REPUBLIC OF LATVIA
SUPREME COURT
SENATE

ACA EUROPE

Seminar organized by the Supreme Court of the Republic of Latvia in cooperation with ACA-Europe

Riga, 27 April 2023

Questionnaire
The judge and inert administration. Administrative discretionary power

Introduction

The seminar will address the issue of inert administration and the role and competence of the courts in this regard. The inaction or silence of the authorities and its consequences affect the rights of individuals no less significantly than the administrative actions or administrative acts of the authorities. While institutional silence is mainly related to the managerial aspects of public administration, it also interacts and correlates with legal aspects, such as principles of legal certainty, good administration and the prohibition of arbitrariness. The aim of the questionnaire and the seminar is therefore to summarise and analyse the regulation and practice of the Member States in order to determine whether the rights of individuals in the context of administrative silence converge and are comparable in the different legal systems.

As the administrative silence is mainly related to the failure of authorities to act or to reply within the prescribed procedural time limits, the questions in the first section of the questionnaire will provide insights into the regulation and application of procedural time limits in the Member States. The following sections of the questionnaire contain questions that are directly related to the current national regulations of the administrative silence. The regulations are generally classified into a negative model (silence as deemed refusal of a claim) and a positive model (a claim not refused in due time is deemed granted). Most legal systems usually provide for both models and various specific combinations. However, the understanding and regulation of these models, as well as the various exceptions and specific rules, differs among legal systems. The questionnaire also seeks to identify national experiences in implementing Article 13(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, intended as a mechanism of simplifying and speeding the administrative activity. And finally, as one of the most important aspects, the questionnaire will clarify the role and competence of the courts in the process of appeal against fictitious acts resulting from administrative silence, also identifying the legal remedies. The questionnaire is intended to identify mentioned aspects for further workshop discussions.

Co-funded by
the European Union

The seminar is also intended to discuss issues of administrative discretionary power. The most ambiguous aspects of this matter relate to the identification of the discretionary power in each specific case, as well as to the competence of the court and limits of judicial review of use of discretionary power by the authority. The practice and approach of the Member States on this issue vary. Some legal systems between discretion in a narrow sense and margin of appreciation in the interpretation of undefined legal concepts. However, in most legal systems no such distinction is made. There are also differences in the methods, characteristics or mechanisms used to determine whether an authority has discretionary power in a particular case. The questionnaire thus aims to identify national regulations and practices on the mentioned issues.

ADMINISTRATIVE TIME LIMITS

Background:
In order to contextualise the responses of the Supreme Court of Ireland to the below questions, it is necessary to provide some background information in relation to the jurisdiction of the Supreme Court of Ireland. The Supreme Court is the court of final appeal in all matters of law and also the final arbiter of constitutional issues. The Constitution of Ireland provides for the establishment of three "Superior Courts" of Ireland, each with competence in all areas of law, including civil law, criminal law, administrative law and constitutional issues. Pursuant to Article 34.4.1 of the Constitution of Ireland, the Court of Appeal has appellate jurisdiction from all decisions of the High Court. Article 34.5 of the Constitution provides for an appeal from a decision of the Supreme Court if the Supreme Court is satisfied that matter of "general public importance" or it is "necessary in the interests of justice" that there be an appeal. The Constitution also provides for a direct appeal from the High Court to the Supreme Court in exceptional circumstances.

Administrative proceedings in the Irish courts are based on a procedure of judicial review whereby a party may challenge the validity of an administrative act of a public body. There are no specialised administrative courts in Ireland. The High Court, which considers judicial review proceedings at first instance, the Court of Appeal and the Supreme Court are courts of general jurisdiction.

1. **Are specific administrative time limits within which authorities must take administrative decisions or complete administrative actions set in your legal system?**
   - Yes
   - No

- Only in certain areas of law

Please specify your answer briefly:
As mentioned above, Ireland does not have a system of specialised administrative courts or specialist administrative law judges. Instead, the Superior Courts provide legal oversight to the system of public administration in Ireland through the legal remedy of judicial review. The Irish legal system has introduced several legislative schemes with specialised measures that set specific administrative time limits within which authorities must take administrative decisions or complete administrative actions, but only in certain areas of law. Specifically, in those areas of services affecting an individual's personal rights (privacy, immigration, housing, social welfare, access to courts etc).

