



Bundesverwaltungsgericht



**Seminar organized by the Federal Administrative Court of  
Germany and ACA-Europe**

**Functions of and Access to Supreme Administrative  
Courts**

Berlin, 13 May 2019

**Answers to questionnaire: Ireland**



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# ACA-Europe Seminar on Functions of and Access to Supreme Administrative Courts

12 - 14 May 2019

Oberverswaltungsgericht Berlin-Brandenburg  
(Higher Administrative Court Berlin-Brandenburg)

## *Questionnaire*

### **Introduction**

One of the most important tasks of ACA- Europe is to foster mutual understanding of the jurisprudence of the member states. The recognition and evaluation of the jurisprudence of the Supreme Administrative Courts of other member states is a key prerequisite for the development of a European legal community. For this purpose it is not sufficient to be able to read the decisions of the other member courts. In order to really understand their jurisprudence it is also eminent to understand under what conditions and traditions our colleagues perform their duties.

The conditions Supreme Administrative Courts work under are among others strongly determined by the specific functions a Supreme Administrative Court has in its national legal order. The specific functions on their part might have strong influence on how the access to the Supreme Administrative Court is designed and what scope of assessment of a case is applied. This leads to a number of questions: Which “filters”, for example, does administrative procedural law incorporate into the procedure, if it does at all? Does the procedure require a special admission or can every case be brought to the Supreme Administrative Court by the parties? Are only legal questions or also facts to be discussed?

Dealing with these questions the seminar to be held in Berlin from 12<sup>th</sup> to 14<sup>th</sup> May 2019 hopes to contribute to a deeper mutual understanding of the decisions of the member states’ Supreme Administrative Courts. It shares this objective with the closely linked seminar taking place in Dublin on 25<sup>th</sup> and 26<sup>th</sup> March 2019, which will lay an emphasis on the internal mode of decision making, asking how our courts decide. Both seminars will deal with different aspects of the ways of our judicial conduct, deliberation and reasoning which are all important to understand the jurisprudence of the different member states.

These aspects cannot be studied efficiently from manuals, so ACA-Europe seminars are the right place to assess these important features of the judge’s daily work.

## **I. Functions of the Supreme Administrative Court (SAC)**

1. a) How many **instances** are known in your (administrative) jurisdiction?

Ireland does not have a system of specialised administrative courts. There are five tiers of court jurisdiction in Ireland including the District Court, Circuit Court, High Court, Court of Appeal and Supreme Court.

In general, three of these court jurisdictions may be involved in an administrative law case. Any person with locus standi may challenge a public law decision which affects their rights or obligations by seeking judicial review from the High Court, which is the Court on which the Constitution of Ireland confers general unlimited jurisdiction in all areas of law, including civil law, criminal law, administrative law and constitutional law. An appeal from a decision of the High Court may be brought to the Court of Appeal.

If a threshold set out in the Constitution of Ireland is satisfied, an appeal from a decision of the Court of Appeal to the Supreme Court, which is the final court of appeal in all areas of law and also functions as a constitutional court. Pursuant to Article 34.5.3 of the Constitution, the Supreme Court may grant leave to appeal from the Court of Appeal where it is satisfied that:

- i. the decision involves a matter of general public importance, or
- ii. in the interests of justice it is necessary that there be an appeal to the Supreme Court.

Article 34.5.4 of the Constitution provides for an appeal directly from the High Court to the Supreme Court, which is known as a 'leapfrog' appeal if the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it - a precondition for the Supreme Court being so satisfied of the presence of either or both of the following factors:

- i. the decision involves a matter of general public importance;
- ii. the interests of justice.

In addition to the above jurisdiction of the Superior Courts in administrative law proceedings, statutory appeals from certain administrative tribunals may be brought to the District Court or Circuit Court. Such appeals require specific statutory provision.

- b) Does your SAC also serve as a first instance court?

No. In general, the Supreme Court serves as a third instance court, or a second instance court where exceptional circumstances warrant a direct appeal from the High Court to the Supreme Court.

However, there are two circumstances in which the Supreme Court exercises first instance jurisdiction. First, Article 26 of the Constitution of Ireland provides for a reference to the Su-

preme Court by the President of Ireland, after consultation with the Council of State, of Bills of the type prescribed in that Article for a decision as to whether any such Bill or specified provision(s) thereof is repugnant to the Constitution. Should the Court decide that the Bill, or any of its provisions, is incompatible with the Constitution it may not be signed or promulgated as law by the President.

