OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) BILL 1999

JUDGMENT of the Court delivered on the 28th day of August 2000 by Keane C.J.

This is the decision of the Supreme Court on the reference to it by the President of section 5 and section 10 of the Illegal Immigrants (Trafficking) Bill 1999 (hereafter *"the Bill"*) pronounced pursuant to Article 26, s.2, subsection 1 of the Constitution.

The Reference

By order given under her hand and seal on the 30th June 2000 President Mary McAleese referred section 5 and section 10 of the Bill to the court for a decision on the question as to whether the said sections or any provisions thereof were repugnant to the Constitution or to any provision thereof.

Proceedings on the reference

Counsel were assigned by the court to present arguments on the question referred to the court by the President. Prior to the oral hearing, Counsel assigned by the court

presented written submissions to the court, including submissions that certain provisions of section 5 and section 10 were repugnant to the Constitution. Submissions in writing on behalf of the
[*2] Attorney General were presented to the court, including submissions that none of the provisions of section 5 or section 10 of the Bill was repugnant to the Constitution.

The oral hearing then took place before the court on the 27th and 28th July. During the course of the hearing, the court heard oral submissions by counsel assigned by the court and counsel on behalf of the Attorney General.

Sections 5 and 10 of the Bill

The Bill is described in its long title as:

"An Act to prohibit trafficking in illegal immigrants and to amend the Refugee Act 1996 and the Immigration Act 1999 and to provide for related matters."

The effect of Section 5 of the Bill is to preclude any person from questioning the validity of specified decisions or orders made under the Immigration Act 1999, the Refugee Act 1996 and the Aliens (Amendment) No 2 Order 1999 otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts. Such an application must be made within the period of fourteen days commencing from the date on which a person is notified of the decision or order in question unless the High Court considers that there is *"good and sufficient reason"* for extending the period within which the application is to be made. It must be made by motion on notice to the Minister for Justice, Equality and Law Reform and any other person specified for that purpose by the order of the High Court and leave is not to be granted unless the High Court is satisfied that there are *"substantial grounds"* for contending that the decision or order in question is invalid or ought to be quashed. The determination of the High Court on an application for leave to apply for [*3] judicial review is to be final and no appeal is to lie from the decision

of the High Court to the Supreme Court in either case except with the leave of the High Court, which leave is only to be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court. The High Court is also required to give such priority as it reasonably can, having regard to all the circumstances, to the disposal of proceedings in that court under this section.

The orders and decisions referred to in section 5 may be made in respect of non-nationals who have entered, or are attempting to enter, the State. They are referred to in detail at a later point in this judgment and include deportation orders.

Section 10 of the Bill purports to amend sections 3 and 5 of the Immigration Act 1999. Section 3 of the 1999 Act enables the Minister to make deportation orders in respect of non-nationals coming within specified categories, including those whose application for asylum under the Refugee Act 1996 has been refused.

The first amendment purported to be effected by that section is the conferring of a power on the Minister to require a person the subject of a deportation order to:

(a) present himself or herself to a member of the Garda Siochana or immigration officer at a specified date, time and place;

(b) produce any travel document, passport, travel ticket or other document in his or her possession required for the purpose of such deportation;

(c) co-operate in any way necessary to enable a travel document etc. required for the purpose of the deportation to be obtained

(d) reside or remain in a particular district or place in the State pending removal from the State; [*4]

(e) report to a specified Garda Siochana or immigration officer at specified intervals pending such removal;

(f) notify any such member of the Garda Siochana or immigration officer as may be specified in the notice as soon as possible of any change in address.

The second amendment purportedly effected by S. 10 of the Bill confers an extended power of arrest and detention on immigration officers or members of the Garda Siochana. Under Section 5 of the 1999 Act, where an immigration officer or a member of the Garda Siochana, with reasonable cause, suspects that a person against whom a deportation order is in force has failed to comply with any provision of the order, he or she may arrest him or her without warrant and detain him or her in a prescribed place. A person may not be detained under the section for a period or periods exceeding eight weeks in aggregate. Section 10(b) of the Bill purports to extend this power to cases where such an officer or member of the Garda with reasonable cause suspects that the person:

(a) intends to leave the State and enter another State without lawful authority;
(b) has destroyed his or her identity documents or is in possession of forged identity documents or
(c) intends to avoid removal from the State.

It should be pointed out that references in this judgment to *"non-nationals"* or *"aliens"* should not be read as giving rise to any implication as to the rights enjoyed by citizens of member states of the European Union pursuant to the law of the European Communities.

[*5] **Presumption of Constitutionality**

It was submitted by counsel assigned by the court that the question as to whether or not a Bill referred to the Supreme Court under Article 26 of the Constitution enjoys a presumption that it is not repugnant to the Constitution should be reconsidered by the court. It was accepted that the court had made it clear in **In Re Article 26 and the Criminal Law (Jurisdiction) Bill 1975 (1977) I.R. 129** that no distinction should be drawn, in relation to the presumption of constitutionality, between an Act of the Oireachtas and a Bill referred by the President under Article 26 and that this had been reiterated in judgments of the court delivered on subsequent references under Article 26.

It was submitted, however, that the conclusion reached by the court in those cases did not take account of:

(a) the unfettered nature of the discretion conferred upon the President under Article 26;
(b) the combined effect of Articles 15 and 30 of the Constitution in making it clear that the President is an integral part of the Oireachtas;
(c) the fact that until such time as it has been signed by the President, a Bill referred to the court under Article 26 cannot be considered to represent the expression of the legislative power of the Oireachtas.

It was urged that Bills so referred cannot be equated to enactments, because one of the constituent parts of the Oireachtas i.e., the President, has referred the Bill to the court for the very reason that there is a doubt as to whether, if enacted, it would be repugnant to the Constitution. For the court, in such circumstances, to treat the presumption of [*6] constitutionality as applicable would be in effect to prefer the views of the two Houses of the Oireachtas to the views of the President. That, it was said, would be entirely inconsistent with the separation of powers enshrined in the Constitution.

It was further submitted that there was a particular danger in legislation of this nature in applying the presumption of constitutionality. The legislation could operate in a way which would prevent those deported under its provisions from effectively mounting a challenge in the court to the validity of the State's actions. Since the legislation could never be challenged again once its constitutionality was upheld by this court under the reference procedure, it was clearly dangerous to clothe it with the presumption of constitutionality since such serious consequences could ensue for those affected by its provisions.

It was finally urged that this was, accordingly, an appropriate case in which the court should exercise the jurisdiction it undoubtedly enjoyed, as held in **Attorney General v Ryan's Car Hire Limited** (1965) I.R. 642, to depart from its earlier decisions.

The court is unable to accept these submissions. In **In Re Criminal Law (Jurisdiction) Bill (1975)**, O'Higgins C.J. giving the judgment of the court said that:

> *"It was submitted by the opponents that the same considerations should not be applied to a Bill referred by the President under Article 26 as applied in the case of an Act which has been duly passed by both Houses of the Oireachtas and signed and promulgated by the President because the President has referred the Bill after consultation with the Council of State and because a question has been raised in relation to the constitutionality of such Bill or some provision thereof. The court does not accept that any distinction should be drawn, in relation to the presumption of the constitutionality, between an Act of the Oireachtas and a Bill referred by the President under Article 26. "*

[*7] Again in **In Re Matrimonial Homes Bill (1994)** I.R. 305 this court expressly rejected the argument advanced that the earlier authorities should be overruled and that no presumption should attach to the Bill, Finlay C.J. stating (at (317):-

> *"The court is satisfied that there are not compelling reasons which would permit it to depart from the previous decisions which have been referred to and that there is nothing in the present Reference which could possibly constitute it an exceptional case within the general meaning of the phrase as contained in that judgment of Kingsmill-Moore J. in **Attorney General v Ryan's Car Hire Limited**."*

The court is, accordingly, being asked in the case of the present reference to overrule two earlier decisions of the court where precisely the same issue was debated and resolved. It could be said, by way of comment on the arguments advanced by counsel as signed by the court on this issue, that they give entirely insufficient weight to the fact that the President, although doubtless an integral part of the Oireachtas, plays no part whatever in the purely legislative function of the Oireachtas. It is, however, sufficient to say that, whatever the merits be of the arguments advanced in this issue, it has not been demonstrated that in **In Re Criminal Law (Jurisdiction) Bill 1975** and **In Re**

Matrimonial Homes Bill, any relevant argument or authority was overlooked in the judgments of the court. Nor are there any other compelling reasons which would permit the court to depart from those decisions. The court is satisfied that this does not constitute an exceptional case as defined in the judgment of Kingsmill-Moore J. in **Attorney General v Ryan's Car Hire Limited**. It follows that the court will approach its decision on the reference on the basis that the presumption of constitutionality applies to the two provisions under consideration.

[*8] It also follows that, as explained by Finlay C.J. giving the decision of the court in **In Re The Adoption (No. 2) Bill** 1987 (1989) I.R. 656 at p.661:

> *"(1) .... it must be presumed that all proceedings, procedures, discretions and adjudications permitted or prescribed by the Bill are intended to be conducted in accordance with the principles of constitutional justice;*
>
> *(II) ....as between two or more reasonable constructions of the terms of the Bill the construction that is in accordance with the provisions of the Constitution would prevail over any construction that is not in accordance with such provisions."*

Similarly, as pointed out by Walsh J. in **The State (Quinn v Ryan)** 1965 I.R.70 at 130:

> "*In the exercise of powers conferred by an Act of the Oireachtas, any Act inconsistent with the provisions of the Constitution is probably ultra vires the Statute unless expressly authorised by the Statute or authorised by necessary implication, because it may be presumed until the contrary be clearly shown that the Oireachtas did not intend to give legislative authority for Acts inconsistent with the Constitution to which the Oireachtas itself is subject."*

It must also be borne in mind that, the court in considering the interpretation and application of ss.5 and 10 of the Bill is bound to have regard to the fact that s.10 purports to amend in certain respects the Immigration Act 1999 and that both must be read in the light of those provisions and of certain provisions of the Refugee Act 1996 which are also

referred to in the impugned sections. Similarly, there has necessarily been reference in the arguments [*9] addressed to the court in this judgment to two of those Acts. Both of those Acts, however, enjoy the presumption of constitutionality and, unlike the impugned provisions of the Bill, their constitutionality cannot be challenged in this Reference. Accordingly, even though ss. 5 and 10 of the Bill fall to be examined in the context of the entire statutory scheme consisting of the Refugee Act 1996, the Immigration Act 1999 and the Bill, the court must approach the reference on the basis that, unless the constitutional invalidity is established by reference to the impugned sections, whether because of the amendments they effect to the 1999 Act or because of the manner in which they now require that Act or the Refugee Act 1996 to be applied and operated or because they are inherently constitutionally frail, even where they do not relate in any way to the earlier legislation, it would necessarily follow that it had not been established that the impugned sections were repugnant to the Constitution.

The entitlement to look at the legislative history of Sections 5 and 10 of the Bill

The written submissions by counsel assigned by the court quoted extensively from speeches made by the Minister and other Deputies and Senators during the passage of the Bill through both houses of the Oireachtas. It was urged in the course of those submissions and the oral submissions that it was legitimate for the court to consider what was said in the course of those speeches, since in determining whether the measures proposed in sections 5 and 10 are proportionate to the aims sought to be achieved, the purposes of the provisions, as made clear by the Minister in the parliamentary debates, are relevant.

In considering the extent, if any, to which the courts can have regard to the legislative history of an enactment, certain distinctions are relevant. It has been the law since **Bourke v** [*10] **The Attorney General** (1972) I.R. 36 that the court may have regard to the *travaux preparatoires* for international conventions in considering those conventions where legislation has given them the force of law in the State. Similarly, there have been cases in which the courts have had regard to reports of commissions or committees on which the legislation under consideration was based: see **McMahon. v. Attorney General** (1972) I.R.

69 and **Maher v Attorney General** (1973) I.R. 140. It can indeed be permissible to look at the legislative history of a particular provision in general, as explained by Costello P., speaking for this court in **The People (D.P.P.) v McDonagh** (1996) I.L.R.M. 468 where he said:

> *"It has long been established that a court may, as an aid to the construction of a Statute and all of its provisions, consider its legislative history, a term which includes the legislative antecedents of the provisions under construction as well as pre-parliamentary material and parliamentary material relating to it ....."*

It should be observed, however, that what was under consideration in that case was whether the court should have regard to the acknowledged fact that a particular section of an Act of the Oireachtas was in precisely similar terms to a section in an English Act of Parliament: the court considered that it was legitimate to have regard to the state of the law with which the English legislation - and, by implication, the Irish legislation - was intended to deal.

