JUDICIAL REVIEW OF ERRORS OF LAW

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PART 1: THE BASICS OF JUDICIAL REVIEW

What is judicial review?

Judicial Review is a branch of public law. It is means by which the courts supervise the actions of public bodies, the executive, the lower courts and the legislature. DeBlacam defines Judicial Review as follows:

"... [J]udicial review now may be defined as the means whereby the courts examine the legality of all public actions including their own. It may extend to the examination of the constitutional validity of a statute and comprises therefore judicial review in the constitutional sense."2

This paper is not concerned with judicial review "in the constitutional sense" (which DeBlacam describes as examining the validity of statute), but more concerned with the review of actions and decisions taken by the other institutions (i.e. public bodies, the executive and the lower courts).

Judicial review is distinct from the notion of an appeal. Whereas an appeal is typically concerned with the merits of the underlying decision, judicial review is not usually concerned with the merits of a decision. Rather, judicial review is primarily concerned with the legality of the procedure adopted by the decision maker and whether the decision maker remained within the jurisdiction that it was granted by statute.3 The typical grounds upon which judicial review is sought are as follows: error of law, error of fact, unreasonableness or irrationality, decisions made

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1 Barrister. Comments are welcome and may be sent to james.kane@lawlibrary.ie. I received the generous assistance of Caroline Carney BL and Hugh McDowell BL in preparing this paper. Copyright reserved.
2 DeBlacam, Judicial Review (2nd ed) at paragraph 1.01.
3 Although at times the law comes close to review on the basis of merit. See the Wednesbury principles, a detailed expatiation of which is beyond the scope of this paper. See also the concept of proportionality as a means of review (for more information on this aspect of review see Meadows v Minister for Justice [2010] IESC 3).
in want of proportionality, breach of natural justice, delay/failure to make a decision and unlawful fettering of discretion.

The remedies that one may seek in judicial review proceedings are as follows:

(a) certiorari,

(b) mandamus,

(c) prohibition

(d) quo warranto,

(e) declaration,

(f) injunction,

(g) Damages.

What type of decisions may be subject to judicial review?

It is difficult to draw a clear line to identify the types of decisions that are amenable to judicial review and those that are not reviewable. One constant requirement is that there must be a public law element.

The case of Geoghegan v Institute of Chartered Accountants is generally helpful in identifying the types of factors that a court will consider in determining whether a matter is for judicial review or not. In Geoghegan, Denham J (as she was then) ruled that the respondent could be judicially reviewed. She wrote (with my own emphasis):

"There are a number of important factors:—

(1) This case relates to a major profession, important in the community, with a special connection to the judicial organ of Government in the courts in areas such as receivership, liquidation, examinership, as well as having special auditing responsibilities.

(2) The original source of the powers of the Institute is the Charter: through that and legislation and the procedure to alter and amend the bye-laws, the Institute has a nexus with two branches of the Government of the State.

(3) The functions of the Institute and its members come within the public domain of the State.

(4) The method by which the contractual relationship between the Institute and the applicant was created is an important factor as it was necessary for the individual to agree in a ‘form’ contract to the disciplinary process to gain entrance to membership of the Institute.

4 [1995] 3 IR 86.
(5) The consequences of the domestic tribunal's decision may be very serious for a member.

(6) The proceedings before the Disciplinary Committee must be fair and in accordance with the principles of natural justice, it must act judicially."

These are the types of factors that a Court will deploy in assessing whether or not judicial review should lie in a given case. In any given case where one seeks judicial review of a decision, it is most desirable to find a precedent whereby the courts have reviewed a decision that is similar to the one that is now sought to be the subject of judicial review.

The basics of procedure

The procedure applicable to any particular application for judicial review is dependent upon the subject matter of the proceedings. There are, for some subject matters, specific statutory procedures governing judicial review proceedings in those particular cases. For example, an applicant wishing to challenge a decision under the Planning and Development Acts 2000 (as amended) must comply with a specific procedure in those Acts. Similarly an applicant wishing to challenge an asylum decision must comply with a separate statutory procedure.