For example, the Freedom of Information Act 2014 requires public bodies to respond to requests from the public for information they hold. In most cases, public bodies must give their decision on a request within 4 weeks of receiving it.

2. **Where are the administrative time limits set?**
   - The Constitution
   - The general code of administrative law or administrative procedure law
   - Special laws
   - Other

Please specify your answer briefly, if necessary:
There is no general code of administrative law or administrative procedural law that sets out administrative time limits. However, there are general administrative time limits set within specific laws in those areas of services affecting an individual's personal rights (privacy, immigration, housing, social welfare, access to courts etc.).

For example, judicial review of decisions of certain planning matters must be brought within 8 weeks; decisions in relation to the award of public contracts must be challenged within 30 days and decisions in relation to asylum and immigration must be challenged within 14 days.

Further, Court Rules and Procedure places time restrictions for certain administrative elements for the functioning of the administration of justice. For example, Order 84 of the Rules of the Superior Courts place a number of time restrictions applicable to Judicial Review and Orders Affecting

Personal Liberty. Order 84, rule 21 places a six-month time limit to make an application for leave to apply for judicial review.

3. **Is the concept of "reasonable time" for the setting of administrative time limits defined and applied in your legal system or case-law?**

   The concept of "reasonable time" has been defined in specific areas of law but not generally as applied to administrative time limits.

   In contract law for example, section 18, rule 4(b) of the Sale of Goods Act 1893 provides:

   > "If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, **if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact"** [emphasis added].

   Generally, where any reference is made to a reasonable time, the question of what is "reasonable time" is a question of fact: for example, see *Domhnaill v. Merrick* [1984] I.R. 151, [1984] I.L.R.M 40.

   As regards authorisation schemes as per the Bolkenstein Directive, as an example of where time limits are defined and applied, section 18(2) of the European Union (Provision of Services) Regulations 2010 defines a "reasonable period" as a period not exceeding 60 days.

4. **Describe the general time limits in which administrative decisions are made in your legal system.**

   As mentioned in the answer to question No.2, there is no single law governing administrative actions in Ireland. Therefore, there are no general time limits in which administrative decisions are made in the Irish legal system. Time limits for administrative decisions are specific to the service or legislation to which the application refers.

5. **Is it possible to extend the administrative time limits? Under what circumstances?**

   Yes, it is possible to extend the administrative time limits. Some legislation specifically permits the extension of time for certain bodies within a specific service, whilst other bodies allow for the extension of time based on discretion.

For example, as regards authorisation schemes, as per the Bolkenstein Directive, section 18(4) of the European Union (Provision of Services) Regulations 2010 allows for the extension of the "reasonable period [….] once for a further period not exceeding 28 days."

6. **Does a person have the right to complain about the authority's decision to extend the time limit?**

   It is generally possible to appeal a negative decision in an application to extend the time limit of a particular service, but there are no specified legal remedies available for a right to complain about an authority's decision to extend the time limit.

   For example, section 32(1)(b) of the Nursing Homes Support Scheme Act 2009 (as amended), provides for an applicant in receipt of a negative decision in regards to the Nursing Homes Support Scheme to make an appeal "not later than 40 working days after notice of the decision was given to the appellant".

7. **If an administrative decision is unfavourable to the submitter or the potential addressee of the decision, can it still be made after the expiry of the time limit?**

   - Yes
   - No
   - No, unless the delay on the part of the institution has a proper justification
   - Other

   Please specify your answer briefly:
   An administrative decision can still be made after the expiry of the time limit, even if the decision is unfavourable to the potential addressee. This is because all decisions made by public authorities are required by law to be communicated to the relevant party(ies), except where it would be in the public interest not to do so.