Secondly, the Supreme Court has limited original jurisdiction under Article 12.3.1 of the Constitution, which has never been exercised. Article 12.3.1 of the Constitution provides that only the Supreme Court, consisting of not less than five Judges, can establish whether the President of Ireland has become permanently incapacitated.

c) If so, under what circumstances does your court serve as a first instance court?

- depending on the subject-matter?
- depending on the importance of the case?
- depending on a choice by the plaintiff (alone) or the parties (by agreement)?
- depending on other criteria?

Please explain.

The limited circumstances in which the Supreme Court exercises first instance jurisdiction are outlined in question 1(b).

d) What is the percentage of first instance cases compared to the overall case load? Please give statistical data about the quantity of cases (not about the quality or the relative working load resp.)!

Significantly less than 1% as references to the Supreme Court under Article 26 of the Constitution are very rare and the procedure has only been exercised on 15 occasions. Moreover, since the 1937 Constitution of Ireland came into force in 1937, the first instance jurisdiction under Article 12.3.1 in relation to the capacity of the President of Ireland has never been exercised.

2.

- a) Looking at the **case load** of a single judge of your SAC, can you identify larger groups of cases which make up the overall case load (quantitative approach)? I.e. Provisional proceedings, proceedings of admitting an appeal, first instance proceedings, other. What is the percentage of these groups of cases in the overall case load?

Quantatively, determinations of applications for leave to appeal now make up a large group of the overall case load of an individual judge. In 2018, 193 applications for leave were received and 157 applications for leave were determined.

b) If you can identify larger groups of cases (question a), is it possible to weigh these cases as to their complexity and thus to the amount of time required in treating them (qualitative approach)?

Although applications for leave to appeal make up, quantitatively, the largest portion of the case load of an individual judge, dealing with such applications takes up significantly less time than dealing with full appeals once leave to appeal has been granted.

3. a) In appeals cases, does your SAC:

- review decisions of the lower courts with a view to the facts and to the law?
- review decisions of the lower courts with a view to the law only?
- solely answer a(n abstract) legal question?

As an appellate court, the Supreme Court generally reviews the decisions of the lower courts for errors of law, although the Court does, when hearing an appeal, have full discretionary power to receive further evidence on questions of fact.

The leading decision of the Supreme Court in relation to the role of appellate courts in reviewing facts on appeal is *Hay v O'Grady*<sup>1</sup> in which the Court noted that:

“1. An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of the transcript seldom reflect the atmosphere of a trial. 2. If the findings of fact made by the trial judge supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority. 3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact... an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or a recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge.”

The question of whether it was open to the lower courts to determine particular facts on the evidence is therefore a matter of law and, in that sense, the appeal is confined to questions of law.

The Supreme Court has found that, subject to the limitations established in the case of *Hay* and subsequent jurisprudence, leave to appeal may be granted under the Court's new jurisdiction on both legal and factual issues. For example, in a recent determination of the Court de-

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<sup>1</sup> [1992] 1 IR 210

livered in *Data Protection Commissioner v Facebook* [2018] IESC 38 the Court decided to grant leave to appeal on both the legal and factual issues identified, on the basis that the legal issues met the general importance criterion and the factual issues met the interests of justice requirement. Facebook asked the Supreme Court to review certain important findings of fact made by the High Court in its judgment and which informed the decision of the High Court to refer certain questions to the CJEU. However, Facebook made its arguments while accepting that there are significant limitations on the extent to which facts can be re-visited in the Irish appellate process having regard to the principles identified in *Hay v. O'Grady*.

4. What are the **purposes** of the jurisdictional work of the SAC as a court of appeals?

- the standardisation/unification of the law?
- the deliverance of single case justice?
- (further) development of the law?
- care for adherence to procedural rules of lower courts?

All of the above purposes apply to the jurisdiction of the Supreme Court as the final court of appeal.

In respect of the **standardisation/unification of the law**, the legal system of Ireland is part of the common law legal tradition, and therefore decision of the High Court, Court of Appeal and Supreme Court constitute a binding source of law in accordance with the doctrine of precedent. As the final court of appeal and final arbiter of the Constitution, decisions of the Supreme Court are binding on all other courts. Moreover, the Supreme Court rarely departs from one of its own decisions. This has the effect of encouraging uniformity of the law.

The **delivery of single case justice** is also a function of the Supreme Court. A primary aim of the Court in its decisions is to do justice between the parties. In addition, as stated above one of the criteria upon which the Supreme Court may grant leave to appeal is where it is in the interests of justice.