It is important to review whether the intended matter for review is governed by a statutory procedure. If not, Order 84 of the Rules of the Superior Courts provides the default procedure. It is proposed now to explore some of the key provisions of the Order 84 procedure.

Requirement to obtain leave

An applicant for judicial review must first obtain leave from the High Court to apply for judicial review. The purpose of the leave application is to filter out trivial or vexatious claims. Leave is usually obtained ex parte. However the court hearing the application for leave may, "having regard to the issues arising, the likely impact of the proceedings on the respondent or another party, or for other good and sufficient reason," direct that the application for leave shall be heard on notice to the other side. Essentially a court may direct a contested motion in respect of the application for leave.

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5 These principles were applied by the Supreme Court in O'Donnell v Tipperary (South Riding) County Council [2005] 2 I.L.R.M. 168.
6 See sections 50 and 50A of the Planning and Development Acts 2000 (as amended).
7 See section 5 of the Illegal Immigrants (Trafficking) Act 2000.
8 O84 r30(1).
9 See comments of Denham J (as she was then) in G v DPP [1994] 1 I.R. 374 at p. 382: The aim of the leave process is "to effect a screening process of litigation against public authorities and officers. It is to prevent an abuse of the process, trivial or unstateable cases proceeding, and thus impeding public authorities unnecessarily. Even though the ambit of judicial review has widened in recent years, the kernel of the reason for this filtering process remains the same."
10 O84 r 20(2).
The test for granting leave – the principles in G v DPP

It would be beyond the scope of this quick overview of the judicial review procedure to look at the case law that the *G v DPP* principles have spawned. It is nevertheless the first port of call when determining if an applicant should be granted leave to apply.

In *G v. DPP*, Finlay C.J. ruled that in order to obtain leave to apply for judicial review (emphasis added):

“...[a]n applicant must satisfy the court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:-

(a) That he has a **sufficient interest** in the matter to which the application relates...

(b) That the facts averred in the affidavit would be sufficient, if proved, to support a **stateable ground** for the form of relief sought by way of judicial review.

(c) That on those facts an **arguable case** in law can be made that the applicant is entitled to the relief which he seeks.

(d) That the **application has been made promptly and in any event within the three months** or six months time limits provided for in Order 84, Rule 21(1), or that the Court is satisfied that there is a good reason for extending the time limit.

(e) That the **only effective remedy**, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure.”

Time within which leave must be sought

Leave to apply for judicial review must be sought within three months of the date on which the grounds for review first arose. In cases in which *certiorari* is sought, the date on which the grounds for review are deemed to arise is the date of the judgment or order that is being challenged.

A court has the power to extend time, where “(a) there is good and sufficient reason for doing so, and (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned [...] either— (i) were outside the control of, or (ii) could not reasonably have been anticipated by the applicant for such extension.”

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12 Pp. 377and 378.
15 O84 r21(3).
Even where an applicant is within the three months, the court still retains jurisdiction to dismiss the application if there is delay in applying for leave if it causes or is likely to cause prejudice to either the respondent or a third party.\textsuperscript{16}

**Discretion in judicial review**

Judicial review is a discretionary remedy; it cannot be claimed as a right.\textsuperscript{17} A court will often take into account a wide range of factors in deciding whether to grant review. Some case law expands on the issue of discretion.

In *State (Abenglen Properties) v Corporation of Dublin* [1984] IR 381 the issue of discretion was discussed. It seems that the thrust of the judgments was that discretion to refuse certiorari should only be exercised in that manner in certain circumstances.

For example, in the judgment of O’Higgins CJ, he set out, at length, how a court would exercise its discretion in a particular case (emphasis added):

“This discretion remains unfettered where the applicant for the relief has no real interest in the proceedings and is not a person aggrieved by the decision... Where, however, such applicant has been affected or penalised and is an aggrieved person, it is commonly said that certiorari issues *ex debito justitiae*. This should not be taken as meaning that a discretion does not remain in the High Court as to whether to give the relief or to refuse it. There may be exceptional and rare cases where a criminal conviction has been recorded otherwise than in due course of law and the matter cannot be set right except by certiorari. In such circumstances the discretion may be exercisable only in favour of quashing... In the vast majority of cases, however, a person whose legal rights have been infringed may be awarded certiorari *ex debito justitiae* if he can establish any of the recognised grounds for quashing; but the court retains a discretion to refuse his application if his conduct has been such as to disentitle him to relief or, I may add, if the relief is not necessary for the protection of those rights. For the court to act otherwise, almost as of course, once an irregularity or defect is established in the impugned proceedings, would be to debase this great remedy.