8. **Is failing to comply with established administrative time limits a common problem in your country?**
   - Rather yes
   - Rather no

9. **What are the main reasons for failing to comply with administrative time limits in your country?**

- Lack of clear regulation
- Lack of institutional capacity
- Deficiencies in the administration of the authorities
- Deficiencies at national policy level
- Other

Please specify your answer briefly:
As a result of the disparate nature of Irish legislation and the Irish legal system, it is not really possible for the Irish Supreme Court to provide a "one size fits all" answer to this question, save to say that some decision-making processes are more complex than others and may take more time or relate to matters or involve a larger volume of material to consider and process.

10. **Are there any penalties, disciplinary or criminal liability for authorities or their staff with regards to not complying with the time limits?**

No, there are no specific legal penalties, disciplinary or criminal liability for authorities or their staff with regards to not complying with the time limits. There may, however, be internal disciplinary procedures where the competence of the staff to comply with procedural time limits is in question.

ADMINISTRATIVE SILENCE

1. **Does your national legislation define "administrative silence" as a legal concept? Please specify.**

No, it does not appear that Irish national legislation defines "administrative silence" as a legal concept.

2. **Does your legal system provide for a negative model of administrative silence (deemed refusal of a claim)?**

Yes, the Irish legal system does provide for a negative model of administrative silence, but only in specific and limited areas of law.

3. **Does your legal system provide for a positive model of administrative silence (a claim not refused in due time is deemed granted)?**

Yes, the Irish legal system does provide for a positive model of administrative silence, but only in specific and limited areas of law. This

model was mainly implemented by transposing the positive silence model provided for in Article 13(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market into national legislation.

For example, as regards authorisation schemes, section 18(5) of the European Union (Provision of Services) Regulations 2010 provides as follows:

> "… **if a competent authority in the State fails** to determine an application within the decision period **the application is taken to have been granted at the end of the decision period**" [emphasis added].

Another example is section 97(10) of the Planning and Development Act 2000, which provides:

> **"Where a planning authority fails within the period of 4 weeks** from—
>
> (a) the making of an application to it under this section, or
>
> (b) (in the case of a requirement under subsection (6)) the date of receipt by it of any information or documentation to which the requirement relates,
>
> to grant, or refuse to grant a certificate, **the planning authority shall on the expiry of that period be deemed to have granted** a certificate to the applicant concerned." [emphasis added]

4. **Which regulatory model of administrative silence is more typical for your legal system?**

Whilst both models exist in the Irish legal system, typically, they are not used as a general principle in public administration. Both models are not explicitly referred to as such in the Irish legal system and are only applicable in specific areas of administrative law, such as in those areas of services affecting an individual's personal rights (privacy, immigration, housing, social welfare, access to courts etc.).

THE NEGATIVE MODEL

1. **What are the types of administrative procedures that the negative model can be applied to**?

   - Procedures that are initiated on the basis of an application or claim by a person
   - Ex officio procedures

- Other
- Not applicable

2. **Does the negative model mean that a person's application or claim is automatically considered to be rejected or are extra actions required in order for the person to be able to appeal the rejection (for example, does the person have to provide proof that authority has been silent on the particular matter in order for it to be able to appeal the rejection)?**

   In the relevant legislative examples in Ireland (as outlined throughout this questionnaire), the negative model means that a person's application or claim is automatically considered to be rejected. For example, section 19(1) of the Freedom of Information Act 2014 provides:

   > **"Where notice of a decision** under section 9 or 13 **is not given** to the requester concerned or to the person who made the application concerned under section 9 **before the expiration of the period** specified for that purpose in section 9 or 13, as the case may be, a **decision refusing to grant the FOI request** or the application under section 9 **shall be deemed** for the purposes of this Act **to have been made upon such expiration** and to have been made by a person to whom the relevant functions stood delegated under section 20" [emphasis added].

3. **Is the process for appealing against a "fictitious refusal" resulting from an administrative silence different from the general appeals process (for example, is there a different time limit or review body than in general appeals process)? Please describe the main differences.**

   There are no legal mechanisms for appealing against a "fictitious refusal" resulting from an administrative silence different from the general appeals process.