The **further development of the law** is also a function of the Supreme Court due to the precedential value of its decisions and because one of the grounds upon which the Supreme Court grants leave to appeal is where the decision for which leave to appeal is sought involves a matter of public importance. Thus, cases considered often contribute to the development of the law in certain areas or involve points of law in areas where the law is not settled. Additionally, Article 34.5.5 of the Constitution provides that “[n]o law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of the Constitution.” The effect of the role of the Supreme Court as the final court of appeal in cases in which the validity of a law is challenged and its first instance constitutional jurisdiction under Article 26 has been the development of a significant body of constitutional law. Similarly, the role of the Court as the final court of appeal in all areas of law means that its decisions contribute the development of the law across a very wide variety of areas.

Finally, ensuring adherence by lower courts to procedural rules is a function of the Supreme Court as it reviews the legality of decisions of the court below.

b) What is the rationale of assigning certain proceedings to the SAC as a court of first instance?

In respect of references by the President under Article 26 of the Constitution to the Supreme Court to consider the constitutionality of a Bill before it being signed into law, it may be said that the importance of such process, the need for certainty and the time constraints involved require such cases to be decided by the Supreme Court, which is the final arbiter of the Constitution, at first instance.

According to Article 26 of the Constitution, if the President decides to refer a Bill to the Supreme Court pursuant to Article 26 of the Constitution, he or she must do so no later than the seventh day after the date on which it is presented to him for his signature. The Supreme Court consisting of not less than five judges must decide on the constitutionality of the Bill and, having heard arguments by or on behalf of the Attorney General (the legal advisor to the Government of Ireland) and by counsel assigned by the Court, must pronounce its decision on such question in open court as soon as may be, and in any case not later than sixty days after the date of such reference.

Article 26 also provides that, contrary to the general position which is that each judge may deliver a separate judgment, the decision of the majority of the judges of the Supreme Court shall, for the purposes of this Article, be the decision of the Court and shall be pronounced by such one of those judges as the Court. No other opinion, whether assenting or dissenting, may be pronounced nor can the existence of any such other opinion be disclosed.

When the Supreme Court decides that any provision of a Bill referred under this process is repugnant to the Constitution, the President must decline to sign the Bill. If the Supreme Court finds that the Bill is not unconstitutional, the President must sign the Bill as soon as may be after the date on which the decision of the Supreme Court shall have been pronounced.

6. a) Is there a separate constitutional court in your country?

No. As indicated in question 1(a), the Supreme Court of Ireland exercises final appellate jurisdiction in all areas of law and also serves as a constitutional court of final appeal.

b) Does the SAC in your country serve as a constitutional court?

There is no Supreme Administrative Court, but the Supreme Court, which is the final court of appeal in all areas of law, including administrative law, serves as a constitutional court of final appeal.

b) In how far does your SAC consider constitutional law, especially fundamental rights?

The Supreme Court plays a very important role in the interpretation of the Constitution, the development of constitutional principles and the protection of the fundamental rights guaranteed by the Constitution.

A significant proportion of the written text of the Constitution with the heading, 'Fundamental Rights' is dedicated to the protection of specified fundamental rights. The fundamental rights provisions of the Constitution have led to the development by the Supreme Court of a significant body of constitutional law jurisprudence, in particular given the common law nature of the Irish legal system.

In addition to those rights specified in the Constitution, the Supreme Court, in the decision of *Ryan v Attorney General*,<sup>2</sup> held that Article 40.3 of the Constitution, which provides that the "State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen" guarantees other personal rights not explicitly referred to in the text of the Constitution. The Supreme Court has identified a number of such unenumerated rights including, for example, the right to bodily integrity, the right to marital privacy and the right to earn a living.

The Constitution expressly confers on the High Court, Court of Appeal and Supreme Court, the power to review the constitutionality of legislation and to invalidate legislation which is incompatible with the Constitution. Since the enactment of the Constitution in 1937, the Courts, including the Supreme Court, have exercised this jurisdiction of constitutional judicial review to find provisions of legislation incompatible with the Constitution.

As the final court of appeal in all areas of law, the Supreme Court has ultimate jurisdiction in constitutional law cases. Article 34.5.5 of the Constitution provides that "[no law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution"]".

d) If there is a separate constitutional court, is there a special/extraordinary remedy against (final) decisions of the SAC to the constitutional court claiming violations of constitutional law?

N/A

e) If there is a separate constitutional court and your court considers constitutional law, too, how would your court handle a case, if your court deems a relevant law as unconstitutional?