The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the court’s discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which certiorari has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence

\textsuperscript{16} O84 r21(6).

\textsuperscript{17} See for e.g. comments of O’Higgins CJ in *State (Abenglen Properties) v Corporation of Dublin* [1984] IR 381 at paragraph 392, where he stated: “Its purpose is to supervise the exercise of jurisdiction by such bodies or tribunals and to control any usurpation or action in excess of jurisdiction. It is not available to correct errors or to review decisions or to make the High Court a court of appeal from the decisions complained of. In addition it remains a discretionary remedy.”
of such ought not to be a ground for refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate.”

Walsh J set out his opinion in respect of discretion, as follows:

“There is no doubt that the existence of alternative remedies is not a bar to the making of an order of certiorari. A court, in its discretion, may refuse to make such an order when the alternative remedy has been invoked and is pending. However, a court ought never to exercise its discretion by refusing to quash a bad order when its continued existence is capable of producing damaging legal effects. A court's discretion cannot in justice be exercised to produce or permit a punitive or damaging result to be visited upon an applicant as a mark of the court's disapproval or displeasure when such result flows from, or is dependent upon, an order which is bad in law —even when the applicant (by his conduct or otherwise) has contributed to the making of such an order. Such conduct can be dealt with in deciding the question of costs.”

This view was, arguably, loosened in Patrick O’Donnell v Tipperary (South Riding) County Council [2005] 2 I.L.R.M. 168. In that case, all the circumstances of the case are to be considered and there is no predisposition to the exercise of discretion in one direction or the other. Denham J (as she was then) approved of the following statement of law from the earlier High Court decision in McGoldrick v An Bord Pleanála [1997] 1 I.R. 497:

“Once it is determined that an order of certiorari may be granted, the court retains a discretion in all the circumstances of the case as to whether an order of certiorari should issue. In considering all the circumstances, matters including the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of certiorari is not granted and the degree of fairness of the procedures, should be weighed by the court in determining whether certiorari is the appropriate remedy to attain a just result.”

18 Pp. 392 – 393.
19 P. 398.
PART 2: JUDICIAL REVIEW OF ERRORS OF LAW

The paper, in addressing errors of law and the judicial review process, is intended to peruse the main cases that deal with this subject. Judicial review, being a well-established procedure in Irish law has given rise to a large body of case law within various areas of challenge. For example, there is well-developed body of case law dealing with judicial review in criminal matters, in planning law and in asylum law, to mention a few. This paper takes a general approach to the subject and discusses matters at a general level of principle. To that end, this paper will probably serve only to introduce the topic and consider the main case law.

As will be shown presently, there is a doctrinal difference between the manner in which the Irish Courts treat errors of law and the manner in which the English Courts treat such errors. The approach of the Irish Courts has, by and large, been to ask whether or not the error identified was one which was within the decision-maker’s jurisdiction. If the error was one that was within the jurisdiction of the decision maker (i.e. an error that it was “entitled” to make), the decision is effectively immune to certiorari.

Conversely, the English Courts adopt the position that any error of law is an error that is outside the decision maker’s jurisdiction. The rationale is that no decision maker has any entitlement to make a decision that is not correct in law.

There some signs that Irish law has endorsed this approach, but there are conflicting authorities on the point. Irish Law has failed to engage, in a consistent manner, with the theory put forward in English Law. It is likely that the reader of this paper will, at the end, be left with a feeling of dissatisfaction and uncertainty with the state of Irish law on this topic. The level of inconsistency in Irish Law in respect of this fundamental point is objectionable. More will be said about the diverging approaches of the Irish and English cases presently, however, a brief consideration of the concept of jurisdiction within error is merited.