4. **Can the "fictitious refusal" resulting from an administrative silence be appealed in court?**

   Not applicable. Fictitious refusal resulting from administrative silence is not a legal concept recognised in the Irish legal system.

5. **What is the competence of the court if the "fictitious refusal" is found to be unjustified?**

Not applicable. Fictitious refusal resulting from administrative silence is not a legal concept recognised in the Irish legal system.

6. **What legal remedies are available in your legal system if an authority has failed to comply properly with a court order to issue a decision?**

   Not applicable. A court cannot order an authority to issue an administrative decision, owing to the separation of powers. However, a person subjected to 'administrative silence' may apply for an order of Mandamus through judicial review, which can compel the authority to act, on the grounds of failing to comply with a statutory duty.

7. **In which cases the court has the competence to decide upon the matter itself instead of the "silent" authority:**

   - In all cases
   - Only in cases of objective urgency
   - Only in cases which concern significant rights of the person
   - Only in cases in which the authority has no discretionary power or it is limited to zero
   - Never, because only the authority can make a decision
   - Other

THE POSITIVE MODEL

1. **What is the main purpose of the positive model in your legal system?**

   - To simplify certain administrative procedures
   - To protect the rights of individuals in case an authority fails to comply with the administrative time limits

   Please specify your answer briefly:
   The positive model was mainly implemented in the Irish legal system by transposing Article 13(4) of Directive 2006/123/EC into national legislation, which states that failing a response within the time period set or extended, authorisation shall be deemed to have been granted. This has been implemented into the Irish legal system through the implementation of section 18(5) of the European Union (Provision of Services) Regulations 2010. The purpose of this regulation is mainly related to providing administrative ease for the development of public services, as well as simplifying and modernising public administration.

2. **Are there any prohibitions or restrictions on the application of the positive model in certain areas of law in your legal system?**

   The Irish legal system does not contain any specific prohibitions or restrictions on the application of the positive model.

3. **When (a specific moment or particular circumstances) is the person's claim deemed to have been granted?**

   As implemented by section 18(5) of the European Union (Provision of Services) Regulations 2010 transposing Article 13(4) of Directive 2006/123/EC, it shall be considered that an authorisation has been issued by tacit approval if the competent authority does not take and does not notify its decision regarding the granting of authorisation or the refusal to grant it within the time period specified in the legislation. This means that a person's claim is deemed to have been granted immediately after the expiry of the time limit.

4. **Does the person have to get any kind of confirmation or proof that the claim has been granted? Where and within what time limit does it need to be received?**

   Yes, generally national legislation provides that a person has a legal right to receive confirmation or proof that the claim has been granted. confirmation is provided to the applicant, usually through communication procedures set out by legislation or procedural official documents (circulars, policies etc). For example, in relation to an application for a freedom of information request, section 13(1) of the Freedom of Information Act 2014:

   > "Subject to this Act, a head shall, as soon as may be, but not later than 4 weeks, after the receipt of an FOI request—
   >
   > (a) decide whether to grant or refuse to grant the request or to grant it in part,
   >
   > (b) if he or she decides to grant the request, whether wholly or in part, determine the form and manner in which the right of access will be exercised, and
   >
   > (c) **cause notice, in writing or in such other form as may be determined, of the decision and determination to be given to the requester concerned"** [emphasis added].

As regards the implementation of the positive silence model, no confirmation or proof is required as the legislative requirement is that a claim is deemed to have been granted, after the legislative time limit has expired.

5. **Are there any legal remedies available to third parties affected by the "fictitious decision" of granting a claim, if necessary?**

National legislation does not provide for specific legal remedies available to third parties affected by the "fictitious decision" of granting a claim. 'Fictitious decision' is not a legal concept recognised in the Irish legal system. Applicants in receipt of a negative decision often have a right of appeal, depending on the service and the legislation governing that service. In the final instance, applicants in receipt of a negative decision can avail of a judicial review remedy.