It was also held by Costello J. as he then was, in **Beecham Group Limited v Bristol Myers Company** (unreported; 13th March 1981) that the court was entitled to have regard to the Dail Debates themselves to construe a particular provision in patents legislation, even though the statutory provision was perfectly clear and unambiguous. It was also held by the [*11] House of Lords in **Pepper v Hart** (1993) A.C. 593 that regard could be had to speeches made by Ministers during the course of the parliamentary debates on the measure under consideration by the court. However, it would appear that the view was taken in that jurisdiction that this was only permissible where the provision under consideration was ambiguous or obscure or a particular construction would lead to an absurdity.

It is unnecessary, however, for the purposes of this judgment to consider whether a court is entitled to have regard to what was said by the Minister with responsibility for piloting legislation through Parliament in order to ascertain the meaning of a particular provision and, if so, whether the power to do so can be invoked only where the provision is obscure or ambiguous or, construed in a particular manner would lead to an absurdity. In the

present case, it is conceded that the meaning of sections 5 and 10 is clear: what is at issue is whether they are repugnant having regard to the provisions of the Constitution.

Even it can be assumed that the speeches of the Minister and other members of the Oireachtas are a safe guide as to what the purpose of the Oireachtas collectively was in enacting the provisions in question, this court is solely concerned with the meaning of the legislation as actually passed by the two Houses of the Oireachtas. Irrespective of what may have been in the minds of the Minister in piloting the legislation through the Oireachtas or in the minds of those individual Deputies and Senators who voted for the legislation, the two provisions as passed by them are to be construed in accordance with normal canons of construction: if, as so construed, they are repugnant to the Constitution, the President must be so advised. If they are not, the President must be similarly so advised. Whatever may be the position in other cases, this is not a case in which the court can derive any assistance as to the constitutionality of the two sections from anything that was said concerning them in the course of the debates in the Oireachtas.

[*12] **Section 5**

Section 5 of the Bill is limited in scope in so far as it confines itself to determining and regulating the procedure for challenging the validity of certain orders, notifications, refusals, recommendations and decisions made in respect of non-nationals pursuant to, *inter alia*, The Refugee Act, 1996 and The Immigration Act, 1999.

In order to illustrate the range of matters covered by the procedural requirements of s. 5 the terms of ss (1) are set out hereunder with an indication in parenthesis, where appropriate, of the nature of the matter concerned.

"5.(1) A person shall not question the validity of -

(a) a notification under section 3(3)(a) of the Immigration Act, 1999, [of a proposal to make a deportation order]

(b) a notification under section 3(3)(b)(ii) of the Immigration Act, 1999, [of a decision to make a deportation order]

(c) a deportation order under section 3(1) of the Immigration Act, 1999,

(d) a refusal under Article 5 of the Aliens (Amendment) (No. 402) Order, 1999 (S.I. No. 24 of 1999), [of leave to land to a person entering the State]

(e) an exclusion order under section 4 of the Immigration Act, 1999, [of a specified non-national from the State] [*13]

(f) a decision by or on behalf of the Minister to refuse an application for refugee status or a recommendation of an Appeal Authority referred to in paragraph 13 of the document entitled "Procedures for Processing Asylum Claims in Ireland" which, as amended, was laid by the Minister for Justice, Equality and Law Reform before the Houses of the Oireachtas in March, 1998,

(g) a recommendation under section 12 (as amended by section 11(1)(h) of the Immigration Act, 1999) of the Refugee Act, 1996, [that an Applicant not be declared a refugee on the grounds that the application is manifestly unfounded]

(h) a recommendation of the Refugee Application Commissioner under section 13 (as amended by section 11(1)(i) of the Immigration Act, 1999) of the Refugee Act, 1996, [as to whether the Applicant should be declared a refugee]

(i) a decision of the Refugee Appeals Tribunal under section 16 (as amended by section 11(1)(k) of the Immigration Act, 1999) of the Refugee Act, 1996, [on an appeal from a recommendation of Refugee Applications Commissioner]

(j) a determination of the Commissioner or a decision of the Refugee Appeals Tribunal under section 22 (as amended by section 11(1)(p) of the Immigration Act, 1999) of the Refugee Act, 1996, [to transfer an application for asylum to a convention country for examination in

accordance with the Dublin convention]. [*14]

(k) a refusal under section 17 (as amended by section 11(1)(i) of the Immigration Act, 1999) of the Refugee Act, 1996, [by the Minister, pursuant to a report of the Commissioner or a decision of the Appeals Tribunal, to give an Applicant for asylum a statement declaring that the Applicant is a Refugee].

(l) a determination of an officer appointed under section 22(4)(a) of the Refugee Act, 1996, [by an officer by the Minister that an application for asylum should be transferred to a convention country for examination in accordance with the Dublin convention].

(m) a decision of an officer appointed under section 22(4)(b) of the Refugee Act, 1996, or [to confirm a determination of a deciding officer that an application for asylum should be transferred to convention country for examination].

(n) a decision under section 21 (as amended by section 11(1)(o) of the Immigration Act, 1999) of the Refugee Act, 1996, [by the Minister to revoke a declaration that a person is a refugee].

otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of the 1986) (hereafter in this section referred to as 'the Order').''

The remainder of section 5 provides as follows:

"(2) An application for leave to apply for judicial review under the Order in respect of any of the matters referred to in subsection (1) shall -

(a) be made within the period of 14 days commencing on the date on which [*15]*the person was notified of the decision, determination, recommendation, refusal or making of the Order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and*

(b) be made by motion on notice (grounded in the manner specified in the Order in respect of an ex parte motion for leave) to the Minister and any other person specified for that purpose by order of the High Court, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed.

3 (a) The determination of the High Court of an application for leave to apply for judicial review as aforesaid or of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

(b) This subsection shall not apply to a determination of the High Court in so far as it involves a question as to the validity of any law having regard to the provisions of the Constitution.

(4) The High Court shall give such priority as it reasonably can, having regard to all the circumstances, to the disposal of proceedings in that Court under this section. [*16]

(5) The Superior Court Rules Committee may make rules to facilitate the giving of effect to subsection (4).

(6) References in this section to the Order shall be construed as including references to the Order as amended or re-enacted (with or without modification) by rules of court."

Arguments of Counsel assigned by the Court

Counsel assigned by the court submitted that certain provisions of s.5 of the Bill violated the constitutional rights of access to the courts and were in breach of the constitutional guarantee of equality before the law.

It was submitted that s.5(2), in limiting to fourteen days the period during which a person may seek to challenge by way of judicial review the validity of a decision or other matter referred to subsection (1) infringes the constitutional right of all persons of access to the courts to defend and vindicate a legal right. While the constitutional right of access to the courts is not absolute and can be curtailed by a limitation period any interference with the right of access to the court has to be justified by reference to the question as to whether the litigant is still provided, first, with an adequate opportunity to ascertain whether he or she has a right of action and secondly with an adequate opportunity to institute proceedings.

Counsel submitted that a limitation period in itself may be so unjustifiable as wrongfully to infringe the right of access to the court. They relied on **Brady v Donegal County Council [1989] ILRM 282** where Costello J. (as he then was) concluded that the two month time limit for challenging planning decisions (with no possibility of extension in exceptional cases) was unreasonable and therefore unconstitutional. Although in s. 5(2) there is an express provision allowing for an extension of time this is not sufficient, it was argued, [*17]to compensate for an unjustified and excessive restriction on the time for bringing judicial review proceedings as imposed by that subsection.

It was submitted that any consideration of the constitutional validity of the fourteen day time limit, notwithstanding the power of the High Court to extend the period for *"good and sufficient reason"*, must be examined having regard to the following factors:-

(i) The nature and variety of the types of decisions, orders, refusals, notifications and recommendations listed in Section 5(1) of the Bill, all of which are subject to the fourteen day provision;

(ii) The category of persons who will probably be subject to such decisions etc.;

(iii) The extent to which provision is or is not made for a requirement that such persons have the decisions, the possible avenues of appeal and the procedures explained to them in their own language

(iv) The policy of the State in dispersing applicants for refugee status around the country;

(v) The nature of the provisions regarding the service of notice on such persons in relation to the beginning of the running of the fourteen day period;

(vi) The extent to which adequate legal advice is available to such persons whether by way of entitlement or as a matter of practice;

(vii) The adequacy of existing procedures to enable the applicant to get access rapidly to all the information and material which was before the person who took the decision which may be the subject of a possible judicial review challenge with a view to ascertaining possible grounds of challenge within the fourteen day period;

(viii) The likely nature of the challenges to such decisions, etc. which may arise, the complexity of the potential arguments, and the reality or lack thereof in expecting the putative applicant to correctly identify valid grounds of challenge, instruct a solicitor [*18] with all relevant facts and material, have counsel instructed and have an application made within the fourteen day period;

(ix) The adequacy of judicial review;

(x) The declared legislative objective or policy which is supposedly served by the fourteen day period and the extent to which such policies or objectives justify the significant curtailment of the right of access to the court represented by the fourteen day period.

One of the primary arguments of counsel assigned by the court was that a consideration of those factors as an ensemble (with the possible exception of the last two elements which stood to be considered alone) demonstrates that the limitation of fourteen days within which to initiate the judicial review procedure renders a person's right of access to the courts so excessively difficult as to be arbitrary, unreasonable and therefore unconstitutional.

Counsel also argued that a number of these factors taken separately and distinctly undermined a person’s right of access to the courts to such an extent as to constitute a denial of his or her constitutional rights. Thus it was submitted that the failure to make a general provision requiring all decisions and procedures to be explained in all circumstances to the

persons concerned in their own language constituted a breach of his or her constitutional right of access to the courts.

The same was said of the provisions as to service of certain notices contained in s.10(c) of the Bill. In broad terms, this provides that where a notice under the Immigration Act, 1999 is served by a form of recorded delivery addressed to a person at the address most recently furnished by him or her to the Minister or at an address for service finished by him [*19]or her such service shall be deemed to have been duly effected. It was submitted that for a variety of reasons it may well be that the person concerned never in fact received the notice or received it much later than the presumed date of service. Since the fourteen days within which to bring judicial review proceedings runs from the date on which the person was notified of the decision or matter to be challenged, the effect of s.10(c) in conjunction with the s.5(2) limitation of fourteen days could be to deny a person his or her constitutional right of access to the courts.

Similarly, counsel argued that the inadequacy of legal aid or difficulty in getting it, having regard to the nature and complexity of the decisions involved and the need to establish substantial grounds as the basis for a successful application for leave to apply for judicial review, constituted a denial of the right of access to the courts. This was so because in such circumstances it would be extremely difficult if not impossible to prepare and initiate a claim for judicial review within the fourteen day limitation period. The difficulties of gaining access to adequate legal advice during the fourteen day period were compounded by the state policy of dispersing asylum seekers throughout the State. In a similar vein, it was argued that persons seeking to bring judicial review would have difficulty in gaining access to the material on which such decisions were based and to prepare their case in sufficient time before the expiry of fourteen days. The absence, in the Bill, of any provision entitling applicants or would be applicants for judicial review to obtain the material on which the decision being impugned was made eliminated in practical terms the right of access to the court. It was also argued that the imposition of a limitation period of fourteen days on persons seeking judicial review of administrative decisions made pursuant to legislation governing immigration and asylum was arbitrary and discriminatory as against non-nationals.

[*20] Counsel assigned by the Court also argued that s. 5(3) was unconstitutional in so far as it restricted a person's right of appeal to the Supreme Court. It was accepted that the right of appeal to the Supreme Court can be regulated by law. However any limitation on a right of appeal from the High Court to the Supreme Court must be objectively justifiable. Such justification must be substantial and must reflect some significant or compelling State interest such as to warrant the interference with the constitutional right of access to the courts on appeal. No such justification could be inferred from the terms of the Bill.

Finally, it was submitted on behalf of counsel assigned by the court that s.5 of the Bill, in confining the procedure for challenging the validity of the relevant orders and decisions to judicial review, denied to persons detained pursuant to s.10 of the Bill a right to challenge the lawfulness of their detention by way of habeas corpus proceedings pursuant to Article 40.4 of the Constitution.