N/A as there is no separate constitutional court.

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<sup>2</sup> [1965] 1 IR 294.



f) If there is a separate constitutional court in your country, can plaintiffs challenge administrative acts also before the constitutional court (i.e. without bringing the case before the SAC first)? If so, how are actions before the constitutional court related to the proceedings before the SAC?

N/A as there is no separate constitutional court.

## II. Access to the SAC

1. a) Does a party have to be **represented by a legal professional** before the SAC?

No. There is no requirement for a party to be represented by a legal professional in the Supreme Court or in any other court in Ireland and persons who are not represented often appear before the Supreme Court.

b) If so, does the representative have to be an attorney at law/solicitor/barrister?

N/A

c) Are there attorneys/solicitors/barristers specially authorized to act before the SAC?

No.

d) Are other legal professionals admitted as representatives? I.e. legal scholars, representatives of NGOs...?

In Ireland there is a distinction between two branches of the legal profession, which is divided into barristers and solicitors. Although both have a right of audience in every Court, a barrister is (save for in a small number of exceptional circumstances) not permitted to take instructions directly from a party and engages in courtroom advocacy, while a solicitor is typically the first point of contact with a litigant and prepares the case for court.

There a distinction between a party to procedures and a representative of a party, who must have a right of audience before the Court.

The Court does not admit legal professionals other than barristers and solicitors, such as legal scholars and NGO representatives to represent parties.

An exception is the appointment of a Guardian ad Litem in proceedings involving children in order to independently establish the wishes, feelings and interests of the child and present them to the Court with recommendations. Such persons are usually not lawyers, but are generally professionals with expertise in dealing with children. However, the appointment of a Guardian ad Litem generally occurs in courts of first instance and not the Supreme Court.

It is possible for organisations to be admitted as an ‘amicus curiae; or ‘friend of the Court’, not a party or legal representative, but to provide expertise to the court. An example of a body which may be admitted as amicus curiae is the Irish Human Rights and Equality Commission.

In some cases, litigants may be assisted by lay persons, sometimes referred to as ‘McKenzie friends’. Such persons are not entitled to act as advocates or conduct litigation but may provide moral support to litigants, take notes, help with case papers and quietly give advice to litigants on the case.

e) Are there specific (different) rules for representatives of administrative authorities?

No, there are no specific rules for representatives of administrative authorities.

2. a) What are the **formal requirements** for an appeal to the SAC (e.g. precise application, reasoning,...)?

As indicated above, the legal threshold for bringing an appeal to the Supreme Court is provided for in the Constitution of Ireland. The formal procedural requirements are outlined in legislation,<sup>3</sup> Order 58 of the Rules of the Superior Courts<sup>4</sup> and Practice Direction SC19-Conduct of Proceedings in the Supreme Court.<sup>5</sup>

A party seeking leave to appeal to the Supreme Court must, within 21 days of the perfecting of the order of the High Court or Court of Appeal, lodge in the Supreme Court Office an application for leave to appeal in the form subscribed by the Rules of Court setting out way the constitutional threshold for the granting of leave to the Supreme Court has been met. A new system whereby such documents may be filed online is being introduced in early 2019. A copy of the notice of application for leave to appeal must be served on all parties directly affected by the application for leave to appeal or appeal on the same day on which the application has been filed. Each respondent must, within 6 weeks from the perfection of the order, serve a respondent’s notice in a prescribed form.

Within seven weeks from the perfecting of the order from which leave to appeal is sought, or such extended time as may have been allowed, the applicant must file electronically and if the Supreme Court e-filing system is not being used file in the Office four hard copies of a booklet containing copies of certain documents relevant to the application for leave to appeal.

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<sup>3</sup> Courts (Supplemental Provisions) Act 1961 as amended by the Court of Appeal Act 2014.

<sup>4</sup> Available at <http://www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/aab93d875e7532ff80256d2b0046b3f1?OpenDocument>

<sup>5</sup> Available at <http://www.courts.ie/courts.ie/library3.nsf/16c93c36d3635d5180256e3f003a4580/3ec749309ffb82dc8025837b005e2163?OpenDocument>

Applications for leave to appeal are considered by the Court consisting of at least three judges and, by way of an exception to the tradition of oral hearings, applications are normally decided based on the documents unless the Supreme Court directs that the application, or any matter arising on the application should be determined with an oral hearing.<sup>6</sup>

When the Court has considered the documents filed it may then:

- (i) direct that written submissions on the application for leave to appeal be filed;
- (ii) refuse leave;
- (iii) grant leave on all or specified grounds;
- (iv) direct an oral hearing with or without the filing of written submissions;
- (v) invite the parties to file written submissions as to the grant of leave on terms whether as to costs or otherwise.