6. **Is there a certain procedure that allows to annul a "fictitious decision" of granting a claim? If yes, are there any differences from the general procedure?**

There are no procedures in the Irish legal system that allows to annul a "fictitious decision" of granting a claim. 'Fictitious decision' is not a legal concept recognised in the Irish legal system. Applicants in receipt of a negative decision may make an application for judicial review to the High Court if the decision reached is unreasonable. In the final instance, applicants in receipt of a negative decision can avail of a judicial review remedy.

7. **Please describe the implementation of the positive silence model provided for in Article 13(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market in your legal system. In which legal areas has it been implemented? Have there been any difficulties in its' implementation?**

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services (Bolkenstein Directive) has been transposed into the Irish legal system through the implementation of the European Union (Provision of Services) Regulations 2010. In particular, Article 13(4) of Directive 2006/123/EC has been transposed through section 18 of the European Union (Provision of Services) Regulations 2010 as follows:

> "(1) Every competent authority in the State responsible for administering an authorisation scheme shall ensure that—

(a) the procedures and formalities under the scheme provide applicants for an authorisation with an assurance that their applications will be processed as quickly as possible and, in any case, within a reasonable period that is fixed and publicly notified in advance, and

(b) if in a particular case an extension is made under paragraph (4) to the period referred to in subparagraph (*a*), that extension is notified to the applicant before the period referred to in that subparagraph has expired.

(2) For the purposes of paragraph (1)(*a*), a period that exceeds 60 days is not reasonable.

(3) The period referred to in paragraph (1) does not begin to run until an applicant for an authorisation has complied with all requirements of the competent authority in the State relating to the production of documents.

(4) If justified by the complexity of the matter, a competent authority in the State may, before the end of the period referred to in paragraph (1)(*a*), extend that period once for a further period not exceeding 28 days, and if it does so, it shall notify the applicant concerned in writing of that extension and the period of the extension giving reasons for the extension to the applicant before the period referred to in paragraph (1)(*a*) has expired.

(5) Subject to paragraph (7), if a competent authority in the State fails to determine an application within the decision period the application is taken to have been granted at the end of the decision period.

(6) For the purposes of paragraph (5), the decision period for an application is the period that is made up of—

(a) the publicly notified period referred to in paragraph (1)(*a*) in relation to the application, and

(b) if the competent authority concerned has extended that period in relation to the application under paragraph (4), the period of that extension.

(7) A competent authority in the State may put different arrangements in place that are justified by overriding reasons relating to the public interest (including the legitimate interest of third parties) and where such arrangements are in place, paragraph (5) shall not apply."

Section 18(5) of the European Union (Provision of Services) Regulations 2010 implements the concept of positive silence into the Irish legal system as relating to authorisation schemes:

"… if a competent authority in the **State fails to determine an application** within the decision period **the application is taken to have been granted at the end of the decision period"** [emphasis added].

OTHER LEGAL REMEDIES

1. **What legal remedies exist in your legal system in situations of administrative silence where the law does not regulate the administrative silence neither in accordance with the positive, nor the negative model?**

   As mentioned above, administrative proceedings in the Irish courts are based on a procedure of judicial review whereby a party may challenge the validity of an administrative act of a public body.

2. **Is a person entitled to claim a compensation for financial loss or non-financial damage which has been caused as a result of the administrative silence of the authority?**

   No, a person is not entitled to claim a compensation for financial loss or non-financial damage which has been caused as a result of administrative silence of the authority. However, a person may be entitled to an award of damages or costs as a result of a judicial court order.

CASE LAW AND REGULATION IN NON-HARMONISED SECTORS OF LAW

1. **Do you have any case-law where national regulation on administrative silence has been found unfounded or inapplicable in a particular case?**

   No, there does not appear to be such a case-law in Ireland.

2. **Do you have any case law on the application or interpretation of the positive model provided for in Article 13(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market? If so, please describe the substance of the most relevant cases.**

   No, there does not appear to be such a case-law in Ireland.

