COURTS, PUBLIC INTEREST LITIGATION, AND HOMELESSNESS: A COMMENTARY ON RECENT CASE LAW

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INTRODUCTION

This article examines a series of relatively recent High Court judgments concerning local authorities and their statutory responsibilities toward those who are homeless. The cases concerned are *Middleton v Carlow County Council*,[2] *Tee v Wicklow County Council*[3] and *C v Galway County Council*.[4] When considered together, these judgments demonstrate several notable trends of importance to scholars and practitioners of administrative and constitutional law. First, they strongly suggest several judges of the High Court have adopted the position that there is no implied constitutional right to adequate shelter for adults or children in Irish law. In doing so, the High Court did not engage with earlier Supreme Court dicta suggesting that, in appropriate instances, vindicating constitutional rights to bodily integrity may effectively convert a local authority's statutory discretion to provide housing into a mandatory duty. Second, they highlight that the highly deferential rationality standard of review for administrative discretion is alive and well, even when the interests and rights of vulnerable persons are engaged. Third, these cases vividly encapsulate some of the risks of public interest litigation. In these instances, they cumulatively helped transform a potentially constructive legally ambiguous situation, into one with several clear pro-respondent precedents.

Public interest litigation can thus have *perverse* consequences, meaning an action actually produces a state of affairs contrary to what was intended. Here, an attempt by the applicants to gain judicial

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[2] [2017] IEHC 528.
[3] [2017] IEHC 623.
[4] [2017] IEHC 784.

recognition that local authorities must use their statutory discretion in a manner which vindicates constitutional and ECHR rights, ended up producing a state of affairs that resulted in *expanded* local authority discretion and arguably less regard for these rights. Part I of this article provides an outline of the relevant cases. Part II offers a critical commentary of the judgments and discusses their significance. Part III concludes.

PART I – OUTLINE OF CASES

Middleton v Carlow County Council[5] concerned a challenge by a woman and her young son to a local authority determination that they were not homeless for the purposes of s 2 of the Housing Act 1988 **('1988 Act')** and thus not entitled to emergency accommodation support. The applicants argued they met the definition of being homeless as provided for in the Act and were thus eligible for emergency accommodation support pursuant to s 10 of same. In other words, they had no reasonable alternative accommodation to avail of and could not provide any through their own means. The applicants had been living in a tent for a period and their situation attracted some media attention.[6] Counsel for the Respondent, in turn, argued the applicants were not homeless as the local authority had formed the opinion that they could be reasonably expected to avail of alternative accommodation: in this case, the homes of their immediate family members.

In rejecting the applicants' arguments, the High Court emphasised the need for deference when reviewing decisions of the local authority concerning determinations of homelessness. Noting that ss 2 and 10 of the 1988 Act provided the respondent local authority statutory discretion on the question of determining whether an applicant is homeless, the Court emphasised its own role was

[5] [2017] IEHC 528.
[6] Jack Power, 'Homeless mother stays in tent outside Carlow council offices' (Irish Times, 15th June 2017) <https://www.irishtimes.com/news/ireland/irish-news/homeless-mother-stays-in-tent-outside-carlow-council-offices-1.3121490.>

limited.[7] The Court decided the appropriate standard of review for administrative decisions of the local authority was that in *O'Keeffe v An Bord Pleanala*,[8] under which decisions of a statutory body will not be quashed unless they are 'fundamentally at variance with reason and common sense', 'indefensible for being in the teeth of plain reason' or have 'flagrantly' disregarded common sense.[9] Adopting this standard meant that the Court's jurisdiction was self-limited to reviewing whether there was a rational basis for the decision of the respondent.[10] Deploying this standard, the Court consequently held the respondent's determination the applicants were not homeless because they could rely on family and friends for alternative accommodation support was not fundamentally irrational – despite the applicant's strenuous insistence that she could not do so. Given that the *O'Keeffe* test is the most deferential standard of review employed the courts, it is not surprising the respondent's decision was upheld. After all, all that is required is *some* material to plausibly undergird the Council's determination. This case effectively boiled down to each party speculating as to whether the applicant could reasonably rely on an interpersonal network of family and friends for alternative accommodation. It was not difficult in this situation for the respondent to suggest that as a matter of common sense it is not *wholly irrational* to expect an individual to be able to reside with members of their immediate family, absent evidence of irrevocable family breakdown. With a relaxed standard of review like *O'Keeffe*, a court was unlikely to second-guess the rationality of this determination, given that it was more or less discretion anchored on a clash of speculation.