The theory of error within jurisdiction

To explain error within jurisdiction it is easiest to consider an example.

DeBlacam gives the following example to explain jurisdiction. The Employment Appeals Tribunal is given jurisdiction under statute to hear and determine certain disputes arising under the Unfair Dismissals Act, 1977, as amended. One of the remedies that statute permits the EAT to make is an award of up to 104 weeks remuneration. A clear breach of its jurisdiction would be to attempt to make an award of 105 weeks remuneration. This, he says, is a clear cut example of an error of law that is outside its jurisdiction and is amenable to certiorari on review.

What is less clear however is the following example that he hypothecates. If the EAT heard a dispute and decided that there was an unfair dismissal, when all the evidence pointed to the

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21 Hogan and Morgan say in Administrative Law (4th edition) at para 10-115: “The old distinctions [between errors within jurisdiction and those that are not] retained an exiguous vitality and the courts veered from one direction to another without ever reproaching themselves for their lack of consistency in this matter.”

22 See DeBlacam Judicial Review paragraphs 8.01-8.05.
contrary, has it exceeded its jurisdiction? This problem is amplified if the party aggrieved by the decision of the EAT can actually demonstrate that the dismissal was not unfair. Because there is (obviously) no statutory warranty for compensation for a fair dismissal, can it be said that the EAT acted outside jurisdiction in awarding compensation in such a case? The answer is not clear cut; although the decision is wrong, the Oireachtas appears to have entrusted the determination of such questions to the EAT.

One can extrapolate the difficulty across to other decision makers. For example, it is clear that the District Criminal Court could not sentence a person convicted of a single offence to 13 months imprisonment, as the maximum permitted sentence in respect of a single offence is 12 months. That is clear cut. But can the District Court convict someone of say section 2 assault, when there is not sufficient evidence to prove that the accused carried out the actus reus of the offence. The answer is surely “no.” What is less clear, conceptually23, is whether one can seek certiorari of that decision.

Irish Courts are not consistent on this point. They have failed to put forward a durable definition of “jurisdiction” such that the decision maker has a clear and definite circumference within which he must operate. Put simply, it will be shown that, the Irish Courts have not consistently stated whether or not an error of law is ipso facto an error outside of jurisdiction.

For the purposes of reading the rest of the paper, readers should consider that, at least as a matter of theory, “jurisdiction” may be thought of in a narrow sense or a broad sense.24 And depending on which incarnation one adopts, one may be drawn to a different answer in respect of different decisions and decision making bodies.

By way of answering these questions, DeBlacam submits that the High Court likely must reserve to itself, in principles, the ability to intervene in situations in which the body has gone wrong in law (emphasis added):

“... the High Court is certainly less likely to look favourably on an application for review where intervention entails the reassessment of complex issues of fact and law, particularly where the preliminary assessment of the issues has been entrusted by the legislature to a body with a particular expertise in the field and where there is an adequate alternative remedy by way of appeal. But it is difficult to see how the High Court can avoid reserving to itself, at least in principle, the right to intervene where an inferior body has, in law, no authority for the decision made by it. The question really is who, in a particular case, is to have the last say as to the scope of the decision-making power. In times past the courts were

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23 This specific question can likely be answered as “no” having regard to the decision in Delany v Judge Donnchadh O Buachalla [2011] IEHC 138. But it is an apt question to pose for the purposes of explaining the conceptual questions that arise in this context.

24 These are terms used by DeBlacam. The narrow view of jurisdiction deals with the decision maker’s capacity to enter into the decision making process itself or its capacity to reach the decision that he did. The decision maker in EAT scenario hypothesised earlier had no capacity to make an award of 105 weeks compensation. The broader view of jurisdiction favours the theory propounded in English law that any error of law is a violation of jurisdiction.
much more inclined to leave the final say to the bodies under review. Consequently, so long as they stayed within clear statutory limits, these bodies did have the right to go wrong.”

It is now proposed to review in some detail two judgments in particular. The first, exemplifying the historical Irish approach and the second concerning the (revolutionary) approach of the House of Lords to the question of jurisdiction. These two judgments, in particular, are worthy of analysis as they spawned a large body of subsequent cases.