As required by s. 7(15) of the Courts (Supplemental Provisions) Act 1961 as inserted by section 44 of the Court of Appeal Act 2014, the Court provides brief reasons for its decision to grant or refuse leave to appeal, which are published in a written determination on the website, [www.courts.ie](http://www.courts.ie). The application for leave to appeal and respondent's notice are also published together with the determination of the Court.

b) Is your SAC bound by (and limited to) review the case according to specific objections (on procedural law and/or on substantive law) of the appellant?

*In Grace & Sweetman v. An Bord Pleanála & ors*<sup>7</sup> the Supreme Court reiterated its finding in a previous case, *McEnery v. Commissioner of An Garda Síochána*<sup>8</sup> that, subject to very limited exceptions, the only questions which may be addressed by the Court on an appeal under its new constitutional jurisdiction are the issues which can fairly be said to come within the ambit of the grounds on which leave to appeal is given.

However, the Court has decided that an overly technical approach should not be taken. In a recent case, *Callaghan v An Bord Pleanála* [2017] IESC 60, the Supreme Court granted leave to appeal to the appellant against a decision of the Court of Appeal. The respondents contended that the appellant had, in written submissions filed by the him, gone beyond the scope of the appeal permitted in accordance with the determination of the Supreme Court granting leave to appeal. The Court held that the proper approach of the Supreme Court is to confine an appellant to issues which can fairly be said to arise within the scope of the appeal as identified in the determination of the Court granting leave to appeal. However, the Court also found that it should not, in so confining an appeal, adopt an overly technical or narrow approach but

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<sup>6</sup> Section 7(11) of the 1961 Act as amended.

<sup>7</sup> [2017] IESC 10.

<sup>8</sup> [2016] IESC 26.

should consider whether, on a fair basis, it can be said that the arguments sought to be relied on come within the broad scope of the leave granted. It was of the view that where the potential construction of a statute or legislative measures is at issue in proceedings, the Court should not ignore arguments which might impact on the proper objective construction of the measures concerned which derive either from the principle of constitutional construction or from the requirement of conforming interpretation as a matter of European Union law.

c) If this is the case, how does your SAC deal with its duty to refer to the ECJ for a preliminary ruling under art. 267 TFEU?

If the Court is satisfied that an issue of EU law potentially arises in an appeal for which leave is sought, that the issue is not *acte clair* and that it may be necessary for the resolution of the appeal, the Court will grant leave and consider, at a full hearing, whether a reference is required.

3. Concerning the function of the SAC in your country as a **court of appeals** (i.e. not as a court of first instance):

a) Does every party of the proceedings at the lower instance have the right to seize the decision of the SAC against all kinds of decisions of the court of lower instance?

As explained above, the Supreme Court only grants leave to appeal in circumstances where the constitutional threshold is met. However, the Court hears appeal in all types of cases and is not limited to hearing appeals in any particular areas of law or types of cases.

b) Can certain types of decisions of lower courts (e.g. provisional decisions, certain fields of law,...) not be brought before the SAC?

No. Any order made in the High Court or the Court of Appeal in any type of decision may be the subject of an appeal to the Supreme Court once the constitutional threshold is satisfied.

4. As far as in general the parties of the proceedings of the lower instance can seize the decision of the SAC (as a court of appeals):

a) Is this right restricted by a legally established filter (quantitative, e.g. depending on a certain value in litigation, or qualitative, e.g. in certain fields of law, depending on a preliminary assessment)?

Yes. As indicated above, since the establishment of the Court of Appeal in 2014, the almost automatic right of appeal to the Supreme Court can be said to have been qualitatively limited to the circumstances set out in the Constitution and described in question 1 above.

b) If there is a preliminary assessment, please give details:

- Which court decides (lower court or SAC)?

The Supreme Court determines whether to grant or refuse applications for leave to appeal to the Supreme Court.

- If the lower court admits a case to the SAC, does this decision have binding effect on the SAC?

N/A

- If the SAC decides, is there a specific procedure of admittance before the SAC? Please give details!

Yes. The process for the determination of the Supreme Court of applications for leave to appeal is set out in question 2(a) above.

- If the lower court decides (in a negative way), can the SAC still admit a case?

N/A

- If the lower court decides, does it decide on the admission of an appeal ex officio or only on application?