Tee v Wicklow County Council concerned a judicial review taken by a Malaysian woman and her 14-year-old Irish citizen daughter against a decision of Wicklow County Council to refuse the applicants emergency accommodation. The first applicant travelled with her daughter from Malaysia to Ireland in 2016. The applicants lived in bed-and-breakfast accommodation after they

[7] [2017] IEHC 528, para 43.
[8] [1993] 1 IR 39.
[9] [2017] IEHC 528, para 40.
[10] [2017] IEHC 528, para 43.

were unsuccessful in securing private rented accommodation. The applicants' funds began to run out in February 2017 and shortly thereafter they resorted to sleeping in a rented car for about seventeen days. They eventually came to the notice of An Garda Síochána, who put them in touch with a woman's refuge After that, the applicants were accommodated by a variety of NGOs and charitable institutions, and occasionally slept in garda stations.[11] The applicant's application for emergency accommodation was refused by Wicklow County Council on the basis that they could access reasonable alternative accommodation with the first applicant's mother in Malaysia. The Council effectively concluded the applicants were not homeless because they had a home, albeit not in this jurisdiction. The applicants argued the Council failed to vindicate their rights under Articles 40.1, 40.3 and 42A of the Constitution and Articles 3, 8 and 14 of the European Convention of Human Rights (**'ECHR'**) as incorporated into Irish law by the European Convention of Human Rights Act 2003. The applicants argued the failure arose from the respondent not taking sufficient cognisance of the increased risk posed to the applicants by rough sleeping and, in particular, the risks to the child applicant when considering whether they were entitled to emergency housing support.[12]

In rejecting their challenge, the Court in *Tee* also applied the *O'Keeffe* standard when assessing the exercise of statutory discretion of the respondent. Noonan J noted that s 2 of the Housing Act 1988 requires a housing authority to form a discretionary statutory opinion in respect of two criteria: whether an applicant has no accommodation available to him, and whether an applicant is unable to provide such accommodation from his own resources.[13] Noonan J considered that the Court's view of these questions, and as to what may or may not render a person homeless, was entirely irrelevant.[14] Noonan J held the statutory discretion of the Council in forming an opinion

[11] [2017] IEHC 528, para 5.
[12] [2017] IEHC 528, para 21.
[13] [2017] IEHC 623, para 17.
[14] [2017] IEHC 623, para 24.

on these matters could only be displaced where it was employed in an arbitrary or capricious manner, or in a manner that flies in the face of fundamental reason and common sense.[15] Employing this relaxed standard, the Court held that the respondent's determination the applicants were not homeless because they could access alternative accommodation in Malaysia was not at variance with fundamental reason.[16] The Court added two additional reasons for adopting a deferential approach to reviewing the discretion of local authorities. First, Noonan J cited the ostensible technocratic competence of local authority officials, suggesting that due to their proximity to tackling issues stemming from the homeless crisis on a daily basis they enjoyed significant expertise the Court lacked.[17] Second, the Court emphasised it had no function to perform in cases involving the allocation of resources by public bodies facing competing claims on those resources.[18]

A similarly deferential approach was adopted by the High Court in *C v Galway County Council*,[19] which concerned a lone-parent applicant and her five young children. The applicants were from the Traveller community. One of the applicants had autism and other severe intellectual disabilities and required specialist medical treatment five days a week.[20] Two of the other applicant children had milder forms of intellectual difficulty.[21] The applicants became homeless in 2017 after being evicted from private rented accommodation and were provided with emergency accommodation.[22] The applicants were eventually offered transitional accommodation, but this was refused by the first applicant on the basis it was unsuitable for her children's needs. The first applicant maintained that the location meant her applicant child with severe mental disabilities would not be able to

[15] [2017] IEHC 623, para 24.
[16] [2017] IEHC 623, para 24.
[17] [2017] IEHC 623, para 25.
[18] [2017] IEHC 623, para 25.
[19] [2017] IEHC 784.
[20] [2017] IEHC 784, para 8.
[21] [2017] IEHC 784, para 8.
[22] [2017] IEHC 784, para 7.

attend treatment on a five-day-per-week basis.[23] The first applicant additionally stated that the offer was unsuitable as she would have to drive approximately 100 miles per day to accommodate the children in their schools in Galway if the family were to move.[24] Following this refusal, the Council withdrew emergency accommodation from the applicants on the basis they had reasonable alternative accommodation they could avail of, but were deliberately choosing not to. In the view of the local authority, the offer of transitional accommodation ensured they were simply no longer homeless. The applicants argued the Council's withdrawal of emergency accommodation would leave them roofless and constituted a disproportionate decision which breached the applicants' constitutional rights under Articles 40.1, 40.3, 42, and 42A as well as Article 8 of the ECHR, particularly due to the fact that most applicants were vulnerable children.[25]

The High Court accepted that the respondent authority had an obligation to have regard to the applicants' right to 'equality before the law, personal rights, the best interest of the children, a right to education, and the right to private life and family life'.[26] But, having noted this, the Court proceeded to reject the application for certiorari on the basis the Council's decision was neither irrational nor in breach of the applicants' rights. The Court was satisfied the local authority had made an offer of reasonable accommodation to the applicants, one which took into account their needs. Notwithstanding the first applicant's serious concerns over its adequacy for her children, the Court considered the respondent authority was 'doing the best within its resources to balance and facilitate the needs identified by the various applicants to the best of its ability'.[27]