Arguments on behalf of the Attorney General

Counsel for the Attorney General submitted that in principle there was nothing to preclude the Oireachtas from prescribing the form of procedure which a particular litigant must adopt. This, it was said, seems clear from the provisions of Article 36. iii of the Constitution which provides:-

> *"Subject to the foregoing provisions of this Constitution relating to the Courts, the following matters shall be regulated in accordance with law, that is to say…*
>
> *(iii) The constitution and organisation of the said Courts, the distribution of jurisdiction and business among the said Courts and judges and all matters of procedure. "*

[*21] To the extent that the provisions of s. 5(1) of the Bill require litigants to proceed by way of judicial review, they are logical, rational and fair. It provides a unified system of challenging administrative decisions. The entire procedure provides for a speedy and expeditious determination of the validity of administrative action in contrast to the

procedural complexities and delays common in the case of proceedings commenced by plenary summons.

As regards the fourteen day limitation period within which to apply for leave to bring judicial review proceedings, subsection (2)(a) of s.5 allows the Court to extend the time *"where it considers that there is good and sufficient reason"* for so doing. Such a provision may be properly regarded as a legislative regulation of a litigant's right of access to the Courts and, having regard to the dicta of this court in **Murphy v Green** [1990] 2 IR. 566 there is nothing inherently unconstitutional in such a regulation.

There are a series of examples of statutory restrictions on the right to apply for judicial review, e.g., Housing Act, 1966, s. 78; Local Government (Planning and Development) Act, 1992 s. 19; Transport (Dublin Light Rail) Act, 1996, s. 12; Irish Take-Over Panel Act, 1997, s.13 and Roads (Amendment) Act, 1998, s. 6. These, it was submitted, are all instances where there are legitimate public policy reasons - stemming from the need for legal certainty and speedy decision making - for such restrictions on the right to apply for judicial review. Similar considerations apply here, since there are public policy objectives in ensuring that illegal immigrants challenging deportation orders do so as quickly as possible, as otherwise they might tend to become enmeshed further in Irish society only thereafter to be forced to leave.

[*22] In any case, any effective deportation system must be able to function efficiently and distinguish quickly between genuine refugees and other migrants not entitled to enter or remain in the State. It was also submitted that an inefficient system for processing such asylum applications and implementing deportation in the case of illegal immigrants would act as a *"magnet"* attracting illegal immigrants from elsewhere and would further undermine the functioning of the system.

Counsel for the Attorney General drew attention to the fact that the time period prescribed in the Irish Take-Over Panel Act, 1997 is only seven days from the date on which the decision is given and that the High Court has a more limited power for extending time than in the present Bill. The, period prescribed in the Local Government (Planning and Development) Act, 1992 is longer, namely two months, but that period cannot be extended under any circumstances. In contrast s. 5(2)(a) contains a generous power to extend time in

appropriate cases. It was further submitted that account should be taken of the fact that as regards a deportation order an applicant will have had notice prior to its making since section (3)(b) of the Immigration Act, 1999 requires the Minister to have given the applicant fifteen working days (i.e. three weeks) to make representations prior to the making of any such Order. In practice therefore an applicant will have had at least five weeks (subject to extensions granted by the court) to prepare for any application for judicial review from the date that he has been informed that the Minister is proposing to make a deportation order. Again in practice the typical period between the giving of the notice of intention to deport and the actual deportation is eleven weeks. Moreover, the person concerned will have become aware during the decision making process governing his or her application for asylum that his or her claim for refugee status is being contested. In the foregoing context it has to be borne in mind that the applicant will have access to free legal representation from the Refugee Legal

[*23]Service (established by the Legal Aid Board as a specialised office to provide independent legal advice to asylum seekers) during key stages of the process. Accordingly, an applicant will have become aware from the very initial stages of the process that his or her application for refugee status is being contested and should generally have had sufficient time in advance of the making of any deportation order to consider legal issues which might arise in any application for judicial review.

As regards the power of the High Court to extend time under s. 5(2)(a), this is analogous to the general power of the court to extend time for *"good reason"* under Order 84, Rule 21(1) of the Rules of the Superior Courts. All the plaintiff has to show, the onus being on him, is that there are reasons which both explain the delay and afford a justifiable excuse for the delay. **(O'Donnell v Dunlaoghaire Corporation (No. 2) [1991] ILRM 301 at 315.)** It was submitted that it would be impossible to anticipate the infinite variety of circumstances in which applications for extension of time might arise but the jurisdiction of the High Court to extend time under the section is *"a generous and extensive one"*. It was submitted that having regard to the presumption of constitutionality which attaches to the discretionary powers conferred by the Bill (particularly when exercised by the High Court), it must be assumed that factors such as language difficulties, absence of official

documentation, impecuniosity, unfamiliarity with the legal system, illness and a host of similar considerations would, in an appropriate case, justify the High Court granting an extension of time. The High Court must extend time should constitutional principles of fairness and protection of constitutional rights so require. As thus construed, s.5 cannot be regarded as unconstitutional. The terms of the present Bill can be distinguished clearly from those considered in **Brady v Donegal County Council [1989] 1LRM 282** where the two month time limit was found [*24] unconstitutional precisely because the time period was absolute and incapable of judicial extension.

It was submitted on behalf of the Attorney General that the requirement as to the service of documents (section 6 of the 1999 Act as amended by section 10(c) of the Bill) is a reasonable and necessary one. It was not unreasonable to provide that such service may be effected at the address that had been provided by the person concerned for that purpose. Otherwise the Minister could be effectively frustrated in the exercise of his powers. Even in an extreme situation, where, without fault on the part of the person concerned, the fourteen day period runs before he or she receives actual notice, it may be readily anticipated that the court would, in such circumstances regard the case as an appropriate one in which to exercise its power to extend the time for the making of the application.

As regards the requirement that an applicant for leave to issue judicial review proceedings establish *"substantial grounds"* that an administrative decision is invalid or ought to be quashed, this is not an unduly onerous requirement since the High Court must decline leave only where it is satisfied that the application could not succeed or where the grounds relied on are not reasonable or are *"trivial or tenuous".* This follows from a number of authorities where a similar requirement, as regards the Planning Acts, has been judicially considered. Counsel for the Attorney General referred in particular to the judgment of Egan J. in **Scott v An Bord Pleanala [1995] 1 ILRM 424, 428,** Carroll J. in **MacNamara v An Bord Pleanala,** and Morris P. in **Lancefort Limited v An Bord Pleanala [1997] 2 ILRM 508, 516.** In order to justify the *"substantial grounds"* requirement, the Oireachtas does not have to advance any actual factual justification. Objective justification can be inferred from the assumed justification for the legislation in question. It was submitted that the words of

[*25]Costello P. in **Molyneux v Ireland [1997] 2 ILRM 241, 244** (in the context of a discrimination claim based on Article 40.1) are relevant:-

> *"...it is not necessary for the court to search the parliamentary debates to ascertain the arguments used to justify the enactment of the measure - it will usually be possible for the court to make reasonable inferences from the provisions of the statute itself and the facts of the case".*

It was submitted that the Bill speaks for itself as regards objective justification. All the statutory instances where the *"substantial grounds"* requirement has been introduced have a common *leitmotif*: the need for legal certainty and the swift determination of the validity of the administrative measure impugned in the proceedings has been present.

As regards s. 5(3) which regulates the right of appeal to the Supreme Court, counsel for the Attorney General relied on the terms of Article 34.4.3 which provides that the Supreme Court *"shall, with such exceptions and regulations as may be prescribed by law, have appellate jurisdiction from all decisions* of *the High Court..."*.

It was submitted that there are statutory precedents where the Oireachtas has either regulated the right of appeal (by subjecting it to certain specified conditions), or has *"excepted"* it altogether. Section 42(8) of the Freedom of Information Act, 1997 provides that a decision of the High Court on an appeal or reference under the section shall be final and conclusive. In other instances the Oireachtas has regulated the appellate jurisdiction by requiring leave of the High Court before an appeal to the Supreme Court (e.g. Courts (Supplemental Provisions) Act, 1961, s. 52(2)), or by confining the appeal to a point of law (e.g. Patents Act, 1992 s.96). Furthermore, the wording of section 5(3)(a) follows the language of the Local Government (Planning and Development) Act, 1992, section 19. A [*26]similar formula has also been used in other instances as for example in the Irish Take-Over Panel Act, 1997. Moreover, it was submitted, that it has not been heretofore suggested that Article 34.4.3 placed any implicit limitations on the right of the Oireachtas to impose restrictions or exceptions to this court's appellate jurisdiction. In such cases as **Minister for Justice v Wang Zhu Jie [1993] IR. 426** and **Irish Asphalt Limited v An Bord Pleanala [1996] 2 IR. 179,** this court gave effect to statutory provisions regulating its

appellate jurisdiction. In both cases the court found that as the putative appellants had not been granted prior leave by the High Court the Supreme Court lacked jurisdiction. In **Irish Asphalt** Barrington J. drew attention (at 186) to the underlying policy of the 1992 Act when he observed:-

> "*Finally it appears to me that the interpretation of the subsection of the Act of 1992 given above accords best with what appears to have been the policy of the Act of 1992. Clearly, the purpose of this Act was to speed up the planning process by shortening litigation and by eliminating applications for judicial review which were devoid of substance."*

The constitutionality of the restriction on an appeal to the Supreme Court was not called in question and it was submitted that similar considerations apply in the present case. Finally, no authority was advanced for the proposition that a restriction by the Oireachtas on the right of appeal to the Supreme Court must be objectively justified. There is nothing in the constitution from which a requirement for objective justification could be deduced.

General Issues

Before dealing with the issues which have arisen in relation to the specific provisions [*27]of s.5 there are some matters of a more general nature which it is appropriate to address at this point.

The court has earlier in this judgment reaffirmed the principle that the presumption of constitutionality applies to a Bill referred to it under Article 26 of the Constitution. It has also been pointed out that as a result, the principles laid down in **East Donegal Co-operative Livestock Mart Ltd v Attorney General** are relevant in considering the constitutionality of the Bill.

The constitutional status of non-nationals

"[The] State... must have very wide powers in the interest of the common good to control aliens, their entry into the state, their departure and their activities within the State." This statement of the law by Costello J. in **Pok Sun Shum v Ireland [1986] ILRM 593 at**

599 reflects an inherent element of State sovereignty over national territory long recognised in both domestic and international law.

For this reason, in the sphere of immigration, its restriction or regulation, the non-national or alien constitutes a discrete category of persons whose entry, presence and expulsion from the State may be the subject of legislative and administrative measures which would not, and in many of its aspects, could not, be applied to its citizens.

In **Osheku v Ireland [1986] I.R. 733, 746,** where the plaintiff failed in his claim that the Aliens Act, 1935 was unconstitutional, Gannon J. said;-

> *"The control of aliens which is the purpose of the Aliens Act, 1935, is an aspect of the common good related to the definition, recognition and the protection of the boundaries of the State. That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure,* [*28] *and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter. The integrity of the State constituted as it is of the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concord maintained with other nations in accordance with the objectives declared in the preamble to the Constitution."*

This statement of Gannon J. has been cited with approval in a number of judgments of this Court including that of Keane J. (as he then was) in **Laurentiu v Minister for Justice [2000] 1 ILRM 1, 50** where he said:-

> *"It is clear that, altogether apart from the provisions of the 1935 Act and any preceding legislation, Saorstat Eireann as a sovereign state enjoyed the power to expel or deport aliens from the state for the reasons set out in the judgment of Gannon J. in* ***Osheku v Ireland.*** *It is of course the case that in modern times, both here and in other common law jurisdictions, the exercise of the power is regulated by statute, but*

that does not affect the general principle that the right to expel or deport aliens inheres in the State by virtue of its nature and not because it has been conferred on particular organs of the State by statute."

Both counsel assigned by the court and counsel for the Attorney General made submissions, in the light of their particular status, as to the nature and extent to which persons

[*29] seeking asylum or refugee status enjoy the protection of certain rights under the Constitution in accordance with the principles of natural justice and constitutional justice. Counsel assigned by the court submitted that, despite the undoubted power of the State over non-nationals (including asylum seekers), such persons are not without rights while they are within the jurisdiction of the State. It is only necessary to examine this question in this part of the judgment to the extent that such rights are relevant to the interpretation of s. 5 of the Bill. The rights, including fundamental rights, to which non-nationals may be entitled under the Constitution do not always coincide with the rights protected as regards citizens of the State, the right not to be deported from the State being an obvious and relevant example.