N/A

c) Are there special rules for filters for certain fields of law (e.g. asylum law,...)?

Paragraph 18 of a new Practice Direction governing procedures in the Supreme Court, which was introduced in 2019 and has not yet been utilised, provides that the Chief Justice may from time to time by notice, to be annexed to or published with the statutory practice direction, specify categories of applications that are to be subject to an expedited procedure and may specify the time limits and special procedures to be applicable to such categories.

It also provides that in other urgent cases, including but not limited to cases involving liberty of the individual, urgent medical intervention or the urgent need to secure the well-being of a child, a request for expedition may be made. In such case, an application for leave to appeal shall be accompanied by a letter to the Registrar and a copy of same shall be sent at the same time to the respondent requesting that the application be expedited and indicating the reasons why the request is being made, and a copy of that letter shall be served with the notice of application for leave to appeal. The parties must inform the Registrar when the proceedings fall under the Convention on the Civil Aspects of International Child Abduction (the Hague Convention) or the revised Brussels II Regulation.

In order to achieve expedition the Court may set aside or vary the time limits and practice directions that normally apply to applications and appeals.

In addition, abridged procedures and special rules for the production of documents may be applied to meet the circumstances of each application and appeal.

d) If your jurisdiction knows a procedure of admittance, what are the general requirements under which a case can be admitted to the SAC?

As stated in the response to question 1(a) above, the Constitution provides that the Supreme Court may grant leave to appeal from the Court of Appeal where it is satisfied that:

- i. the decision involves a matter of general public importance, or
- ii. in the interests of justice it is necessary that there be an appeal to the Supreme Court and:

The Constitution also provides for an appeal directly from the High Court to the Supreme Court

if the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it - a precondition for the Supreme Court being so satisfied of the presence of either or both of the following factors:

- i. the decision involves a matter of general public importance;
- ii. the interests of justice.

e) If there are more than two instances in your country, is it possible to appeal against decisions of the court of first instance to the SAC directly? Under what requirements?

Yes. The High Court is a court of first instance and, as indicated in the previous question, the Constitution provides for a 'leapfrog' appeal to be brought directly from the High Court to the Supreme Court where the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it - a precondition for the Supreme Court being so satisfied of the presence of either or both of the following factors:

- i. the decision involves a matter of general public importance;
- ii. the interests of justice.

In a few categories of cases, the most common being environmental cases and environmental cases, legislation stipulates that no appeal lies from the High Court to the Court of Appeal unless the High Court certifies that its own decision involved a point of law of exceptional public importance or it is in the public interest that there be an appeal to the Court of Appeal. This form of statutory restriction applied in respect of appeals from the High Court to the Supreme Court in such areas of law under the previous appellate regime. A significant proportion of cases in which the Supreme Court grants leave to leapfrog appeal from the High Court to the Supreme Court under the reformed jurisdiction involves cases where a party in an immi-

gration or environmental law case has been refused a certificate in the High Court to appeal to the Court of Appeal.

f) Are there specific requirements in certain fields of law?

There are no specific requirements applicable to certain fields of law.

g) If your jurisdiction knows a procedure of admittance, what is the percentage of cases admitted?

In 2018, 157 applications for leave were determined and leave to appeal was granted in 58 cases, amounting to 37%. This figure is consistent with all other years since the new appellate structure came into being.

5. If there is no legally established filter (Q. II.4.), has your SAC established a jurisprudence on the (in-)admissibility of appeals or of specific objections (see also Q. II.2.b)) which has the effect of a factual filter, e.g. by rejecting them as abusive, or by dismissing petty cases?

N/A

6. Considering the functions of your SAC as a court of appeals (Q. I. 3.), how are these functions related to restrictions of the access to the SAC as discussed in Q. II.4.), as far as applicable?

In addition to the information already provided in the answers above, it is worth noting that, as an appeal lies in most cases to the Court of Appeal, the Supreme Court does not consider that a second appeal is required unless the constitutional threshold is met.

7. a) Are there any constitutional provisions in your country with respect to having an appeal's instance?

The appellate structure of the Superior Courts of Ireland (the High Court, Court of Appeal and Supreme Court is provided for in Article 34 of the Constitution and, as previously indicated, the threshold for the granting of leave to appeal is set out in the Constitution. The Constitution of Ireland may only be amended by the People following a constitutional referendum, and therefore a referendum was required in order to establish the Court of Appeal.

b) If so, does the constitution in your country provide for a full review of a first instance decision or for access to a procedure of admittance to the next instance?