3. **Have you submitted a question to the Court of Justice of the European Union in order for it to make a preliminary ruling in a case concerning national regulation on administrative silence? Briefly describe the request and the substance of the judgment.**

No, Ireland does not appear to have submitted such a question to the Court of Justice of the European Union.

4. **Briefly describe the national regulation on administrative silence in the following legal areas:**

4.1. Construction, spatial development planning and environmental protection

There are a number of national legislations in this area, but none explicitly regulates administrative silence. Instead, the positive silence model can be found in some legislation. For example, section 97(10) of the Planning and Development Act provides:

"**Where a planning authority fails within the period of 4 weeks** from—

(a) the making of an application to it under this section, or

(b) (in the case of a requirement under subsection (6)) the date of receipt by it of any information or documentation to which the requirement relates,

to grant, or refuse to grant a certificate, the planning authority shall on the expiry of that period be deemed to have granted a certificate to the applicant concerned" [emphasis added],

4.2. Social security

There are a number of national legislations in this area, but none that explicitly regulates administrative silence.

4.3. Freedom of information

The Freedom of Information Act 2014 regulates this area, but there is no explicit legislation regulating administrative silence. Instead, both the positive and negative silence models can be found in the 2014 Act.

In particular, section 19(1) and (3) of the 2014 Act provides for a negative silence model, where failure by the authority to provide a decision within the specified time limit will be deemed a refusal, whilst section 19(2) provides for a positive model, where notice of a decision is not given to the person who made the application before the expiration of the period specified, a

decision affirming the decision to which the application relates shall be deemed.

ADMINISTRATIVE DISCRETIONARY POWER

1. **How is administrative discretionary power defined in your legal system?**

Administrative discretion is not a legal concept explicitly defined in the Irish legal system, though it is the most common form of administrative method used in decision-making.

Generally understood, administrative discretion is the power of a public authority to make a decision that cannot be determined as right or wrong in any objective way. Owing to the separation of powers established by the Irish constitution, decisions made by the executive arm of the State are rarely scrutinised by the courts, except where questions of legality and constitutionality arise with the decision in question. To this effect, in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701, the Irish Supreme Court noted:

> "… that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied, on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense."[1]

The legislature has full power, subject to the constitutional limits explained in *Cityview Press Ltd. v. An Comhairle Oiliúna* [1980] I.R. 381, to delegate tasks to administrative bodies, which involve the making of administrative decisions. Most government and public bodies' functions and roles involve the exercise of discretion. These bodies are commonly given broad powers and responsibilities that are exercised through administrative discretion. The legislative basis is usually worded in a manner that bestows discretion, such as "at his discretion" or "as he shall think proper" or "if he so thinks fit". This discretion is then cascaded down to all government agencies within the Minister's department who in turn exercise their discretion in making an executive decision.

[1] *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R 701, para. 71

2. **Does your legal system distinguish between discretion (*deutsch – Ermessen*) and margin of appreciation (scope of appraisal) in the interpretation of undefined legal concepts (*deutsch – Beurteilungsspielraum*)?**

   No such distinction is made between discretion and margin of appreciation, though the courts have provided administrators with a margin of appreciation in giving effect to their administrative discretion when dealing with applications of Human Right concerns. The Court have noted that "In having regard to the degree of discretion, (*sic*) a margin of appreciation should be allowed to the decision-maker in choosing an effective means of fulfilling any legitimate policy objectives".[2]

   In *Connelly v. an Bord Pleanála* [2018] IESC 31, [2021] 2 I.R. 752, the Supreme Court noted:

   > "Decision makers are normally afforded a significant margin of appreciation within the parameters of the legal framework within which a particular decision has to be taken. Courts will not second guess sustainable conclusions of fact. As noted earlier, many decisions involve the exercise of a broad judgment and here again the courts will not second guess the decision maker on whom the law has conferred the power to make the decision in question."[3]

   Accordingly, whilst no explicit distinction is made in law between discretion and a margin of appreciation, the courts will bestow upon an administrator a margin of appreciation in giving effect to his/her discretion in making a decision that may affect the Human Rights of the applicant or of relevant parties.