Counsel assigned by the court submitted that among the rights of a non-national which have been recognised by the courts are the following: -

(i) If detained, a right under Article 40.4.2 of the Constitution to apply to the High Court to question the legality of his or her detention. The Article is clearly not limited to citizens but applies to *"any person"*;

(ii) A right of access to the courts to enforce his or her legal and constitutional rights;

(iii) In dealing with applications for refugee status or asylum, a right to fair procedures and to the application of natural and constitutional justice;

(iv) A right to require that any measures taken against a non-national by the State, in the exercise of its rights and powers, are exercised in a constitutionally valid

manner and in accordance with laws which are not repugnant to the Constitution.

[*30] Counsel also submitted that non-nationals enjoy a constitutional right to equal treatment in the sense that any difference in treatment must be justified by some legitimate government objective. It was also submitted that non-nationals were entitled to the unspecified personal rights guaranteed by Article 40.3.2 of the Constitution and a right of reasonable access to legal advisors. Counsel for the Attorney General, although they differed materially in respect of certain of the submissions made by counsel assigned by the court on this subject, were in general agreement, in their submissions, that the rights referred to above are enjoyed by non-nationals as well as citizens.

Counsel assigned by the court are correct in the submission that our courts have recognised the right of non-citizens to apply for release from custody pursuant to Article 40.4.2 on the grounds that the person concerned is not being detained in accordance with the law. In **The State (Kugan & Another) v O'Rourke [1985] I.R. 658** Egan J, sitting as a judge of the High Court, stated

> *'It was suggested by the respondent that the remedy of habeas corpus might not properly be sought by the prosecutors as they are not citizens of the State, but under Article 40, s. 4., sub-s. 2 of the Constitution it seems clear that such relief can be sought by 'any person', and I so hold".*

Suffice it to add that this court, in **The State (Trimbole) v The Governor of Mountjoy Prison [1985] IR. 550** upheld the Order of the High Court directing that the prosecutor be released from detention pursuant to Article 40.4.2, the prosecutor being an Australian citizen and a non-national.

[*31] It would be contrary to the very notion of a state founded on the rule of law, as this State is, and one in which, pursuant to Article 34 justice is administered in courts established by law, if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the courts to enforce their legal rights. In **Murphy -v- Green [1992] IR. 566 at 578** Griffin J. observed

"it is beyond question that every individual, be he a citizen or not, has a constitutional right of access to the courts. Stated in its broadest terms, this is a right to initiate litigation in the courts."

It may be that in certain circumstances a right of access to the courts of non-nationals may be subject to conditions or limitations which would not apply to citizens. However, where the State, or State authorities, make decisions which are legally binding on, and addressed directly to, a particular individual, within the jurisdiction, whether a citizen or non-national, such decisions must be taken in accordance with the law and the Constitution. It follows that the individual legally bound by such a decision must have access to the courts to challenge its validity. Otherwise the obligation on the State to act lawfully and constitutionally would be ineffective. For the purpose of this reference, the Court is satisfied that non-nationals have a constitutional right of access to challenge the validity of any of the decisions or other matters referred to in ss (1) of s. 5 taken in relation to him or her.

Similar considerations arise with regard to a non-national's right to fair procedures and to the application of natural and constitutional justice where he or she has applied for asylum or refugee status. The Refugee Act, 1996 and the Immigration Act, 1999 confer and regulate the legal right of non-nationals to apply for asylum or refugee status. Persons charged with taking decisions pursuant to those acts are engaged in the administration of the [*32]law of the State. As regards judicial review of those decisions the court adopts the following statement of the law by Barrington J. in **The State (McFadden) v Governor of Mountjoy Prison [1981] ILRM 113 at 177:**

"The substantive rights and liabilities of an alien may be different to those of a citizen. The alien, for instance, may not have the right to vote or may be liable to deportation. But when the Constitution prescribes basic fairness of procedures in the administration of law it does so, not only because citizens have rights, but also because the Courts in the administration of justice are expected to observe certain forms of due process enshrined in the Constitution. Once the Courts have seisin of a dispute it is difficult to see how the standards they should apply in investigating it,

should, in fairness, be any different in the case of an alien than those to be applied in the case of a citizen."

In that case Barrington J. was concerned with fairness of procedures in the administration of law by the courts. In this reference the court is not concerned with the constitutional principles which should apply in the operation of procedures envisaged by the Refugee Act, 1996 and the Immigration Act, 1999. There is a presumption that those Acts are applied in accordance with those principles. The court is concerned only with the provisions of section 5 determining the procedure by which the validity of a decision or other matter governed by section 5(1) may be challenged before the Courts. The court is satisfied that, in the case of applications to the High Court to challenge the validity of such decisions or other matters, a non-national is entitled to the same degree of natural justice and fairness of procedures as a citizen.

[*33] **Legal Aid**

The court received observations from counsel on both sides concerning the availability of legal aid to persons seeking asylum or refugee status. While they are not in agreement as to the efficacy of the legal aid services provided, it is not in question that such a service is to some extent in place and available to persons seeking asylum or refugee status. It is clear that the Legal Aid Board has established, under its aegis, a Refugee Legal Service intended to provide legal advice and assistance to applicants at all stages of the asylum process, including representation before an appeals authority and, in relation to humanitarian leave to remain, deportation issues and judicial review. The service has established its headquarters in Lower Mount Street, Dublin. Since its establishment, it has augmented its staff to meet a growth in the volume of work and with a view to directing its services to asylum seekers dispersed throughout the country. Counsel assigned by the court have contended that the legal aid service available to persons who have applied for asylum or refugee status is so inadequate and ineffective that it constitutes a denial of their constitutional right to access to legal advice and its inadequacy compounds the obstacle created by a fourteen day judicial review limitation period for access to the Courts. For reasons stated later in the judgment it is

not necessary for the purposes of this reference to evaluate the quality and efficacy of the legal aid service available to non-nationals.

Processing of Asylum cases

Neither is it necessary or relevant to review in detail the various procedures according to which an application for asylum or refugee status is dealt with and finally determined pursuant to the relevant statutes and the arrangements notified to the United Nations High Commissioner on Refugees under what is commonly referred to as the "Hope Hanlon Letter".

[*34] Section 5 of the Bill contains no provision governing the manner in which the process is to be carried out, being concerned only with the procedure by which the validity of decisions and other matters decided in that process may be challenged in the High Court. It is sufficient to note that the process, irrespective of the category of case which may be involved, is a lengthy one, commencing usually with an initial application and interview, the completion of a detailed questionnaire by the applicant followed in most cases by a further detailed interview, a decision, an appeal process and a final decision. Self-evidently the applicant is directly and personally involved throughout the process. It is also the case that, where the Minister proposes to make a deportation order pursuant to section 3 of the Immigration Act, 1999 he or she must, subject to certain limited exceptions, notify the person concerned of the proposal and give that person fifteen working days, in effect almost three weeks, to make representations. Accordingly such a person will have nearly three weeks notice of the fact that his or her application has not been successful and that it is proposed to make a deportation order unless the Minister, in the light of the submissions, decides on certain grounds (usually referred to as humanitarian grounds) not to proceed with the deportation. In any event the unsuccessful applicant will have become aware prior to the appeals stage of the negative position adopted by the relevant State authorities to his or her application.

Section 5 (1) - Judicial Review

Article 36 of the Constitution provides, *inter alia* that

"Subject to the foregoing provisions of this Constitution relating to the Courts, the following matters shall be regulated in accordance with law, that is to say:-... [*35]

(iii) The constitution and organisation of the said Courts, ... and all matters of procedure"

It is within the competence of the Oireachtas to regulate by law, by primary legislation or, in the due exercise of its powers, by way of secondary legislation, such as statutory instruments, procedural matters, including procedural remedies, before the courts provided constitutional rights and other provisions of the Constitution relating to the courts are not infringed. Subsection (1) of s.5 specifies judicial review as the only procedure by which a person may question the validity of any decision or other matters referred to at paragraphs (a) - (n) of the subsection. All of those matters fall to be decided in an administrative process by persons authorised by law to decide them. It is not the function of the courts to decide such matters anew on their merits but to determine the validity of the decisions taken as a question of law. Should a person seek to challenge the validity of any of the matters covered by the subsection, he or she will not be limited as to the grounds upon which the validity of a decision may be attacked by virtue of being confined to judicial review as the only form of remedy. Given that the jurisdiction of the courts is limited to reviewing whether any such matter has been decided in accordance with law, the grounds for challenging such validity would not be any more extensive under other procedures such as proceedings commenced by plenary summons. Indeed judicial review is a remedy which is regularly opted for by persons seeking to challenge the validity of administrative decisions. The court concludes that judicial review as such is not an inadequate remedy.

Section 5 (2)(a) - Fourteen days limitation

Subsection (2) regulates the manner in which an application for leave to apply for judicial review in respect of any of the matters referred to in subsection (1) is to be made. In [*36]doing so the subsection sets out certain conditions with which an application for leave to apply for judicial review must comply.

Among these conditions is the requirement in paragraph (a) that the application for leave be made within the period of fourteen days from the date on which the person was notified of the decision or other matter concerned. This period may be extended if the High Court considers that there is *"good and sufficient reason"* for doing so.

As the court has already acknowledged in this judgment, non-nationals have a constitutional right of access to the Courts to challenge the validity of any decision or other matter referred to in section 5 (1). They also enjoy constitutional right to fair procedures in such proceedings. Section 5 of the Act contains no provision regulating or governing the procedures to be followed or the processes by which applications for asylum or refugee status are determined. It is concerned only with judicial review of the relevant decisions in the High Court.

Counsel assigned by the court made what might be described as a general submission that a whole range of factors, many of them peculiar to the position of non-nationals seeking asylum or refugee status in this country result in judicial review with a fourteen day limitation (even with the Court's discretion to extend the time) not providing in practice a useful or effective means of access to the Courts to assert their legal rights. This range of factors has been outlined earlier in the judgment and the thrust of counsel's argument in this context was that all of them or many of them taken together were such that it would in practice be impossible or virtually impossible for the persons concerned in many cases to be in a position to prepare, and in particular to bring, judicial review within the fourteen day period.

Certainly non-nationals who enter the State and seek asylum or refugee status face difficulties which are special to them. In many, if not most, cases, they will be strangers to [*37]its culture, its way of life and its languages. They may be located a good distance away from the centre where decisions concerning them are taken and may be completely ignorant of the legal system. These and many other factors could combine to make it difficult to pursue applications for asylum or refugee status or, which is what the court is concerned with in this reference, to seek judicial review of administrative decisions affecting them. Indeed counsel for the Attorney General conceded that one could by no means exclude a combination of circumstances in a particular case which could result in an applicant not

finding it possible to bring an application for leave to seek judicial review within the fourteen day period.

Counsel assigned by the court cited the judgement of Costello J. in **Brady v Donegal County Council** who said that a two month time limit for challenging planning decisions with no possibility of extension in exceptional cases was a

> *"... serious restriction on the exercise of the Plaintiff's constitutional rights ... [which] cannot reasonably be justified. Unmodified, the section is unreasonable; being unreasonable it is unconstitutional, and I will so declare."*

However, as counsel readily acknowledged, that was a case in which there was no provision which permitted the courts to extend the time for the bringing of judicial review proceedings by affected persons who, through no fault of their own, were unaware of relevant facts until after the expiration of the limitation period.

It should be noted that in that case, Costello J. found that the public interest in establishing at an early date certainty in the decisions of planning authorities and the avoidance of unnecessary costs and wasteful appeals procedures could well justify the imposition of stringent time limits for the institution of court proceedings. It was simply the absence of any modification of the strict limitation period, by way of the kind of saver [*38]referred to above, that led the learned trial judge to hold that the provision was unreasonable and unconstitutional.