The Constitution provides that the final Court of Appeal shall be called the Supreme Court and sets out the constitutional threshold which a party must meet in order for the Supreme Court to grant leave to appeal from the Court of Appeal or High Court. It also provides that no law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases

which involve questions as to the validity of any law having regard to the provisions of this Constitution, and that decisions of the Supreme Court shall be final and conclusive.

The Constitution provides for an almost unrestricted right of appeal to the Court of Appeal.

8. Is there a political or academic discussion concerning any kind of reform with regard to the access to the SAC (e.g. introducing filters, restricting the filter, loosening the filter)?

The significant changes to the jurisdiction of the Supreme Court which resulted in the process for bringing applications for leave to appeal to the Supreme Court were introduced following much discussion of reform. In 1996, the Constitution Review Group (a group set up to review the Constitution and make proposals regarding its reform) recommended that Article 34 of the Constitution of Ireland be amended to allow for the establishment of a Court of Appeal. The Government of Ireland established a Working Group to review the necessity for a Court of Appeal and to consider the options as to how such a Court could be established. The Working Group produced its report in 2009, recommending the establishment, by constitutional referendum, of a Court of Appeal and the introduction of an application for leave procedure which would involve the Supreme Court determining which cases it would hear.

Since the new jurisdiction was introduced, discussion has largely centred around how the new jurisdiction of the Supreme Court and the associated new procedures have operated in practice. Following three years of the operation of the reformed jurisdiction, the Chief Justice established a Committee to Review Supreme Court Procedures. The Committee consulted with legal practitioners in relation to the practical operation of the rules and procedures governing applications for leave to appeal to the Supreme Court. Following recommendations of the Committee, a revised Order 58 was enacted by the Superior Courts Rules Committee in January 2019, together with a new Practice Direction signed by the Chief Justice to provide practical guidance in relation to the conduct of proceedings in the Supreme Court.

One development since the establishment of the Court of Appeal which has given rise to commentary relates to the fact that, although the establishment of the Court of Appeal has meant that the Supreme Court has now dealt with its backlog of cases, a backlog of cases has developed in the Court of Appeal. Article 64, a transitory provision of the Constitution of Ireland which came into effect on the establishment of the Court of Appeal, empowered the Chief Justice, if satisfied that it was in the interests of justice and the effective determination of appeals to do so, and with the concurrence of the other judges of the Supreme Court, to give a directing providing that specified appeals be heard and determined by the Court of Appeal. However, a subsequent backlog of appeals in the Court of Appeal resulted in the return of a number of such appeals to the Supreme Court, where they were heard by the Supreme Court in panels, with judges of the Court of Appeal sitting as judges of the Supreme Court on some of such Article 64 returns.

### **III. Implementation / Procedural Aspects**



1. As far as your SAC serves as a court of first instance: What is the **possible content of decisions** of your SAC:

- cassation of the administrative act?
- obligation of the administrative authority to issue an administrative act?
- obligation of the administrative authority to issue a new discretionary decision
- obligation of the administrative authority to act in a certain way (other than by administrative act: payment, omission...)?
- issue an administrative act itself?
- issue a discretionary decision out of its own authority?
- remit to the constitutional court?
- other?

When the Supreme Court exercises its first instance jurisdiction under Article 26 of the Constitution, the decision of the Supreme Court contains an opinion as to whether the Bill which has been referred is unconstitutional. If the Court decides that it is unconstitutional, the Bill does not become law.

2. As far as your SAC serves as a court of appeal:

a) What is the possible **content of decisions** of your SAC:

- cassation of the decision of the lower court and remitting the case back to the lower court?

Yes, although the term “cassation” is not used in the common law legal tradition.

- cassation of the administrative act?

Yes although, as indicated, the term “cassation” is not used.

- obligation of the administrative authority to issue an administrative act?

Yes.

- obligation of the administrative authority to issue a new discretionary decision?

Yes.

- obligation of the administrative authority to act in a certain way (other than by administrative act: payment, omission...)?

Yes, once it has such a duty or power under the law.

- issue an administrative act itself?

No.

- issue a discretionary decision out of its own authority?

No.

- remit to the constitutional court?

N/A as there is no separate constitutional court.

- issue a legal opinion/authoritative interpretation of the law without connection to a single case?

No. With the exception of the procedure under Article 26 of the Constitution, all decisions of the Supreme Court are made in the context of appeals brought by litigants in specific cases.

- other?