[23] The respondent countered that the premises offered was the only four-bedroom dwelling available within the respondent housing stock proximate to Galway, that it does not have housing stock within Galway City, that in offering the property in T to the applicants they were in fact prioritised and the respondent had communicated with Galway Simon to ensure that all appropriate supports for the family would be made available in T including, for example, the two- to three-day placement for the sixth named applicant in a facility similar to the facility which was available to him in Galway for a five-day period. [2017] IEHC 784, para 17.
[24] [2017] IEHC 784, para 16.
[25] [2017] IEHC 784, para 2.
[26] [2017] IEHC 784, para18.
[27] [2017] IEHC 784, para 22.

Although O'Regan J cited *Meadows* as the applicable test[28] for reviewing the statutory discretion of the local authority, the Court's distinct lack of proportionality analysis and its reference to the respondent's decision not being 'irrational or unlawful in any manner so as to secure an order of certiorari' suggests the Court substantively applied a rationality standard.[29] Proportionality analysis would have demanded more scrutiny of the potential effects of the decision to withdraw emergency housing on the acknowledged constitutional and ECHR rights of the applicants. It would have also encompassed closer consideration of whether the offer of transitional accommodation *really was reasonable* in light of the acute needs of some of the applicants, which were stressed by their first applicant mother.[30] However, a thin rationality standard demands much less than this. All that is required to meet this threshold is some evidence to plausibly sustain the respondent's determination. Withdrawing emergency accommodation due to the applicant's refusal of transitional accommodation arising from bona fide concerns of its special-needs incompatibility could well be disproportionate, but it is much more difficult to sustain the argument it is *wholly irrational*. The conclusion the Court substantively applied a rationality test is also bolstered by the Court's observation it should be slow to interfere with the decision of expert administrative tribunal[31] – implying the local authority was an expert body warranting *O'Keeffe* deference.[32]

[28] [2017] IEHC 784, para 19.
[29] [2017] IEHC 784, para 24.
[30] In *Meadows v Minister for Justice* [2010] 2 IR 701, 753, Denham J held that 'when a decision maker makes a decision which affects rights then, on reviewing the reasonableness of the decision:– (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective'.
[31] The Court cited the Supreme Court judgment in *Henry Denny & Sons (Ireland) Ltd v Minister for Justice Social Welfare* [1998] 1 IR 34 where Hamilton CJ held that 'the courts should be slow to interfere with the decision of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact… such conclusions must be corrected.'
[32] [2017] IEHC 784, para 17.

PART II – COMMENTARY

These judgments display a number of trends of importance to scholars and practitioners of administrative and constitutional law.

A. No Constitutional Right to Shelter for Homeless Adults or Children

The potential adverse impact of being homeless or residing in inadequate shelter on an individual's mental and physical integrity is severe. It is therefore unsurprising scholars have explored whether the Constitution provides a vista through which to imply a right to shelter in appropriate circumstances, because of the intimate relation of shelter to safeguarding basic physical and mental integrity protected via Article 40.3.[33]

The jurisprudence of the Keane CJ Supreme Court in the early 2000s undoubtedly placed significant obstacles in the path of doing so, due to strong *obiter dicta* statements against implying a right to shelter through the Constitution. In *TD v Minister for Education*,[34] some members of the Supreme Court were unequivocal:

> With the exception of Article 42 of the Constitution, under the heading 'Education', there are no express provisions therein cognisable by the courts which impose an express obligation on the State to provide accommodation, medical treatment, welfare or any other form of socio economic benefit for any of its citizens however needy or deserving.[35]

Murphy J added that the right to bodily integrity established in *Ryan* did not 'suggest the existence of any general right in the citizen to receive, or an obligation on the state to provide, medical and

[33] See Conor Casey and Daire McCormack-George, 'An Analysis of the Right to Shelter in Irish Law for Children and Adults' (2015) 54 Irish Jurist 131–54.
[34] [2001] IESC 101; [2001] 4 IR 259.
[35] [2001] IESC 101; [2001] 4 IR 259, 316.

social services as a constitutional obligation'.[36] For some commentators, the approach adopted by the Supreme Court some years later in *In re Article 26 and the Health (Amendment) (No 2) Bill 2004*[37] to arguments based on the existence of implied socio-economic rights, held out the slight prospect of some recognition of a constitutional right to shelter in exceptional circumstances.[38] In that case, the Court appeared to hold open the possibility that particularly vulnerable citizens might enjoy an implied socio-economic right to care and maintenance, including shelter, stating:

> In a discrete case in particular circumstances an issue may well arise as to the extent to which the normal discretion of the Oireachtas in the distribution or spending of public monies could be constrained by a constitutional obligation to provide shelter and maintenance for those with exceptional needs.[39]