**The root of the Irish approach – R(Martin) v Mahony**

The long line of case law dealing with the availability of certiorari for error of law traces its way back to the decision of *R(Martin) v Mahony* 26. That case, which was heard by eight judges of the Kings Bench Division, concerned the conviction of the applicant for an offence under the Betting House Act 1853. The case proceeded on the hypothesis that the evidence before the first instance court was insufficient to ground the conviction. The argument then advanced was that the first instance tribunal “had acted without and in excess of jurisdiction, there being no evidence given before him that the [applicant] had used the shop in question for the purpose of betting.” 27 Each of the three reserved judgments rejected the claim for certiorari. Interestingly, they each did so for different reasons. O’Brien LCJ rejected it on the basis that a lack of evidence was not something that could destroy jurisdiction. Palles CB denied relief because the High Court simply had no jurisdiction to probe the evidence (in the course of judicial review proceedings). Gibson J denied review for several reasons. An analysis of each of these written judgments is merited in this important case.

The first judgment was written by O’Brien LCJ. The Judge framed the main question before the Court as being whether or not, in a criminal case, the want of evidence would destroy jurisdiction. He wrote:

“The main, the all-important, question we have to determine is whether, in a case of a criminal or penal nature within the summary jurisdiction of magistrates, mere insufficiency of evidence to warrant a conviction or order destroys jurisdiction.” 28

He surmised the position of the applicant as being simply that the lack of evidence ousted the lower court’s jurisdiction: “... it is contended that the fact that evidence, such as it was, did not authorize a conviction, ousts, destroys, jurisdiction. I emphasize the word ‘jurisdiction.’” 29

In rejecting that position comprehensively, he cited the following comments from Lord Denman in an earlier case, where it was said that the question of jurisdiction “does not depend upon the truth or falsehood of the charge, but upon its nature. It is determinable at the commencement, and not at the conclusion, of the inquiry; and affidavits to be receivable must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry.” 30

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25 DeBlacam at [8.06].
26 [1910] 2 IR 695.
27 P 696.
28 P 705.
29 P 705.
30 P 706, citing *The Queen v Bolton* 1 QB 66.
O’Brien LCJ was satisfied that, because the charge was correctly presented, jurisdiction was good, at the outset, and therefore it could not be lost through insufficient evidence.\textsuperscript{31} Further, there was nothing that occurred in the course of the proceedings that required “the magistrate to stop, to stay his hand.”\textsuperscript{32} He utilised a sophisticated syllogism to dismantle the applicant’s contention. Because the applicant had conceded that the trial court had a jurisdiction to acquit, but not convict, the Judge wrote the following well-known passage in opposition to that submission:

“This, in my opinion, is plainly wrong. It confounds want of jurisdiction with error in the exercise of it. Once it is obvious, and it is so here \textit{ex hypothesi} that the \textit{charge} as stated is properly, adequately, stated, and within jurisdiction, one cannot go further except in such cases, such matters, as I have excluded from discussion as not being involved in the present controversy. To grant \textit{certiorari} merely on the ground of \textit{want of jurisdiction}, because there was no evidence to warrant a conviction, confounds, as I have said, want of jurisdiction with error in the exercise of it. The contention that mere want of evidence to authorize a conviction creates a cesser of jurisdiction, in my opinion, the unsustainable proposition that a magistrate has, in the case I put, jurisdiction only to go right; and that, though he had jurisdiction to enter upon an inquiry, mere miscarriage in drawing an unwarrantable conclusion from the evidence, such as it was, makes the magistrate act without and in excess of jurisdiction.”\textsuperscript{33}

The Judge was clear in distinguishing the facts before him from a case in which a trial court failed to observe the “essentials of justice” which is a well-utilised ground for review in Irish law.