3. **What are the characteristics, criteria or methods used in your legal system to determine whether an authority has discretionary power in a particular case? Provide the most typical examples of case law where the discretionary power has been recognised.**
   If your legal system distinguishes between discretion and margin of appreciation, please describe both.

   Government agencies and public authorities derive their discretionary powers from legislation. An example can be found in the area of immigration law wherein the Minister, under section 5 of the Refugee Act

[2] *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R 701.
[3] *Connelly v. an Bord Pleanála* [2018] IESC 31, [2021] 2 I.R 752, para. 10.2.

1996, "[…] may, at his or her discretion, grant permission in writing to a person".

Some examples from case law where discretionary power has been recognised include *Pok Sun Shum v. Ireland* [1986] ILRM 593; *A.J.A. v. Minister for Justice and Equality* [2022] IEHC 624; *Mallak v. Minister for Justice Equality and Law Reform* [2012] IESC 59, [2012] 3 I.R 29

4. **Is there a limit of judicial review of use of discretionary power by the authority in your legal system? If so, please explain possibilities of court examination and assessment in such a case?**
If your legal system distinguishes between discretion and margin of appreciation, please describe both.

There are limits placed on the use of judicial review as a legal remedy to decisions made by public authorities using their discretionary powers. In a judicial review, generally the court is not concerned with the merits of the decision but rather with the lawfulness of the decision-making process. This includes reviewing how the decision was made and the fairness of it.

In Ireland, there are two types of judicial review:

- **Conventional judicial review**: Procedure governing conventional judicial review is set out in Order 84 of the Rules of the Superior Courts.
- **Statutory judicial review**: Some legislation sets out rules about how statutory reviews of decisions made under the legislation should be governed. Statutory schemes apply to such areas as asylum, pollution control, planning and the takeover of companies.

5. **Is judicial review affected by the fact that the discretionary power used by the authority has resulted in a restriction of human rights? Is the intensity of judicial review in such a case different from that in the case of no administrative discretion?**

Whilst judicial review is not in itself a remedy to review the discretionary powers of a public authority, but rather of the decision (-making process) emanating from the use of that power, such powers are reviewable in circumstances where the Human Rights of an aggrieved person are concerned.

Judicial review is concerned with the Courts exercising their constitutional duty to ensure that powers, governmental and administrative, are exercised within the law and the Constitution and in a manner consistent

with the rights of individuals affected by them: "Where fundamental human rights are at stake, the courts may and will subject administrative decisions to particularly careful and thorough review".[4]

The courts have often repeated that the Minister, public bodies and agents, must act judicially in the exercise of their discretion,[5] and exercise his or her discretion in accordance with notions of fair procedures and constitutional justice.[6] Where an aggrieved applicant is of the opinion that the public authority has not acted in accordance with constitutional justice (which includes notions of natural justice, fair procedures, fundamental rights, human rights etc) in the exercise of his/her discretion when making a decision, the aggrieved party is entitled to apply to the courts for a remedy.[7]

In *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701, the Supreme Court noted:

> "When the decision being reviewed involves fundamental rights and freedoms, the reviewing court should bear in mind the principles of the Constitution of Ireland, 1937, the European Convention on Human Rights Act, 2003, and the rule of law, while applying the principles of judicial review. This includes analysing the reasonableness of a decision in light of fundamental constitutional principles. Where fundamental rights and freedoms are factors in a review, they are relevant in analysing the reasonableness of a decision. This is inherent in the test of whether a decision is reasonable.[8]

[4] *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701
[5] *LGH v. Minister for Justice, Equality and Law Reform* [2009] IEHC 78.
[6] *East Donegal Co-Operative v. Attorney General* [1970] I.R. 317, 341.
[7] *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 52, [2012] 3 I.R. 297; *Hussain v. Minister for Justice and Equality* [2013] 3 I.R. 257.
[8] *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701, paras. 133-134