The 2015 Supreme Court decision of *O'Donnell v South Dublin County Council*[40] has also been highlighted as another slight shift from the Court's earlier stance against any implied constitutional recognition for a right to shelter. In *O'Donnell,* the plaintiff was living in overcrowded accommodation unfit for human habitation. The plaintiff's disabilities ensured she had a medical requirement for separate accommodation, but her family was unable to meet the cost of the accommodation or to obtain other suitable shelter for her. McMenamin J, for a unanimous Supreme Court, stated that the statutory discretion of South Dublin County Council to provide housing to those unable to provide their own had to be exercised in light of constitutionally protected rights and values and the exceptional circumstances of deprivation in the case.[41] The Supreme Court accepted that the plaintiff was subjected to inhuman and degrading

[36] [2001] IESC 101; [2001] 4 IR 259, 316.
[37] [2005] IESC 7; [2005] 1 IR 105.
[38] Conor Casey and Daire McCormack-George, 'An Analysis of the Right to Shelter in Irish Law for Children and Adults' (2015) 54 Irish Jurist 131–54; Eoin O'Dell and Gerry Whyte, 'Is this a Country for Old Men and Women? In re Article 26 and the Health (Amendment) (No 2) Bill 2004' (2005) 27 Dublin University Law Journal 368, 371.
[39] [2015] IESC 28.
[40] [2015] IESC 28.
[41] Which were known to the local authorities for a number of years. [2015] IESC 28, para 71.

accommodation conditions, which compromised her rights to autonomy, bodily integrity and privacy under Article 40.3. The Court noted that the housing authority, 'when faced with clear evidence of inhuman and degrading conditions, [had] to ensure it carried out its statutory duty' under the Housing Acts in a manner which respected the plaintiffs' constitutional rights.[42] The authority's discretionary powers under the Housing Act 1988 could have, noted McMenamin J, been exercised and executed with the aim of respecting these constitutional rights by making offers of financial assistance, having repairs carried out and/or lending a second caravan so as to make temporary accommodation space for the plaintiff and her needs. The Supreme Court held that if discretionary statutory powers are:

> given to assist in the realisation of constitutionally protected rights or values, and if powers are given to relieve from the effects of deprivation of such constitutionally protected rights, and if there are no reasons, constitutional or otherwise, why such statutory powers should not be exercised, then I think such powers may be seen as being mandatory.[43]

The Court thus awarded the plaintiff modest damages for the breach of the respondent's duties toward her. *Contra* to the dicta of Murphy J in *TD*, then, *O'Donnell* suggests the right to bodily integrity and the person protected by Article 40.3 could, in certain circumstances, require for its vindication the positive provision of care and maintenance, including a right to adequate shelter. Despite the prima facie relevance of *O'Donnell* to these cases, the High Court in the above cases did not engage with the Supreme Court judgment or its potential scope. For the most part, the High Court avoided facing the question squarely, either expressly reserving its position on whether a right to shelter existed, as in *Tee*, or hinting that the courts should be reluctant to recognise any implied constitutional rights with a socio-economic tinge, as in *C*.[44] That the High Court does not

[42] [2015] IESC 28, para 74.
[43] [2015] IESC 28.
[44] [2017] IEHC 784, para 17.

recognise an implied constitutional right to shelter is further bolstered by *obiter* comments from Barrett J in two 2017 High Court cases. In *Duniyva v Residential Tenancies Board*[45] Barrett J accepted that there was no express nor implied constitutional right to shelter, but suggested:

> [T]hat is not to say that some qualified, un-enumerated (and as yet unrecognised) constitutional right to accommodation/housing might not at some future point be found by a court to exist as a matter of Irish law.[46]

In another case shortly after, Barrett J again revisited the potential for an implied right to shelter in *EBS v Kenehan*.[47] In *EBS*, Barrett J similarly noted that:

> There is no express right to housing in Irish law; but that is not to say that a qualified, as yet unrecognised, un-enumerated right pertaining to housing may not at some point be recognised by the courts as existing in and under the Constitution.[48]

In both instances, Barrett J's comments, as with the High Court judgments examined here, adopt the premise there is no extant implied right to shelter in Irish law. The question of whether, and if so to what extent, the Constitution protects a right to shelter remains to be definitively decided by the Supreme Court.