Although s.5 (2) (a) of the Bill contains the express provision whereby the Court may extend the time for bringing judicial review beyond the fourteen days where there is "good and sufficient" reason for doing so, counsel assigned by the Court submitted that this power had little or no significance as to the constitutional validity of s.5 on two grounds. First, for all the reasons already outlined, it seems inevitable that a very large number, perhaps even a majority of applications would have be brought outside the fourteen day period. A specified limitation period which is so short that it will inevitably trigger the invocation of a judicial power of extension on many occasions, must, in its nature, be flawed and fundamentally unjust. Secondly, it was submitted that the difficulty in the case of asylum seekers is that many of them might well find themselves deported before any application could be made on

their behalf to the court for an extension of time. This is particularly so where there is no minimum period prescribed by law before a deportation can take place.

Before addressing any other arguments, it should be said that, in the view of the court, these two last mentioned grounds are not a valid basis on which to attack the efficacy of the discretion granted to the High Court to extend the period of fourteen days in appropriate circumstances for the bringing of an application for leave to seek judicial review. Whether a large number or even a majority of persons seeking leave to apply for judicial review will find it necessary also to apply for an extension of time is a matter for speculation. In any event, such a mathematical approach is not a basis on which to assess the validity or efficacy of such a provision. The courts are regularly requested to extend the time for the taking of certain steps in proceedings, for an appeal from one court to another and indeed for the bringing of judicial review itself. The extension of time for the filing of pleadings, by [*39] agreement or by leave of the court, may, under a relevant rule, occur in a very large number of cases but this has never been regarded as undermining the constitutional validity of the rule in question. More fundamental, however, is the fact that a person seeking judicial review pursuant to s.5 must in the first instance apply to the High Court for leave to apply for judicial review, irrespective of any time limit for doing so. If such a person has also to apply for an extension of the time within which to make the application on the grounds that there is good and sufficient reason for such an extension, that cannot be said to undermine access to the court. Indeed by giving that very discretion to the Court to extend the time, access to the Court is enhanced.

The second of these grounds of objection concerns only a decision to deport and its implementation before the person in question has made or has had an opportunity to make an application for leave to apply for judicial review (particularly when there is no minimum time
period before which a deportation decision can be implemented). Apart from the fact that it is
not in issue that the average period between a decision to deport and actual deportation is eleven weeks, this is an objection which could be in principle raised in respect of any period of limitation (including for example the six months limitation period of general application

which it has not been suggested would be unconstitutional).

As a preliminary observation, it should be recalled that a person who is the subject of a deportation order will have become aware in the course of the extended processing of his or her application that he or she is on real risk of becoming the subject of a deportation order. In addition, the person concerned will in the vast majority of cases have received almost three week's notice of the intention to make the deportation order. Once the deportation order has been notified to the person concerned there are fourteen days from the date of notification (or deemed notification as the case may be) within which to apply for judicial review and this in [*40] turn is subject to an extension at the discretion of the Court. There is nothing in the section which would prohibit the person concerned from applying for an extension of the fourteen day period before that actual fourteen day period had elapsed.

It must be remembered that the statutory power to make a deportation order and its implementation derives from s3 of the Immigration Act, 1999. The court has already held that a non-national has a constitutional right of access to the courts to challenge the validity of a decision such as a deportation order. The second objection raised by counsel assigned by the Court is to the effect that, if the power to deport under the 1999 Act is exercised in a particular fashion, particularly when that Act, or some other Act, does not contain a provision preventing deportation before a minimum period has elapsed, there would be a denial of that person's right of access to the courts. Whether a person is entitled to remain within the State for a minimum period of time in order to exercise a constitutional right to bring judicial review proceedings, is a matter to be determined in appropriate proceedings in the High Court concerning the powers of deportation deriving from the 1999 Act. Section 5 of the Bill does not purport to affect the exercise by the State of its power or its discretions in the implementation of a deportation order. On the contrary, it allows for a means of access to the courts to challenge its validity.

0bjective Justification and Proportionality

Counsel assigned by the court submitted that the fourteen day limitation period, even with the power to extend time, was a restriction on the constitutional right of access to the courts which must be objectively justified by some State objective or imperative of

compelling importance. Furthermore, it was submitted, that in so far as s.5 (2) seeks to strike a balance between the competing interest of the right of access to the Courts and any public [*41] interest in speedy disposal of cases of this nature, the principle of proportionality as set out by Costello J., in **Heaney -v- Ireland [1994] 3 I.R. 593** should be applied. The application of this principle means that the right of access to the courts should only be limited to the extent necessary to achieve the objective in question. In this case, none of the reasons advanced by counsel for the Attorney General is capable of justifying it and in any case a longer period within which to make applications for judicial review will still meet the same objectives.

Counsel for the Attorney General in the course of their submissions advanced various objectives which the fourteen day limitation period was designed to serve. As already noted, counsel assigned by the court quoted extensively from the Dail debates as regards these objectives.

As Costello J. stated in **Molyneux -v- Ireland [1997] 2 I.L.R.M. 241 at 244**

> *"...it is not necessary for the Court to search the parliamentary debates to ascertain the arguments used to justify the enactment of the measure - it will usually be possible for the Court to make reasonable inferences from the provisions of the statute itself and the facts of the case".*

In that case, the court was concerned with the basis for the different treatment of different categories of persons having regard to Article 40.1. Adopting a similar approach, the court is satisfied that the objectives of the Bill as regards the fourteen day limitation period can be reasonably inferred from the provisions of the Bill. There is a well established public policy objective that administrative decisions, particularly those taken pursuant to detailed procedures laid down by law, should be capable of being applied or implemented with certainty at as early a date as possible and that any issue as to their validity should accordingly be determined as soon as possible. (**Brady -v- Donegal Co. Co., Irish Asphalt** [*42]**Ltd -v- An Bord Pleanála,** and **KSK Enterprises Ltd -v- An Bord Pleanála [1994] 2 I.R. 128 at 135).** Furthermore, it may be inferred from the Bill and the surrounding circumstances that the early establishment of the certainty of the decisions in question is

necessary in the interests of the proper management and treatment of persons seeking asylum or refugee status in this country. The early implementation of decisions duly and properly taken would facilitate the better and proper administration of the system governing seekers of asylum for both those who are ultimately successful and ultimately unsuccessful.

For these reasons, the court is of the view that the State has a legitimate interest in prescribing procedural rules calculated to ensure or promote an early completion of judicial review proceedings of the administrative decisions concerned. However, in doing so, the State must respect constitutional rights and in particular that of access to the courts.

Accordingly, the court is of the view that there are objective reasons concerning the public interest in the certainty of the validity of the administrative decisions concerned on the one hand and the proper and effective management of applications for asylum or refugee status on the other. Such objective reasons may justify a stringent limitation of the period within which judicial review of such decisions may be sought, provided constitutional rights are respected.

The test is not whether a more extended period of time within which to seek leave to apply for judicial review (whether slightly longer or very much longer) would permit the same policy objectives to be attained. As already mentioned, procedures of the courts may be regulated by law. It is a matter of policy and discretion for the legislature to choose the appropriate limitation period. The legislature is not obliged to choose the longest possible period that might be thought consistent with the policy objective concerned. However, in exercising that discretion the legislature must not undermine or compromise a substantive [*43] right guaranteed by the Constitution such as the right of access to the courts. Where a limitation period is so restrictive as to render access to the courts impossible or excessively difficult it may be considered unreasonable in the sense that Costello J. found the rigid rule in **Brady -v- Donegal County Council** to be unreasonable, and therefore unconstitutional.

In applying that test in this case, the court acknowledges that there are likely to be cases, perhaps even a very large number of cases, in which for a range of reasons or a combination of reasons, persons, through no fault of their own, (as in the Brady case), are unable to apply for leave to seek judicial review within the appeal limitation period, namely fourteen days. This is a situation with which the courts deal on a routine basis for other

limitation periods. The fourteen day time limit envisaged by the Bill is not the shortest with which the courts have had to deal.

Moreover, the discretion of the court to extend the time to apply for leave where the applicant shows "good and sufficient reason" for so doing is wide and ample enough to avoid injustice where an applicant has been unable through no fault of his or hers, or for other good and sufficient reason, to bring the application within the fourteen day period. For example counsel assigned to the court have argued that the complexity of the issues, or the deficiencies and inefficiencies in the legal aid service, may prevent the applicant from being in a position to proceed with his application for leave within the period of fourteen days.

However, where this has occurred through no fault of the applicant, it may be advanced as a ground for extending the time for applying for leave for judicial review. In **R -v- Stratford on Avon District Council and anor [1985] 3 AER 769** the Court of Appeal of England and Wales held that difficulty in seeking and getting legal aid constituted a good reason for extending the time limit within which to apply for judicial review. It held that

> [*44]*"...It is a perfectly legitimate excuse for delay to be able to say that the delay is entirely due to the fact that it takes a certain time for a certificate to be obtained from the legal aid authorities."*

That was where despite proper endeavours upon the part of the applicant and her legal advisors, a difficulty still arose.

The court is satisfied that the discretion of the High Court to extend the fourteen day period is sufficiently wide to enable persons who, having regard to all the circumstances of the case including language difficulties, communication difficulties, difficulties with regard to legal advice or otherwise, have shown reasonable diligence, to have sufficient access to the Courts for the purpose of seeking judicial review in accordance with their constitutional rights.

The Court does not therefore consider the limitation period to be unreasonable as such and its repugnancy to the Constitution has not been established.

"Substantial Grounds"

The court does not consider that this conclusion is affected by the argument by counsel assigned by the Court to the effect that s.5 (2) (b) in requiring an applicant to satisfy the High Court that there are "substantial grounds" for contesting the validity of the matter in question imposes a burden which, taken with the fourteen day limitation, unreasonably restricts access to the Courts. The Oireachtas has imposed the 'substantial grounds' requirement in other legislation including the Planning Acts, the Roads Act 1993 (as amended by the Roads (Amendment) Act, 1998) the Irish Take-over Panel Act 1997 and the Fisheries (Amendment) Act 1997. In **McNamara -v- An Bord Pleanála (no. 1) [1995] 2**[*45] **I.L.R.M 125** Carroll J. interpreted the phrase "substantial grounds" in the provisions of the 1992 Planning Act as being equivalent to "reasonable", "arguable" and "weighty" and held that such grounds must not be "trivial or tenuous". Although the meaning of the words "substantial grounds" may be expressed in various ways, the interpretation of them by Carroll J. is appropriate. The court is of the view that the imposition of a requirement to show "substantial grounds" in an application for leave to apply for judicial review is one which falls within the discretion of the legislature. It is not so onerous, either in itself or in conjunction with a fourteen day limitation period, as to infringe the constitutional right of access to the Courts or the right to fair procedures.

Section 5 (2) (a) in conjunction with Section 10 (c) of the Bill

Section 10 (c) of the Bill amends s6 of the Immigration Act 1999 by the insertion of the following subsection:

> *"(2) Where a notice under this Act has been sent to a person in accordance with paragraph (b) of the foregoing subsection, the notice shall be deemed to have been duly served or given to the person on the third day after the day on which it was so sent."*

Section 6 of the Immigration Act 1999 requires certain notices of the taking of decisions in respect of persons who have applied for asylum or refugee status to be served on him or her by sending it by post in a prepaid registered letter, or other form of recorded delivery prescribed by the Minister, to him or her at the address most recently furnished by

him or her to the Minister or, in a case in which an address for service has been furnished, at that address.

[*46] Counsel assigned by the court have submitted that, since the time for applying for leave for judicial review commences to run from the date of notification of a decision or matter to the person concerned, the limitation or period of fourteen days may be considerably reduced or have expired before such a person *de facto* receives notification of the particular decision. A person may have changed address or may be away from his address for a few days or a week or more or other circumstances may cause him to be absent from the address to which such a notice is sent. In such circumstances the person could be deprived of his or her right of access to the courts.

First, it must be observed that a person seeking asylum or refugee status is the applicant for that status. There is an administrative procedure in place to carry out and assist him or her in the processing of that application. He or she is not a passive participant in that process. It is not unreasonable for the State to require that such a person accept that an address given by him or her to the Minister or furnished by him or her specifically as an address for service should be one at which service by a form of recorded delivery should be deemed as good service. In availing of such procedures and in exercising any discretion in relying on such procedures the State is bound to act with due respect to the constitutional right to access to the courts and the right to fair procedures of the persons concerned. For these reasons, the court concludes that s.5 (2) (a) in conjunction with s.10 (c) if applied in conjunction with one another does not infringe the constitutional rights of the individuals concerned.

Language, Legal Aid, Dispersal of Persons etc.