The Judge provided more information as to when precisely jurisdiction may be “lost.” The Court cited an example that occurred in a previous case in which it was identified that a court may lose jurisdiction at two stages: the first, at the time “the summons comes to be heard… or it may in some case crop up in the course of the hearing…”\textsuperscript{34} The hyperbole being that if jurisdiction is ousted at \textit{either} of those stages then the judge of the summary court is required to “stay his hand” and not proceed to decide the matter.\textsuperscript{35} This is a fairly clear-cut position; provided the decision-maker is permitted by the summons \textit{and} the conduct of the trial (and presumably, by analogy, any statutory restrictions on jurisdiction) to proceed to give judgment, one way or another, then his jurisdiction must be deemed to be intact and cannot be challenged by probing the evidence behind the decision.

Later, O’Brien LCJ reiterated his opposition to the proposal that a lack of evidence ousts jurisdiction. A distinction was necessary, he said, between the nature of the charge and the evidence required to convict. In that regard, it was said that the applicant’s position suffered from the following defect:

“You make jurisdiction depend, not as he said it should depend, on the nature of the charge, but upon the evidence that may prove or fail to prove it. You confound conclusion from the evidence with jurisdiction. You confound what the magistrate has to try with his jurisdiction

\textsuperscript{31} P 706.
\textsuperscript{32} P 706.
\textsuperscript{33} P 707.
\textsuperscript{34} Pp. 707-708.
\textsuperscript{35} See generally p. 709.
to try it. You confound want of jurisdiction with error appearing upon the face of the proceedings; which may justify a conclusion or order being quashed when the evidence, when set out or incorporated, does not warrant the conclusion arrived ay-but this does not establish want of jurisdiction."

The Judgment of Palles CB followed. He too refused certiorari, but for different reasons. His judgment was along the lines that the High Court simply had no ability to look at the evidence, or lack of it, that was before the lower Court.

He summarised the question posed by the case at bar in the following terms: “The question, therefore, is whether, if the proceedings were brought up to the Court by certiorari, the evidence would be examinable by us, so as to give us jurisdiction to quash the conviction by reason of the insufficiency of that evidence.”

Palles CB simply did not consider (at least directly) the question posed by the applicant as to whether or not the lower court lost jurisdiction by virtue of a want of evidence. His answer was simply that the High Court does not itself have jurisdiction to quash a decision on the grounds of insufficient evidence. The issue of the jurisdiction of the court to quash a decision is limited to circumstances in which that decision was made in excess of jurisdiction.

The issue of evidence, was simply not a matter for the High Court. He said:

“I am, therefore of opinion that where a statute authorizes a form of conviction which does not state or refer to the evidence upon which it is founded, and does not impose an obligation upon the Justice to record it, such evidence is not examinable upon certiorari.”

This judgment might be critiqued for being somewhat opaque in that it says not whether the decision maker stayed within his boundaries. His view, that evidence is not examinable on certiorari, is not dispositive of the substantive question itself (i.e. can want of evidence destroy jurisdiction?).

Gibson J ruled, in the course of a sophisticated judgment, that certiorari should be denied. He was concerned that a review of the merits of lower court’s decisions on the basis that there was not sufficient evidence before those courts via judicial review, as distinct from an appeal, would upset the intention of the legislature. He stated:

"Every Court which has jurisdiction to determine any matter of law has jurisdiction to err, and such error can only be corrected in accordance with settled rules of legal procedure. Whether there is sufficient evidence or not is often a question of extreme difficulty... If Justices [of lower courts] have no jurisdiction as to law, save where they go right, and if any determination of theirs, erroneous in law, is intrinsically void as being without jurisdiction..., the summary jurisdiction provided by the Legislature is unintelligible, for it could hardly have been supposed that, alone among earthly tribunal, Justices [of lower

36 P. 710.
37 P. 720.
38 See for e.g. p. 721
39 See p. 722.
40 P. 726.
courts] were gifted with infallibility... If this means that such magistrates have no jurisdiction at all to decide law, or that, if they have it, they lose it when they err, the legislation would seem to be a piece of misleading and malicious pleasantry.”

In a very insightful passage, he states that certiorari lies inter alia “where there is want or excess of jurisdiction when the inquiry beings or during its progress.” This helpful passage suggests that, in the context of this ground for certiorari, provided jurisdiction is not ousted by anything occurring before the decision is made (i.e. at the beginning and during the trial), then the decision, once rendered, is within jurisdiction. He goes on to state that certiorari may also lie on the following grounds: an error on the face of the adjudication, an abuse of jurisdiction, where bias arises and where there is fraud.