The three judgments also highlight that, in the eyes of the High Court, the insertion of Article 42A into the Constitution does not provide for implied constitutional protection of a right to shelter

[45] *Duniyva v Residential Tenancies Board* [2017] IEHC 578.
[46] *Duniyva v Residential Tenancies Board* [2017] IEHC 578.
[47] *EBS v Kenehan* [2017] IEHC 604.
[48] *EBS v Kenehan* [2017] IEHC 604, para 13. For an overview and critique of the reasoning in these cases see James Rooney, 'International Human Rights as a Source of Unenumerated Rights: Lessons from the Natural Law' (2018) 41(2) Dublin University Law Journal.

for homeless children. In these cases, the applicants argued *inter alia* that Article 42A required local authorities to exercise their statutory discretion in a manner consistent with the constitutional rights and best interests of the child. These claims were unsuccessful, and on each occasion the Court simply did not engage in any detail with arguments made in respect of the applicants' rights under 42A, despite the potentially clear adverse impact of homelessness on the well-being of the applicants' children in each case. While the courts have not definitively ruled on whether Article 42A may provide any additional legal protection for homeless children, including a right to basic adequate shelter, the court's refusal to engage with the amendment ensures that thus far Article 42A has had precisely nil impact in this area.[49] This result appears consistent with other cases where the judiciary have been reluctant to apply Article 42A beyond the bounds of family law proceedings. For example, the courts have held that the best interests requirement in Article 42A does not apply to administrative decisions concerning immigration statutes.[50]

B. The Endurance of the *O'Keeffe* Rationality Standard

Judicial articulation of administrative standards has always involved a difficult mediation between pluralist normative goals. Judges seek to juggle many of the same competing goods the administrative state apparatus seeks to balance and optimise through its work: technocratic competence, institutional energy, legality, and democratic accountability.[51] Ensuring pursuit of one goal does not excessively harm another, puts judges in an awkward position when reviewing administrative discretion. On the one hand, judges will strive to ensure administrative power is not exercised insufficiently cognizant, or directly contrary, to fundamental rights and values. On the

[49] For a critique that the Article 42A amendment was never going to substantively alter judicial doctrine but was more of a symbolic gesture pursued by political elites and interest groups see Oran Doyle and David Kenny, 'Constitutional Change and Interest Group Politics: Ireland's Children's Rights Referendum' in Richard Albert, Xenephon Contiades and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017).

[50] *Dos Santos v Minister for Justice and Equality* [2015] IECA 210, [2015] 2 ILRM 483 per Finlay Geoghegan J at para 18.

[51] For excellent theoretical accounts of these pluralist goals see Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press 1983); Robert Baldwin, *Rules and Government* (Clarendon Press 1995) 41–46; Daniel Halberstam, 'The Promise of Comparative Administrative Law: A Constitutional Perspective on Independent Agencies' in Susan Rose-Ackerman and Peter Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2010); Jon D Michaels, 'An Enduring, Evolving Separation of Powers' (2015) 115 Columbia Law Review 515, 553; Adrian Vermeule, 'Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State' (2017) 130 Harvard Law Review 2463, 2464.

other hand, judges recognise that administrative bodies pursue invaluable social and political objectives of great importance to the lives of citizens and policy goals of government. Judges are aware these objectives would be frustrated if excessively choked and obstructed by generalist judges. Judges who tend to have little expertise over the complex and epistemically uncertain issues they review, outside the narrow snapshots they receive into them through litigation and affidavits.[52]

In attempting to reconcile these competing goals, Irish courts have long been reluctant to subject exercises of administrative power by ministers or administrative bodies to intense scrutiny. Nor have they been content to take an entirely 'hands-off' approach. Instead, the basic approach of the courts is broadly, but not boundlessly, facilitative of administrative action, being rooted in an amorphous 'reasonableness' standard of review. In *State (Keegan) v The Stardust Victims Compensation Tribunal*[53] Henchy J articulated a standard of review for administrative action broadly consonant with the test outlined by the UK courts in *Associated Provincial Picture House Ltd v Wednesbury Corporation*.[54] For the Supreme Court, the necessarily implied statutory limitation of administrative power – one stemming from the Constitution – is that a decision may not 'plainly and unambiguously flies in the face of fundamental reason and common sense'.[55] This amorphous standard gives wide scope for administrative action, subject to judicial policing at the margins.

Two additional questions impact how the courts apply this general 'reasonableness' standard of review: deference and fundamental rights. The first acts to depress the standard of review, the second to increase its intensity. Where administrative discretion engages fundamental rights under the Irish Constitution, ECHR, or Charter of Fundamental Rights of the European Union ('**Charter**'), courts in recent years have augmented their standard of review to more closely

[52] Gerard Hogan and David Gwynn Morgan, *Administrative Law* (4th edn, Roundhall 2012) 492.
[53] [1986] IR 642, 658.
[54] [1948] 1 KB. 223, 230.
[55] [1986] IR 642, 658.

examine the substantive content of a decision.[56] These developments were spurred by judicial concern that standards of review anchored on irrationality or reasonableness provided an insufficient remedy to vindicate constitutional, ECHR, and charter requirements – because they only policed the outer margins of administrative action even if it negatively impacted such rights.[57] The Supreme Court's decision in *Meadows v Minister for Justice*[58] infused the *Keegan* reasonableness test for review of administrative decisions with an element of proportionality analysis. There is deep doctrinal uncertainty about what role proportionality plays: whether it is a free-standing standard of review or an analytical tool serving as a strong indicator of reasonableness.[59] For the moment, the judicial position appears closer to the latter position – that proportionality is impressionistic.[60] That is, rather than constituting a separate head of review, it serves as a useful heuristic for whether a decision is unreasonable. Put another way, a decision that is disproportionate in the context of fundamental rights will typically be found to be unreasonable and beyond the boundaries of constitutionally permissible administrative action.