Counsel assigned by the court also submitted that the failure of the Bill to provide specifically for certain difficulties faced by persons seeking refugee status amounted to a [*47]breach of their constitutional right of access to the courts. It was submitted for example that the failure to make a general provision requiring all decisions and procedures to be explained in all circumstances to the persons concerned in their own language constituted

such a breach. The provisions in the existing Acts requiring in some cases notices to be given in the
language of the person concerned where necessary or possible were not sufficient. Similar submissions were made with regard to the inadequacy of legal aid or difficulty in getting it and difficulties posed by the dispersal of persons who have applied for refugee status into different parts of the State. All of these matters arise from practices or procedures adopted by the State in dealing with applicants for asylum or refugee status pursuant to or in accordance with the relevant Acts of the Oireachtas. None of these matters is governed or required by the provisions of s.5 of the Bill.

As O'Dalaigh C.J. speaking for this court in **In re Meads** (Supreme Court, 26 July 1972, unreported) said:

> *"Constitutional rights, for enforcement, do not require statutory vesture unless the Constitution itself were to express such a limitation... If he has ... a right the courts will give effect to it when he invokes the proper court in the appropriate proceeding"*

Similarly, as has already been pointed out in the case of legal aid, if an applicant for asylum or refugee status considers that his or her constitutional rights have been infringed by deficiencies in other statutory or non-statutory procedures adopted by the State he or she can assert them in appropriate proceedings. Since s. 5 of the Bill is concerned only with the procedural remedy of judicial review, it does not purport to restrict any such right so far as it exists. The matters raised in this regard are not relevant for the purposes of this reference.

[*48] **Access to information**

Counsel assigned by the court submitted that an applicant for leave for judicial review requires to be in a position, well within the fourteen days, to obtain access to all the material which was before the decision maker concerned in order properly to evaluate any possible grounds of challenge and that the absence of any mechanism by which the applicant can obtain the necessary material from the decision maker eliminates in practical terms the right of access to the courts.

It was said by counsel for the Attorney General that a well established feature of the process by which applications of this nature are dealt with is that where there is an adverse decision at first instance, and an appeal is brought, all relevant material is furnished to the appellant. In all cases a detailed decision is provided to the appellant by the appeals authority.

However, in any event, an applicant, who establishes that his right of access to the courts has been prejudiced by the failure of the relevant State authority to make available material which is appropriate and necessary to enable him to exercise that right, is entitled to apply to the High Court for discovery of documents. In so far as the submissions of counsel assigned by the court focused on the difficulty of gaining access to such material within the fourteen day period, it is sufficient to say that difficulty in getting appropriate access to relevant material may constitute a good and sufficient reason for extending the time within which to apply for leave to seek judicial review. Difficulty in gaining access to relevant documents in the case of **R -v- Stratford on Avon District Council and anor** was also accepted in that case as a good explanation for part of the delay in applying for leave to seek judicial review. There is nothing in section 5 restricting an applicant seeking to use the ordinary procedural mechanisms for discovery, with or without the benefit of an extension of [*49]time. The court does not consider that the arguments made afford grounds for calling in question the constitutionality of the section.

Habeas Corpus

Counsel assigned by the Court have submitted that s. 5, in providing that the validity of a decision or other matter referred to in s. 5 (1) may only be questioned in judicial review proceedings has the effect of preventing a person concerned raising the validity of any such decision in habeas corpus proceedings, i.e. proceedings pursuant to 40.4.2. of the Constitution where a complaint is made that such a person is being unlawfully detained. A person may be detained pursuant to s10 of the Bill where certain criteria specified in that section apply. One of those criteria is that the person is the subject of a deportation order.

Accordingly, such a person may wish to challenge the validity of that deportation order in Article 40.4.2. proceedings but is precluded from doing so by s 5.

Article 40.4.2 of the Constitution, enshrining, as it does, the historic remedy of *habeas corpus* in constitutional form is a crucial provision ensuring that no one is deprived of his or her liberty save in accordance with law. It is not within the competence of the Oireachtas to circumscribe or abridge the right protected and guaranteed by that article. It is a necessary consequence of the presumption of constitutionality that it must be presumed that it was not the intention of the Oireachtas in enacting this provision to amend or circumscribe that right in any way.

Section 5 deals only with the procedural remedy of judicial review as a means of challenging the validity of the administrative decisions in question. It makes no reference to proceedings challenging the legality of the detention of a person who is also the subject of a [*50]deportation order. It is in its terms solely concerned with proceedings challenging the validity *per se* of the administration decision.

Nothing in the section can be interpreted as restricting the right of any person to bring proceedings pursuant to Article 40.4.2. of the Constitution. The only question is whether the validity of the deportation order can be determined by the courts in a manner consistent with that article.

The validity of the deportation order may be challenged in judicial review proceedings and the issue determined before any question arising of the person concerned being detained. As already stated, the legitimate object of the provision is to ensure that challenges to the validity of the relevant decisions and other matters are brought promptly. In proceedings brought pursuant to Article 40.4.2. challenging the legality of a person’s detention, that detention may be justified by reason of the existence of a deportation Order. The fact that the deportation order has previously been unsuccessfully challenged in judicial review or had not been challenged at all within the time permitted by section 5 may be sufficient to constitute the deportation order as a lawful basis for that person's detention.

On the other hand, if, prior to the initiation of proceedings pursuant to Article 40.4.2. of the Constitution, the person concerned has not initiated judicial review proceedings to question the validity of the deportation Order, he or she would be entitled, concurrently with

the *habeas corpus* proceedings, to apply for an extension of time within which to seek leave to apply for judicial review on showing that there are good and sufficient reasons for so doing. There is no reason why this could not be done at the discretion of the court and the issue as to the validity of the deportation order heard and determined, if necessary, contemporaneously with the habeas corpus proceedings. As already stated, the right to apply to the court in proceedings pursuant to Article 40.4.2. is a fundamental one and the procedural [*51] powers of the courts are as ample as the defence of that right requires. Section 5 does not contain any provision inhibiting the Court in exercising those powers.

For these reasons the court does not consider the submission of counsel in this respect to be well founded.

Section 5 (3) (a) of the Bill

As appears from the text of the paragraph cited above there is no appeal from a decision of the High Court to the Supreme Court in the judicial review proceedings concerned (including the determination of an application for leave) except with leave of the High Court where it certifies that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court. (There is a saver for questions concerned with the validity of any law having regard to the provisions of the Constitution).

Counsel assigned by the court acknowledged that the right of an appeal to the Supreme Court can be regulated and is not absolute. That this is so is evident from Article 34.4.3. of the Constitution which provides that:

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

However, counsel submitted that if an exception or a limitation is to be imposed on the appellate jurisdiction of the Supreme Court, the limitation must be objectively justified and reflect some significant or compelling State interest such as to warrant the interference [*52]

with the constitutional right of access to the court. That justification, it is said, is absent in the present circumstances.

As regards the constitutional right of access to the courts, it is sufficient to say in this context that such a right means the right to have all justiciable questions involving the administration of justice heard and determined by a court established by or in accordance with the Constitution. Questions as to the constitutional validity of any law apart, it does not require that in every case a party has the right to bring the issues on appeal to the Supreme Court. Furthermore, in providing that the appellate jurisdiction of the Supreme Court may be restricted or regulated by law, Article 34.4.3. does not impose any preconditions or qualifications on the right of legislature so to do, (apart from the saver referred to above). The article in question, however, falls to be interpreted in the light of the objects and provisions of the Constitution as a whole and any such limitation would have to be consistent with them.

In giving express power to the legislature to restrict the right of appeal from the High Court to the Supreme Court, Article 34.4.3. grants a wide power of discretion according to which such a restriction may be imposed for a range of policy reasons. This may include a desire on the part of the legislature that certain issues or matters which fall to be determined by the courts should be determined with finality at the stage of first instance. This might be particularly likely to arise in cases where administrative decisions have been heard and determined on their merits, not by a court but by duly authorised administrative bodies. In short, the constitutional provision allows the legislature in the exercise of its discretion to restrict appeals from the High Court to the Supreme Court and unless some constitutional defect is established as to the manner in which the legislature uses that power, it is not a matter for the courts to review the policy grounds upon which the legislature so decided.

[*53] The following passage from the opinion of the Supreme Court of the United States in Ex-parte **McArdle (7) Wall. 506 [1869]** concerning an exception to the appellate jurisdiction of that Court under the US Constitution imposed by a Federal Statute is relevant.

> *"we are not at liberty to enquire into the motives of the legislature. We can only examine into its powers under the Constitution; and the power to make exceptions to the appellate jurisdiction of this Court is given by express words..."*

This aptly summarises the position under Article 34.4.3 of the Constitution.

Since the legislature has an express power, to be exercised for policy reasons within its own area of discretion, the principle of proportionality has no application.

Leaving aside the question of a discriminatory use of that power, which is dealt with below, it has not been established that there has been any constitutional frailty in the manner in which the Oireachtas has exercised its power to limit and regulate the appellate jurisdiction of this Court.

Equal Treatment

Counsel assigned by the court submitted that the limitations and restrictions imposed on applicants for judicial review pursuant to section 5 of the Bill only affect non-nationals and are therefore discriminatory and contrary to the guarantee of equal treatment provided by Article 40.1. of the Constitution. Counsel summarised their own argument in this way:

> *'If the legislative provision divides persons into two classes and treats those two classes differently, then the difference in treatment must be related to a legitimate governmental objective'* .

[*54] Counsel submitted that having "due regard to differences of capacity, physical and moral, and of social function", as permitted by Article 40.1. of the Constitution, means that there must be at the minimum a rational relationship between (a) the difference in treatment of the two classes and (b) the factors defining the two classes.

First, it is to be said that s.5 of the Bill does not expressly or of itself divide persons into two classes or create a distinction between non-nationals and citizens. It is of course correct to say that the provisions of s.5 apply only to challenges to the validity of decisions and other matters referred to in section 5 (1), which in turn are only capable of having direct legal effects for non-nationals. It is the relevant legislation, in particular the Refugee Act 1996 and the Immigration Act 1999, which determine to whom the decisions and other matters referred to in s.5 (1) of the Bill are to apply. Those decisions and other matters only concern non-nationals who are seeking asylum or refugee status within the State. By their

very nature, therefore, they apply only to non-nationals since there is no basis in national law (or international law) for a citizen to apply for asylum or refugee status within his or her own country. Furthermore, the distinction is not simply between non-nationals and citizens. The relevant decisions (and consequently any challenge to their validity) can only concern non-nationals, whose application for asylum or refugee status has yet to be finally determined

or has been finally determined and refused. It does not concern non-nationals whose applications have been determined and granted or other non-nationals who are otherwise lawfully entitled to be and remain in the State, whether for limited or unlimited periods. Moreover, non-nationals seeking asylum or refugee status could well have occasion to challenge the validity of some legally binding decision or order other than those referred to in

section 5 (1) of the Bill and those proceedings would be governed by rules and procedures applying to all persons seeking such judicial review, including other non-nationals and [*55] citizens. Accordingly the Acts referred to above do not divide persons into two classes. In adopting these Acts, the Oireachtas was exercising its authority and indeed its obligation to determine and regulate the manner in which persons may seek asylum or refugee status from the State. The fact that legislation only applies to certain non-nationals and not at all to citizens is not an exercise of discretion on the part of the legislature, but is the result of other factors.

It is in these circumstances that s.5 of the Bill, in selecting a particular category of administrative decisions for the purpose of regulating the manner by which their validity can be questioned before the courts, indirectly applies only to certain non-nationals.

The question still remains whether section 5 of the Bill by this indirect means imposes conditions or restrictions on the exercise of a right by a certain category of non-nationals in a manner that is unfair, arbitrary or invidious so as to constitute unequal treatment within the meaning of Article 40.1 or whether the same is justified by objective reasons other that the mere fact that they affect only that category of non-nationals.

The court has already concluded that s.5 of the Bill does not infringe certain constitutional rights of that category or persons and in particular the constitutional right of

access to the Courts and fairness of procedures in the Courts, enjoyed by non-nationals and citizens alike.