When hearing appeals, the Supreme Court has jurisdiction to exercise all powers and duties of the court from which the appeal was brought and may give any judgment and make any order which ought to have been made, and may make any further or other order as the case requires.

b) To what extent can or must your SAC rely on the facts as they were investigated and determined by the lower court?

As stated in the response to question 3(a) above, the Supreme Court relies heavily on findings of fact made by the trial judge which are supported by credible evidence.

3. a) When your SAC serves as a first instance court, does it apply the same rules of court procedure as the common first instance courts?

No. The Supreme Court rarely exercises its first instance jurisdiction in cases referred to it under Article 26 of the Constitution. When it does, a specialised procedure set out in the Constitution and described in question 4(b) above applies.

d) If not, what are the differences?

As above.

4. As far as there is a specific procedure of admittance of appeals before the SAC, are there different rules of procedure for these procedures of admittance than for admitted appeals' procedures?

The procedures governing applications for leave to the Supreme Court and the conduct of appeals for which leave has been granted are both contained in the same procedural Order, which is Order 58 of the Superior Court Rules. The same Practice Direction also applies to both processes. However, the procedures are set out in separate sections of Order 58 and Practice Direction 19.

5. Are there (compulsory, facultative) public hearings in procedures of admittance and or the admitted appeals' procedure?

As stated above, determination of applications for leave to appeal is carried out based on the papers rather than oral hearing, unless the court directs that an oral hearing is necessary.

The Constitution provides that justice shall be administered in public in all courts in Ireland, including the Supreme Court, save in such special and limited cases as may be prescribed by law.<sup>9</sup> This constitutional obligation is satisfied by the publication of the application for leave, respondents notice and determination of the Supreme Court in relation to the application for leave on [www.courts.ie](http://www.courts.ie)

6. Do the decisions of the SAC have an effect on other cases than the one decided?

Yes. The legal system of Ireland is based on the common law tradition and the system of precedent, encapsulated in the principle of *stare decisis* ('let the decision stand') applies. Courts must follow prior decisions of superior courts. Courts of lower jurisdiction are therefore bound by decisions of the Supreme Court. Courts generally also follow the decisions of courts of equal jurisdiction.

It is only the principle of law which is set out by the Court following the application of the law to the facts of the case (the 'ratio decidendi') which is binding. Other elements of a judgment, such as the facts or any other statements of law contained in the case which are not of direct relevance to the decision ('obiter dicta') are not binding, although such statements are of persuasive authority and may be adopted at the discretion of the court which is later considering the judgment.

- a) Are lower instance courts bound by law to follow decisions of the SAC in other (similar) cases?

Yes, for the same reasons as outlined in the response to the previous question.

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<sup>9</sup> Article 34.1 of the Constitution of Ireland.

b) If so, under which conditions can they deviate from a decision of the SAC?

A Court may depart from a decision of the Supreme Court which would otherwise usually be binding on it by finding that it is not relevant to the case before it if, for example, there are factual differences or different legal issues involved.

c) Is the SAC bound by law to follow its own previous decisions?

It is rare, though not legally impermissible for the Supreme Court to decide not to follow a principle of law which it has decided in an earlier decision. It is more common for the Court to distinguish a previous decision by finding that it is not relevant to the case before it. However, there have been exceptional cases in which the Supreme Court has overruled or departed from a legal principle in one of its previous decisions. Such cases have generally involved a finding by the Supreme Court that a previous decision was wrongly decided.

d) If so, under which conditions can it deviate from its previous decision?

Other than cases in which the Supreme Court distinguishes a previous decision, as described above, the Supreme Court has indicated that it will “depart from an earlier decision for any but the most compelling reasons”.<sup>10</sup>

In *Attorney General and Another v. Ryan's Car Hire Ltd*<sup>11</sup>, the Supreme Court stated that that:

“... the rigid rule of stare decisis must in a Court of ultimate resort give place to a more elastic formula. Where the Court is clearly of opinion that an earlier decision was erroneous it should be at liberty to refuse to follow it, at all events in exceptional cases.”

The following non exhaustive examples were given in that case of what might be considered “exceptional cases”:

- (i) where some material statutory provision was overlooked;
- (ii) where some such provision, although repealed, was applied; or
- (iii) where some binding authority was ignored.<sup>12</sup>

7. Are the judges of your SAC bound by the decisions of other sections within your SAC?

N/A as the Supreme Court of Ireland does not have sections, divisions or chambers.

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<sup>10</sup> *The State (Quinn) v. Ryan* [1965] I.R. 70.

<sup>11</sup> [1965] I.R. 642.

<sup>12</sup> *Ibid* at 654.

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