Conversely, Irish courts typically afford deference to a decision made at first instance in several instances. For example, if a decision-maker can invoke superior institutional legitimacy over it via democratic credentials – for example, because it is made by a minister answerable to the Dáil for their actions. This deference is based on a reluctance to second-guess democratically accountable actors when it comes to resolving difficult questions concerning sensitive economic, social, and political questions concerning the common good.[61] Courts also defer where they are reviewing the

[56] *Clinton v An Bord Pleanála (No 2)* [2007] IESC 19, [2007] 4 IR 701, 741; *ISOF v Minister for Justice* [2010] IEHC 457.
[57] *Efe v Minister for Justice* [2011] IEHC 214.
[58] [2010] 2 IR 701.
[59] For an outline of the doctrinal debate see Hilary Biehler and Catherine Donnelly, 'Proportionality in the Irish Courts: The Need for Guidance' (2014) 3 European Human Rights Law Review 272–83.
[60] See *Donegan v Dublin City Council* [2012] 3 IR 600; *Dun Laoghaire Rathdown County Council v West Wood Club Limited* [2019] IESC 43; *Hughes v Irish Blood Transfusion Service* [2019] IEHC 439.
[61] *Garda Representative Association v Minister for Finance* [2010] IEHC 78, para 22, Charleton J: 'The further a decision operates within the boundary of political choice, the more care the court should exercise in interfering with a discretion granted by statute.' See also *Quinn v Financial Services Ombudsman* [2016] IEHC 453.

work of a body possessed of expertise or technical skill.[62] The reason for deference being that courts have a pragmatic appreciation that it may be difficult for generalist judges to competently comprehend, let alone second-guess the judgment of, administrative bodies whose work grapples with complex or epistemically uncertain policy issues which demand technocratic expertise. This kind of deference is typified in the thin irrationality test outlined in *O'Keefe*,[63] which in its more exuberant articulation stipulates that the onus is on the applicant to show that there is 'no evidence' before the decision-maker which could justify his decision before the courts will intervene.[64]

The courts in these cases thus undoubtedly faced a choice with respect to what standard to deploy, depending on how they framed the issues at hand. The Court could have decided that the *Keegan* reasonableness standard should be applied, on the basis no fundamental rights or special expertise were engaged to justify ratcheting or dampening the reasonableness standard of review. On the other hand, they could have cited the vulnerable condition of the applicants, and *inter alia* the increased risks to bodily integrity posed by homelessness in order to justify reliance on a more intensive proportionality infused *Keegan* test. Or, the courts could emphasise the ostensible special competence and expertise of the local authority officials, and their comparative lack of expertise, in order to justify invoking the highly deferential *O'Keeffe* test.

In opting for the latter approach, the Court's choice highlights that the highly deferential rationality standard of review is alive and well post-*Meadows* even in cases where the interests or rights of

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[62] *M and J Gleeson and Co v Competition Authority* 1999 1 ILRM 401, 410; *Orange Communications v Director of Telecommunications Regulation & Meteor Mobile Communications Ltd* [2000] 4 IR 159, 238; *Efe v Minister for Justice* [2011] IEHC 214. In the latter case Hogan J held at para 14 that it is 'quite clear that decisions which emanate from agencies or persons with proven and established technical and administrative skills enjoy a special degree of deference'.

[63] [1993] 1 IR 39, 72.

[64] Finlay CJ observed: 'I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it *no relevant material* which would support its decision.' In *Aer Rianta cpt v Commissioner for Aviation Regulation* [2003] IEHC 12 O'Sullivan J enunciated a particularly stark understanding of the relevant test for review in the following colourful terms: 'the kind of error that produces invalidity is one which no rational or sane decision maker, no matter how misguided, could essay. To be reviewably irrational it is not sufficient that a decision maker goes wrong or even hopelessly and fundamentally wrong: he must have gone completely and inexplicably mad; taken leave of his senses and come to an absurd conclusion. It is only when this last situation arises or something akin to it that a court will review the decision for irrationality.' [1993] 1 IR 39, 70.

vulnerable persons are prima facie engaged. Indeed, a striking feature of these judgments is that they all, explicitly or implicitly, operate on an expansive understanding of the scope of *O'Keeffe*. Adoption of the *O'Keeffe* standard of review has typically been reserved for statutory bodies making decisions in areas of particularly special and technical skill and knowledge. As Denham J put it in *Meadows,* the *O'Keeffe* test is limited to decisions of 'skilled or otherwise technically competent decision makers… A court should be slow to intervene in a decision made with special competence in an area of special knowledge… such as planning and development.'[65] The paradigmatic example of an administrative body enjoying *O'Keeffe* deference is *An Bord Pleanala*, who are staffed by experts with high levels of technical skill and whose decisions implicate complicated social, economic, environmental, and scientific questions relevant to successful planning and development. Are local authority officials deciding whether an individual is homeless the type of 'technically competent' decision-makers making a decision in an 'area of special knowledge' Denham J was referring to? Even the most sympathetic observer of the competence and skill of the local authority official should find it an implausible stretch to equate the kind of competence required to assess whether someone is homeless or not with the type of complex scientific knowledge and skill required to make competent decisions in the sphere of planning and development. What, then, drove the High Court to take such a broad reading of *O'Keeffe*, if not the special technocratic competence of local authority officials*?*