The conditions imposed by s.5 of the Bill on the bringing of judicial review proceedings to challenge the relevant decisions and other matters are not unique to s.5 and the category of decisions and other matters referred to in subsection 1. There are similar statutory restrictions on the right to apply for judicial review to be found in the Housing Act, 1966 (s.78), Local Government, (Planning and Development Act), 1993 (s.19), Transport (Dublin Light Rail) Act 1996, (s. 12), Irish Take-over Panel Act, 1997, (s. 13) and the Roads[*56] (Amendment) Act 1998 (s.6). As regards the Irish Take-over Panel Act 1997, the time limit within which a judicial review application must be made is seven days from the date on which the decision was given. The time limit for bringing judicial review proceedings pursuant to the 1993 Planning Act is two months, but this is not susceptible to extension for any reason. Further the 1993 Planning Act, the Roads Act, 1993 (as amended by Roads (Amendment) Act 1998 (s.6)), Irish Take-over Panel Act, 1997 and the Fisheries (Amendment) Act, 1997 also impose the 'substantial' grounds requirement. The effect of the provisions referred to is in short to bring about, earlier than might otherwise be the case, finality in judicial review of the validity of certain administrative decisions.

In **Lowth -v- The Minister for Social Welfare [1998] I.R.321 at 341** Hamilton C.J., delivering the judgment of the Court, cited with approval from the judgment of Barrington J. (who in turn was citing from a judgment of Pringle J.) in **Brennan -v- Attorney- General [1983] I.L.R.M. 419,** where he said:

> *"Therefore it would appear that there is no unfair discrimination provided every person in the same class is treated the same way.' ... No doubt this is true, but it might be prudent to express, what is perhaps implied in it, that the classification must be for a legitimate legislative purpose, that it must be relevant to that purpose, and that each class must be treated fairly."*

In so far as s.5 has as its object a certain category of administrative decisions and can be interpreted as applying to one class of persons, namely, non-nationals who applied for asylum or refugee status, the Court has already determined in this judgment that confining

those persons to the procedural remedy of judicial review with the fourteen day limitation period serves a legitimate public policy objective of seeking to bring about at an early stage [*57]legal certainty as regards the administrative decisions in questions. It also facilitates the better administration and functioning of the system for dealing with applicants for asylum or refugee status. The same considerations must apply to the "substantial grounds" requirement and the limitation on the right of appeal to the Supreme Court.

Accordingly, even though by their very nature each one of the conditions and limitations which s.5 of the Bill seeks to introduce apply only to non-nationals, the court is satisfied that they are justified by an objective legitimate purpose independent of the personal status or classification of the persons affected by them. For the reasons already stated, those conditions and limitations are consistent with a constitutional right of access to the courts and the principles of constitutional justice. They cannot be said to treat the persons concerned unfairly.

Therefore, s.5 of the Bill cannot be regarded as violating the right to equal treatment guaranteed by Article 40.1

Conclusion

Subsections (4) - (6) of s.5, which are concerned solely with matters which are subsidiary or complementary to subsections (1) - (3), do not give rise to any question of repugnancy to the Constitution. They do not require any further examination.

The Court is satisfied that it has not been established that S.5 is repugnant to the Constitution.

Section 10.

This section of the Bill takes the form of amendments to ss. 3, 5 and 6 respectively of the Immigration Act, 1999.

[*58] **The general power of detention in relation to deportation orders**

Section 3 of the 1999 Act provided for the making of deportation orders in respect of different categories of non-nationals specified in subsection (2) of the section. The first

amendment proposed to be effected to s.3 is the insertion of a new subsection (1A) which would read as follows:-

> *"A person the subject of a deportation order under this section may be detained in accordance with the provisions of this Act for the purpose of ensuring his or her deportation from the State."*

Counsel for the Attorney General, in their written submissions in reply to the submissions by counsel assigned by the court, say:

> *"The suggestion that the new section 3(1A) of the Immigration Act, 1999 would have the effect of widening the power to detain - a suggestion which appears at page 1 of the submission in opposition to the Bill - is misconceived. Section* 3(1A) *confers no new power of detention. On the contrary, it effectively limits the power of detention conferred by section 5 of that Act by providing clearly that that power may only be exercised in respect of any person 'for the purpose of ensuring his or her deportation from the State'."*

In their earlier written submissions, counsel for the Attorney General elaborate on this argument more fully, citing the passage already referred to in this judgment from the judgment of Keane J. in Laurentiu v. Minister for Justice Equality and Law Reform [2000] 1 1LRM 1 (at 50).

[*59] As counsel for the Attorney General point out, the inherent power to deport is now regulated by s.3 of the 1999 Act and the power to detain under s.5 is consequential upon and ancillary to the power to deport. The amendment proposed to be effected to s.3 of the 1999 Act by the insertion of the new subsection (1A) is simply for the purpose of making express, what would at any rate have been quite clearly implied, namely that the powers of detention are for the purpose of ensuring deportation.

The court agrees with the submissions of counsel for the Attorney General in this regard. There is no question of any new or draconian power of detention being introduced by the Bill. The detention, if it is to remain lawful, must be confined to the statutory purposes in accordance with the principles enunciated by Flood J. in Gutrani v. Governor of Wheatfield Prison and Minister-for Justice (unreported; judgment delivered 19th February 1993).

In that case, the applicant had been detained for a considerable time for the purpose of

deporting him to Libya. It was argued that the Minister was not in a position to effect that deportation and that the detention was no longer lawful. Flood J. observed as follows:-

> *"The essence of the present application is that the Minister's power of detention under the said provisions are for the purpose of fulfilling the deportation order and not otherwise, and that such deportation must take place within a reasonable period from the time, having regard to all relevant factors and circumstances.*
>
> *The Applicant's case is that he has been in custody in a penal establishment since August 29, '91 to the present date. It is considered that his detention up to July '92 was in large measure due to the processing of his claims in relation to the deportation order through the court.*
>
> [*60] *That being said, nearly eight months has elapsed since all litigation as to the validity of the deportation order was finally and conclusively determined by the Supreme Court.*
>
> *That period is more than a reasonable opportunity for the Minister to make suitable arrangements to enforce the said order to deport the said applicant to Libya."*

The learned trial judge goes on to refer to arguments advanced by counsel for the Minister that there were problems about the deportation arising from United Nations sanctions against Libya and that the Minister had made efforts to deport via the Maltese and Egyptian authorities. The learned trial judge correctly expressed the view, however, that the onus is on the Minister to arrange suitable transportation. He found as a fact that there was no evidence before him that the Minister was in a position to provide suitable transportation to Libya in pursuance of the deportation order and that such travel arrangements were unlikely to be available to the Minister in the foreseeable future. In those circumstances, he found the continued detention unlawful. Although the principles applied by Flood J. arose under earlier

legislation, the same principles would apply to any detention under the 1999 Act, whether it be pursuant to the extended grounds under this Bill, if it becomes law, or otherwise.

Further requirements as to deportation orders imposed by Section 10

The second proposed amendment of s.3 of the 1999 Act is to subsection (9). Under the existing paragraph (a) of that subsection, it is provided that, subject to certain other [*61] provisions in paragraph (b), where the Minister decides to make a deportation order and where a notice of the decision is served under the section, that notice is to require the person concerned to present himself or herself to such person and at such date, time and place as may be specified in the notice for the purpose of his or her deportation from the State. The purpose of the proposed amendment is to provide for more elaborate provisions in this regard but with the same end in view.

Under the amendment, the statutory notice may require the proposed deportee to present himself or herself to such member of the Garda Síochána or immigration officer at such date time and place as may be specified in the notice; to produce travel documents, passports etc. required for the purpose of deportation to the guard or immigration officer at the specified date and time; to co-operate in any way necessary to enable the garda or immigration officer to obtain necessary travel documents for the purposes of the deportation; to reside or to remain in a particular district or place in the State pending removal from the State; to report to a specified Garda Station or immigration officer at the specified interval pending removal from the State; and to notify such member of the Garda Síochána, or immigration officer as may be specified in the notice as soon as possible of any change of address.

The new paragraph permits a member of the Garda Síochána or an Immigration Officer if he or she considers it necessary for the purpose of ensuring deportation, to require a person to do any of the things which were authorised to be included in the notice and any of these further requirements are to have effect as if they were in the original notice. It is also provided that any such further requirement be given to the person concerned in a language which he or she understands where that is necessary and possible.

[*62] These extended provisions do not appear to result in any unfair or unconstitutional hardship on a person the subject of a deportation order. They are intended to facilitate the implementation of the deportation order. It is difficult to see how the requirements can give rise to a legitimate, still less to a constitutional, complaint. The primary criticism on constitutional grounds advanced by counsel assigned by the court to s. 10 of the Bill is based on the proposition that it introduces an objectionable form of preventive detention, an argument which will considered in detail at a later point in this judgment. But so far as the additional requirements which can be made by members of the gardaí and immigration officers are concerned, they relate to minor matters concerned with travel and the implementation of the deportation order. There would seem to be no particular reason why the Minister should have the exclusive role of regulating these matters. Accordingly these provisions would not appear to be repugnant to the Constitution.

The amendment to Section 5 of the 1999 Act

The court next considers the amendment to which the submissions were primarily addressed, i.e. the amendment to s.5 of the 1999 Act.

It is important to place the proposed amendment in context. The amendment takes the form of a new subsection (1) which is to be substituted for the existing subsection (1). Under the existing subsection (1) where an immigration officer or a member of the Garda Síochána, with reasonable cause, suspects that a person against whom a deportation order is in force has failed to comply with any provision of the order or with a requirement in the statutory notice under section 3, to which reference has already been made, he or she may arrest him or her without warrant and detain him or her in a prescribed place.

It should be noted that, under subsection (6), which is not being amended, the maximum period allowed for detention is eight weeks in aggregate. [*63]

The proposed substituted subsection reads as follows:-

> *"Where an immigration officer or a member of the Garda Síochána, with reasonable cause suspects that a person against whom a deportation order is in force-*
>
> *(a) has failed to comply with any provision of the order or with the requirement in a notice under section 3(3) (b) (ii),*

(b) intends to leave the State and enter another state without lawful authority,

(c) has destroyed his or her identity documents or is in possession of forged identity documents, or

(d) intends to avoid removal from the State,

he or she may arrest him or her without warrant and detain him or her in a prescribed place."

The effect of the amendment is that three new grounds for detention, namely (b), (c) and (d) are proposed to be added. There is a common thread running through each of the three. Where there is a suspicion with reasonable cause that the person concerned is not going to permit the deportation order to be carried out in a proper manner, detention to secure such proper deportation is to be permitted. It is this part of the section which counsel assigned by the court are primarily maintaining to be unconstitutional.

Preventive detention in general.

It has been a long established principle of our constitutional jurisprudence that the courts would not uphold as constitutional what is known as *"preventive detention".* Counsel assigned by the court in their written and oral submissions maintain that the proposed amendment to s.5 of the 1999 Act is repugnant to the Constitution in that that it is [*64]countenancing a form of preventive detention. They rely strongly on the well known case of The People (Attorney General) v. O'Callaghan [1966] I.R. 501 at 508 and, in particular, on the following passage from the judgment of O'Dalaigh C. :

"... I understood [counsel] to submit that the applicant should be held as a preventive measure. This I take to mean that he should be detained in custody because, if granted bail, it is feared he may commit other offences.

"The reasoning underlying this submission is, in my opinion, a denial of the whole basis of our system of law. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty and seeks to punish him in respect of offences neither completed or attempted. I say 'punish', for deprivation of liberty must be considered a punishment unless it can be required to ensure that an accused person will stand his trial when called upon."

A passage in similar vein from the judgment of Walsh J. at pages 516 and 517 is also cited.

> *"In this country it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit offences if left at liberty, save in the most extraordinary circumstances carefully spelled out by the 0ireachtas and then only to secure the preservation of public peace or order or the preservation of the State in a time of national emergency or in some situation akin to that."*

But as counsel for the Attorney General has pointed out, the preventive detention referred to in O'Callaghan's case is in the context of the criminal law. It is not that there is some constitutional impediment to all forms of preventive detention, but rather that detention for [*65] the purposes of preventing a crime offends the important principle of the presumption of innocence, though other forms of detention may be constitutionally objectionable on other grounds. Detention under the Immigration Act, 1999, if amended as proposed, may in fact have the effect of preventing the commission of a crime but that is not its purpose. Its purpose is to, secure the implementation of the deportation order.

Legitimate forms of preventive detention.