Later in his judgment he states that jurisdiction is founded provided there is a proper complaint, and the conditions of procedure prescribed must be followed.

His main conclusions might be summarised in the following terms. Evidence and findings of fact in a conviction were never reviewable in a case seeking certiorari; a record that was good on its face was conclusive; judges of lower courts had jurisdiction to decide the law within their summary jurisdiction and errors can only be corrected on appeal or via case stated unless it is patent.

One can see that Mahony is a case that is ardently hostile to the proposition that a decision maker who reaches a decision that is contrary to the evidence in the case has erred in law. However, a significant English case would challenge this conventional wisdom.

The English approach in Anisminic Limited v Foreign Compensation Commission

Anisminic Limited v Foreign Compensation Commission is a revolutionary case from the House of Lords from 1968. It is also a highly interesting case, from a factual perspective, so it is worth considering the facts of the case.

The case traces its way back to the “Suez Incident” in October 1956. The Suez Incident was predicated by the nationalisation of the Suez Canal by the Egyptian government. That nationalization drew military reaction from the Israeli, British and French governments. Eventually these armies were forced to withdraw from the area several months later following pressure from both the Soviets and the Americans.

The appellant, whom was named “Sinai Mining Co.” at the time of the incident, was operating in the Sinai Peninsula mining manganese ore. Immediately after the hostility, the Egyptian
government issued a proclamation sequestering the property of English and French nationals. After the sequestration, *some* of the applicant’s assets were destroyed by Israeli forces.

The Egyptian government later legislated for the sale of the sequestered assets. The assets belonging to the appellant were sold to an Egyptian government body named “T.E.D.O.” (Which was an acronym for the Economic Development Organisation).

After the sale to T.E.D.O., the appellants embarked on a campaign whereby it lobbied its customers *not* to buy any assets (which comprised of what was once the appellant’s stock of manganese ore) from T.E.D.O. This was a successful campaign and caused embarrassment for the Egyptian Authorities. It resulted in an agreement between the appellant and the Egyptian government whereby the appellant sold the entirety of their business to the Egyptian government for £500,000.

After the hostilities the United Arab Republic and the British government entered into an agreement whereby the UAR returned sequestered property to British nationals and they also paid a sum of £27,500,000 to the British government in full and final settlement of all claims by UK nationals for certain property (including property that was sold).

The British Government had established the respondent body, the Foreign Compensation Commission to deal with compensation arrangements with other governments. In fact the respondent body had been set up prior to the Suez Incident as it had previous compensation arrangements with Yugoslavia and Czechoslovakia.

The appellants, who had by this time renamed themselves “Anisminic Limited” applied to the respondent for compensation. They were granted compensation in respect of the assets that were destroyed by Israeli forces, but not for those assets that were sequestered and then sold to the Egyptian government body. It was against the decision to refuse compensation in respect of the sequestered property that the appellants brought their claim.

The Queen’s Bench ruled that the decision to refuse compensation was a nullity. The High Court decision was then set aside by the Court of Appeal and the matter rose to the House of Lords. The House of Lords (by a bare majority) quashed the respondent’s decision on the basis that it had erred in law in refusing to grant compensation.\(^{47}\)

The judgment of Lord Reid is recognised as the most significant of all the Lords.\(^{48}\)

As far as a tribunal's jurisdiction is concerned, he said (with my own emphasis):

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\(^{47}\) The precise error of law is a fairly complicated one. Each of the Lords grappled with it but it is best explained by Lord Reid on pages 172 to 175. Essentially (and this is a heavy compression of the point), the Commission applied a provision in respect of applications made by *successors in title* to sequestered property. Because they deemed the successor in title to be T.E.D.O., they declined compensation as T.E.D.O. was not a British national. The House of Lords ruled that this provision (dealing with successors in title) had no applicability to the present case as the applicant was the original owner and therefore the responded should have applied only the provision that applies to original owners of property (i.e. there was an error of law).