A plausible explanation might be that the courts retreated to the well-trodden position in Anglo-American jurisprudence[66] that it is very difficult for generalist judges to competently second-guess decisions which implicate sensitive policy issues like resource allocation. In emphatically opting for the most deferential standard of review available, the courts have laid a marker that they consider

[65] [2010] 2 IR 701, para 119.

[66] For an excellent recent theoretical discussions of the concurrent rise of the administrative state and judicial deference over issues implicating socio-economic policy, see Adrian Vermuele, *Laws Abnegation: From Law's Empire to the Administrative State* (Harvard University Press 2016); Jeff King, *Judging Social Rights* (Cambridge University Press, 2012).

it far beyond their competence, and the judicial role, to second-guess administrative decisions which impact the allocation of scarce housing resources dedicated to alleviating homelessness. The High Court was likely concerned robust involvement on its part in second-guessing local authority determinations, through a more demanding reasonableness or proportionality standard, could implicitly enmesh it in difficult resource-allocation decisions it feels ill-equipped to handle. Judges may be concerned that if judicial review were deployed with liberality and intensity, a local authority's budget and system of prioritisation for the allocation of housing support could be subject to death by a thousand judicial cuts: each one occurring sporadically and based on the case before it, without any overarching or coordinating vision – leading to sub-optimal policy output overall. Indeed, this sits amongst the most well-ventilated critiques associated with attempting to secure policy objectives through litigation – the fact that 'every case has to be decided by reference to its own facts and so one set of legal proceedings may fail to provide a sufficiently broad context within which to formulate a comprehensive response to the social problem at issue'.[67]

This interpretation of why the courts adopted rationality review is supported by each judge's reference to the limits of judicial competence in the face of questions of resource allocation. In *Middleton,* Meenan J noted the extent to which the courts could set aside the respondent's decision was cabined by the fact that it is 'not the function of this Court to direct a local authority as to how it should deploy its resources or as to the manner in which it should prioritise the performance of its various statutory functions'.[68] In *Tee,* Noonan J also suggested that the High Court had 'no function to perform in cases involving the allocation of resources by public bodies facing competing claims on those resources'.[69] Similarly, in *C* O'Regan J approved of judicial dicta stating that it was 'outside the power of a court' to second-guess administrative decisions if doing so

[67] Gerry Whyte, 'The Role of the Supreme Court in Our Democracy: A Response to Mr Justice Hardiman' (2006) 28 Dublin University Law Journal 1, 21.
[68] [2017] IEHC 528, para 43.
[69] [2017] IEHC 194, para 25.

would 'engage in an assessment of the housing stock and of the needs of the applicants'[70] challenging those decisions.

This self-doubt in their own institutional competence echoes Lon Fuller's famous contention that some 'tasks of the administrative state were… simply unsuited to resolution' via 'lawlike decision-making'; as some administrative decisions involve polycentric considerations too 'multifarious, complex, and difficult' to resolve through legalistic tools, including 'how best to allocate a scarce resource with a view to overall public interest'.[71] In other words, it might not be the fact that local authority officials are uniquely qualified to identify if someone is homeless which drives judicial deference to their assessments, but the close link between their decisions and the allocation of housing resources in a time when the latter is very scarce. These issues implicate a realm of administrative decision-making in which Irish courts are deeply reluctant to tread.[72] Reliance on the *O'Keeffe* test, and construing a local authority assessment of whether someone is homeless or not as a technocratic and high-skill activity, allowed the court to avoid implicating itself in a policy area they have long felt uncomfortable.

Whether the courts' concerns are justified or not – and there is ample literature which would critique their concerns over policy-centricity and resource allocation as selective and based on ideological preference[73] – the expansive understanding of the scope of *O'Keeffe* used to justify its deference goes beyond the scope envisaged by Denham J in *Meadows*. It will no doubt have profound implications for similar cases brought on behalf of the homeless refused emergency accommodation. Extending *O'Keefe* deference to local authorities in the discharge of their statutory