It is acknowledged by counsel assigned by the Court that there are in place acceptable forms of detention other than detention pursuant to a sentence of imprisonment for conviction of a crime. Indeed, counsel on both sides seek to rely on the judgment of O'Byrne J. speaking for the former Supreme Court in In re Philip Clarke [1950] IR 235. Referring to s.165 of the Mental Treatment Act, 1945, O'Byrne J. said the following at p.248.

> *"The section is carefully drafted so as to ensure that the person alleged to be of unsound mind shall be brought before, and examined by, responsible medical officers with the least possible delay. This seems to us to satisfy every reasonable requirement, and we have not been satisfied, and do not consider that the Constitution requires, that there should be a judicial inquiry or determination before such* a *person can be placed and detained in a mental hospital."*

Counsel assigned by the court argue that, but for the examination by the responsible medical officers, the court would have taken the view that there would have to be a judicial enquiry or determination before such a person could be detained in the mental hospital.

Counsel for the Attorney General, on the other hand, cited that case in support of their argument that there is no necessary constitutional rule that detention cannot be lawful unless there is some system of recourse to a court to determine lawfulness or at the very least some system of supervision analogous to what exists under s. 4 of the Criminal Justice Act, 1984. [*66] Different kinds of safeguards may be necessary in relation to legitimate forms of detention in the criminal process or otherwise. Section 165 of the Mental Treatment Act, 1945 is one example. The court is satisfied that the argument of counsel for the Attorney General, that there is no general rule and that it depends on the circumstances and nature of the detention, is well founded.

The context of detention under the proposed amendments.

The context of the detention under the proposed new subsection (1) of s.5 of the 1999 Act is that the detainee has availed of, or has had the opportunity to avail of, all the elaborate procedures, whether they be in connection with an application for asylum, an application for refugee status or an application to remain in the country on humanitarian grounds and a stage has been reached where a deportation order has been finally made. That deportation order itself will have been preceded by the statutory notification of the intention to make the order and the due consideration by the Minister of any representations put forward by the detainee as to why he should not make it.

At that stage, the detainee is a person not entitled to be in the country at all. But this does not mean that he is without rights. The detention must be for the necessary statutory purposes. As is made clear at a later stage in this judgment, there are in fact a number of safeguards. There would, of course, be nothing wrong in the Oireachtas in its wisdom expressly providing for periodic review of the detention by a court or for some supervisory role by higher officers in the gardaí or the Minister's department, but the absence of specific provisions of that kind does not necessarily render the legislation unconstitutional. The court considers that in all the circumstances the safeguards which do in fact exist and which will

be outlined further in this judgment are perfectly adequate to meet the requirements of the Constitution in the context of the particular form of detention relevant to this reference.

[*67] That context requires some further elaboration. The citation earlier on in this judgment from the judgment of Keane J. (as he then was) in Laurentiu v. Minister for Justice Equality and Law Reform must be the correct starting point as was submitted by counsel for the Attorney General in their written submissions. It follows that a person who is not entitled to be in the State cannot enjoy constitutional rights which are coextensive with the constitutional rights of citizens and persons lawfully residing in the State. There would however, be a constitutional obligation to uphold the human rights of the person affected which are recognised, expressly or by implication, by the Constitution, although they are not co-extensive with the citizen's constitutional rights.

Common sense suggests that there will always be cases where an immigrant who has gone through, or had an opportunity to go through, all the application and appeal procedures for asylum or for leave to remain in the country on humanitarian grounds will still attempt to evade the execution of a deportation order. Depending on the country of origin, travel arrangements may be extremely difficult to put in place and powers of detention between the making of the deportation order and in advance of the deportation itself may well be necessary in some instances.

As already pointed out, the principles set out by this court in East Donegal Co-operative v. Attorney General must be applied to the statutory powers of detention. It does not follow that because the section permits of detention for up to eight weeks in the aggregate, the proposed deportee may necessarily be detained for that period if circumstances change or new facts come to light which indicate that such detention is unnecessary.

Counsel for the Attorney General have cited R. v. Governor of Durham Prison ex parte Hardial Singh [1984] 1 WLR 704. In that case, Woolf J. (as he then was) considered a [*68] power of detention conferred by the English Immigration Act, 1971 which was not subject to any express time limit.

> *"Since the 20th July, 1983 the Applicant has been detained under the power contained in paragraph 2(3) of Schedule 3 to the Immigration Act, 1971. Although the power*

which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation as to time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detentions if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Second, as the power is given to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention."

Even though the Irish legislation contains an express time limit of eight weeks in the aggregate subject to certain extensions where proceedings are brought etc., it would still be the case that it would be an abuse of the power to detain if it was quite clear that deportation could not be carried out within the eight weeks.

There are therefore a number of safeguards available to a person who is detained under the extended grounds. They can be summarised as follows:- [*69]

(1) Under the principles of the East Donegal Co-operative case and indeed in the light of modern jurisprudence at common law, an executive power of detention must not be unnecessarily exercised. Even if the power is properly exercised in the first instance, the relevant executive authority must be vigilant to ensure that the detention be brought to an end if, having regard to new circumstances or discovery of new facts or for some other reason, it is no longer necessary. This should be done independently of any application in that regard by the person concerned.

(2) The applicant may seek to challenge by judicial review the validity of the deportation order for the purposes of which he has been detained. If he is out of time, of course, he will have to get an extension of time. But if he did get leave to bring such judicial review proceedings then under section 5(5) of the Immigration, Act, 1999 the court on

an application to it has jurisdiction to determine whether the person should continue to be detained or should be released and may make such release subject to such conditions as it considers appropriate, including a number of specific conditions that are set out in the section.

(3) If it is thought that the exercise of the powers of detention is *ultra vires*, an application can be brought for judicial review seeking an order compelling the reconsideration of the grounds for detention. This would seem to accord with the views of McCarthy J. speaking for this court in In re Application of Gallagher [1991] 1 IR 31 at 38.

> *"If and when a person detained pursuant to s.2 subsection 2 of the Act of 1883 seeks to secure release from detention, as in the instant case, he may apply to the executive, as has been done in the instant case, for his release on the grounds that he is not suffering from any mental disorder warranting his continued detention in the public and private interests; then the executive, in* [*70]*the person of the Government or the Minister for Justice, as may be, must enquire into all the relevant circumstances. In doing so, it must use fair and constitutional procedures. Such an inquiry in its consequence may be the subject of judicial review so as to ensure compliance with such procedures."*

(4) The constitutional remedy of an inquiry under Article 40.4.2. will always be available. The eight weeks in aggregate is a relatively narrow time limit and in all the circumstances there would be appear to be adequate safeguards.

The European Convention on Human Rights and Fundamental Freedom

It is suggested by counsel assigned by the court that the extended grounds for detention proposed by the Bill conflict with Article 5 of the European Convention on Human Rights and Fundamental Freedom. Article 5 provides *inter alia* that:-

> *(1) "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by 1aw ....*
>
> > *(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition....*

(2) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(3) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

[*71] Although the convention is not part of domestic Irish law, it has frequently been. considered by the courts in cases involving constitutional rights It is quite clear from the text of Article 5 that the convention accepts the principle of detention with a view to deportation. But such detention must be *"in accordance with a procedure prescribed by law".* It would seem clear that both under the existing legislation and under that legislation if amended by the proposed Bill, detention with a view to deportation would be *"in accordance with a procedure prescribed by law".*

The European Court of Human Rights, however, has concerned itself with the quality of the domestic law. Counsel assigned by the court rely in particular on the judgment of the court in Amuur v. France [1992] 22 EHRR 533. In that case the applicants were Somali nationals who arrived via Syria at Paris-Orly Airport after fleeing Somalia following the overthrow of the President. They effectively applied for asylum but they were refused entry on the ground that their passports had been falsified and they were detained for 20 days by the French authorities at the airport and in a nearby hotel. At the end of that period the French authorities refused the applicants leave to enter France and they were deported to Syria. It was found that they did not have access to legal advice for fifteen days and did not have their detention reviewed by a court for seventeen days but by the time the court determined in their favour that their detention was arbitrary and unlawful they had been deported.

The European Court of Human Rights held that there had been a breach of Article 5(1). But there are no firm principles set out in the judgment of the court which would be relevant to an attack on the constitutionality of the Bill. The provisions which this court has to consider are provisions dealing with detention after a deportation order has been made and

in the context that such a deportation order could not have been made without all the appropriate procedures having been attended to. If for some reason the detention was alleged [*72] to be or to have become *ultra vires* the remedy of judicial review and in appropriate circumstances the remedy of an Article 40 inquiry are available.

Nor can this court gain any assistance from Chahal v. United Kingdom [1997] 23 EHRR 413, also relied upon by counsel. The facts of that case were very special. A Sikh separatist leader had been detained in custody in England, for several years pending deportation, for national security reasons. The court held there was no contravention of Article 5(1) but that there was a contravention of Article 5(4). But this was based on a combination of the inability of the English courts to review the reasons for the detention because of the national security ground and the sheer length of time during which the applicant had been detained.

It has not been demonstrated to the court that the proposed extended grounds for detention would contravene Article 5 of the Convention.

Impermissible delegation of legislation power

Before the proposed amendment to section 6 of the 1999 Act, is considered, there is one other aspect of the proposed amendment to section 5 which must be mentioned.. It has already been noted that one of the grounds for detention under the proposed amendment is where the person the subject of the deportation order *"intends to leave the State and enter another state without lawful authority"*. It has been suggested that the conferring of this power involves an impermissible delegation by the Oireachtas of its power to determine the circumstances in which such a person may be detained and reliance in this regard was placed on the High Court decision in Pigs Marketing Board v. Donnelly [1939] IR 413 and a number of decisions of the High Court and this court in which it has been followed or applied.

The court cannot accept this argument. There is no question here of a purported delegation by the Oireachtas of its law making powers under Article 15 of the Constitution, [*73] whether permissible or impermissible. What is involved is respect for the law of other States.

This, it should be pointed out, is not a question of abstract principle. The preservation of the common travel area between the State and the United Kingdom which, as was acknowledged by the High Court in Kweder v. Minister for Justice [1996] 1 IR 381, is to the benefit of this State, requires some vigilance to ensure that the State is not used as a back door entrance for unlawful immigrants into the United Kingdom. The particular provision in the Bill would appear to be reasonable and does not contravene any part of the Constitution.

Amendments to Section 6 of the 1999 Act

The Bill proposes two amendments to section 6 of the 1999 Act. These read as follows:-

> *"(i) by the substitution in paragraph (b) for 'to the Minister' of 'to the Registration Officer pursuant to Article 11 of the Aliens Order, 1946 (S.R.. & 0., No. 395 of 1946), or to the Refugee Applications Commissioner pursuant to section 9 (4A) of the Refugee Act, 1996, as the case may be', and*
>
> *(ii) by the insertion of the following subsection:*
>
> *'(2) Where a notice under this Act has been sent to a person in accordance with paragraph (b) of the foregoing subsection, the notice shall be deemed to have been duly served on or given to the person on the third day after the day on which it was so sent.' "*

The first of these amendments is purely an administrative matter and could not give rise to any constitutional challenge. The second amendment does require some consideration because it introduces a provision for deemed service of notices. It is suggested by counsel assigned by the court that this means in effect that if the Bill becomes law there could in some
instances be merely constructive service and not actual service with the end result that a [*74]person could be deported without having had an opportunity to avail of the statutory procedures.

Section 10(c) has been already referred to in this judgment in the context of arguments put forward challenging the constitutionality of Section 5(2) (a). In that context the court has already indicated its view that it was not unreasonable for the State to require that a person accept that an address given by him or her to the Minister or furnished by him or her as an address for service should be one at which service by a form of recorded delivery should be

deemed as good service. There is nothing further which the court can usefully add, except to comment that the decision of Costello J. in Brady v. Donegal County Council could not lend support to the view that the amendment to s. 6 of the 1999 Act would be unconstitutional. In that case Costello J. was dealing with notices which have to be affixed on land and placed in a newspaper circulating in the district for planning permission purposes. There was no question in that case of service by registered post at an address already provided by the persons to be served. The court is accordingly, satisfied that it has not been shown that there is any constitutional invalidity in the provisions of s. 10(c) of the Bill.

Decision

The decision of the court is that, for the reasons stated, none of the provisions of s.5 or s.10 of the Bill is repugnant to the Constitution.

The President will be so informed.

I certify this to be the judgment and decision of the Supreme Court pronounced on the 28th day of August 2000.