[70] [2017] IEHC 784, para 17.
[71] See Adrian Vermeule and Cass Sunstein, 'The Morality of Administrative Law' (2018) 131 Harvard Law Review 1924, 1969, citing Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353, 394–404; Lon L Fuller, *The Morality of Law* (Yale University Press 1964) 171–76.
[72] See *TD v Minister for Education* [2001] IESC 101; [2001] 4 IR 259; *Sinnott v Minister for Education* [2001] IESC 63; [2001] 2 IR 505.
[73] For an argument that polycentric considerations are endemic to judicial decision-making and should not be selectively confined to socio-economic rights questions, see Jeff King, 'The Pervasiveness of Polycentricity' (2008) *Public Law* 101–124.

functions concerning housing will make successful challenges to exercises of statutory discretion touching on homelessness very difficult. A decision will remain effectively immune unless it is manifestly irrational or taken in bad faith – a high threshold indeed. The High Court's expansive understanding of *O'Keeffe* may well have broader implications for judicial review of administrative discretion more generally. If local authority officials assessing whether someone is homeless can command the most deferential judicial standard on grounds of ostensible technocratic competence, it is easy to envisage any number of administrative bodies which could plausibly demand the same.

C. Public Interest Litigation and the Risk of Perverse Consequence

Although a longstanding proponent of the legitimacy, and cautious defender of the efficacy of public interest litigation,[74] Professor Gerry Whyte notes it will not always produce a favourable outcome for the group on whose behalf it is taken. This may happen either because the court rules against the claim or because the political system moves to neutralise a positive decision in favour of the group.[75] It can be added to Professor Whyte's comments that public interest litigation can in fact lead to the situation whereby the plaintiff, and similarly situated plaintiffs, are placed in a *more unfavourable* situation from the status quo ante. What may have been an ambiguous legal question pre-litigation – say, the extent of a local authorities' ECHR and constitutional obligations to homeless individuals and children – may have provided leverage for public interest lawyers to exert informal pressure to advocate on their client's behalf. A local authority unsure of the precise bounds of its ECHR and constitutional obligations towards homeless individuals may have conceded demands of a public interest lawyer in an attempt to avoid an escalation to litigation and a possible negative judicial ruling. Unsuccessful public interest litigation can end this potentially

[74] See Gerry Whyte, 'Constitutional Litigation and Disability Rights' (2015) 48 Irish Jurist (NS) 303; Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, IPA 2015); Gerry Whyte, 'The Role of the Supreme Court in Our Democracy: A Response to Mr Justice Hardiman' (2006) 28 Dublin University Law Journal 1.
[75] Gerry Whyte, 'The Role of the Supreme Court in Our Democracy: A Response to Mr Justice Hardiman' (2006) 28 Dublin University Law Journal 1, 22.

constructive ambiguous status quo by providing the State useful judicial precedents to justify and insulate its decisions, both from informal leverage through lawyers advocating on behalf of clients ('the High Court says we can do this'), and through litigation ('we ask the High Court to follow its precedent in X,Y,Z'). These cases therefore vividly highlight how public interest litigation can have perverse consequences.[76] Here, an attempt to gain judicial affirmation that local authorities must direct their statutory discretion in a manner which vindicates the constitutional and ECHR rights of homeless persons ends up producing a state of affairs that results in expanded local authority discretion and arguably less regard for these rights. These cases have also done little to upset the political and public apathy which has surrounded Ireland's large levels of homelessness, including amongst children.[77] None of this should be taken as a general caution against the use of public interest litigation to secure political objectives. As Professor Whyte has extensively and persuasively documented across his prolific body of work on public interest law, such litigation has previously had modest to moderate success in several areas – for example, prompting political action on access to education for disabled persons and securing greater statutory safeguards for social housing tenants facing eviction.[78] Rather, my remarks should be taken as an observation about an under-accounted for facet of public interest litigation, a facet academics and practitioners ought to factor in when weighing the potential risks and rewards of such action.

PART III – CONCLUSION

Taken together, these judgments provide a fascinating window into several important issues of administrative and constitutional law. They highlight the High Court's reluctance to recognise an implied constitutional right to shelter, the endurance and vitality of the *O'Keeffe* rationality test, and

[76] I adopt this term from Professor Hirschman's study of the ideal typical rhetorical arguments deployed against movements for social change. See AO Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (Belknap Press 2004).

[77] Aoife Nolan notes how even unsuccessful litigation 'may result in a heightened public awareness and consideration of housing rights related issues. This can serve to exert pressure on the elected branches of government… and the decision may serve as a basis for future political lobbying.' Aoife Nolan, 'Litigating Housing Rights: Experiences and Issues' (2006) 28 Dublin University Law Journal 145, 170–71. However, this has manifestly not been the case in this instance.

[78] See Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, IPA 2015) 109; Gerry Whyte, 'Constitutional Litigation and Disability Rights' (2015) 48 Irish Jurist (NS) 303.

the serious risks inherent in public interest litigation. More broadly, they are another stark reminder that the current homeless crisis, and its human toll, can only be robustly addressed through the existence of sufficient and enduring political will expressed through difficult budgetary, policy, and legislative choices. They merit further reflection by scholars, public interest law practitioners, and judges alike.