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word ‘jurisdiction’ has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

As to the ability of the courts to scrutinise or remEDIATE these errors, he said (with emphasis added):

“If one uses the word ‘jurisdiction’ in its wider sense, they went beyond their jurisdiction in considering this matter. It was argued that the whole matter of construing the Order was something remitted to the com-B mission for their decision. I cannot accept that argument. I find nothing in the Order to support it. The Order requires the commission to consider whether they are satisfied with regard to the prescribed matters. That is all they have to do. It cannot be for the commission to determine the limits of its powers... If they reach a wrong conclusion as to the width of their powers, the court must be able to correct that—not because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter with which, on a true construction of their powers, they had no right to deal. If they base their decision on some matter which is not prescribed for their adjudication, they are doing something which they have no right to do and, if the view which I expressed earlier is right, their decision is a nullity.”

Then, he says that the respondent had rejected the applicant's request for compensation on grounds which it had no right to and this rendered the decision a nullity.

Lord Reid said: “It follows that the commission rejected the appellants' claim on a ground which they had no right to take into account and that their decision was a nullity. I would allow this appeal.”

Lord Pearce’s judgment is also worthy of mention; he also allows the appeal (i.e. upholds the Queen’s Bench decision to quash the respondent's refusal to compensate the applicant).

49 P. 171.
50 P. 174.
51 P. 175.
Lord Pearce wrote that tribunals must remain loyal to the true construction of the statute in question. They are not entitled to misconstrue statute. He said:

"[T]ribunals must, however, confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament. It would lead to an absurd situation if a tribunal, having been given a circumscribed area of inquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of its mandate to inquire and decide as set out in the Act of Parliament." 52

He gives the example of a statute that is established for the purposes of giving relief to wives against their husbands. It would not, he said, be permissible for the tribunal to misconstrue that proverbial statute and grant relief to unmarried women who cohabited with a man for a substantial period. He was satisfied that it was ultimately for the courts to construe provisions which define a tribunal's jurisdiction.

Lord Pearce said: "It is, therefore, for the courts to decide the true construction of the statute which defines the area of a tribunal's jurisdiction. This is the only logical way of dealing with the situation and it is the way in which the courts have acted in a supervisory capacity." 53

Provided, however a tribunal asks itself the right questions, then it has jurisdiction to go right or wrong. The courts, he said, will intervene "if the tribunal asks itself the wrong questions (that is, questions other than those which Parliament directed it to ask itself). But if it directs itself to the right inquiry, asking the right questions, they will not intervene merely because it has or may have come to the wrong answer, provided that this is an answer that lies within its jurisdiction." 54

Lord Wilberforce also agreed that ascertaining the jurisdiction of a tribunal is a matter for the courts. 55 He proceeded to allow the appeal for the following reason (with my own emphasis added):

"In my opinion, therefore, article 4 should be read as if it imposed three conditions only on satisfaction of which the applicant was entitled, under statutory direction, to have his claim admitted... As... all these conditions were fulfilled to the satisfaction of the commission, the appellants’ claim was in law established; the commission by seeking to impose another condition, not warranted by the Order, was acting outside its remitted powers and made no determination of that which alone it could determine. Indeed one might almost say, conversely, that having been satisfied of the three conditions, the commission has, in law, however it described its actions, determined the claim to have been established." 56

52 P. 194.
53 P. 195.
54 P. 195.
55 P. 208.
56 P. 214.
**Why is Anisminic seismic?**

Several authorities cite Anisminic as being a revolutionary case.

The authors of *De Smith’s Judicial Review* (7th edition), at 4-031, state that “The most important breakthrough in Anisminic was the emphatic rejection by the House of Lords of the idea that the jurisdiction of an inferior tribunal was determinable only at the outset of its inquiry... Although they accepted the survival of the rule that a judicial tribunal has power to err within the limits of its jurisdiction, it was not easy to identify errors of law which, in light of their analyses, would not be held to go to jurisdiction.”

The UK Supreme Court has described Anisminic as follows. “The importance of Anisminic is that it established that there was a single category of errors of law, all of which rendered a decision *ultra vires*.”

James O’Reilly SC stated that the consequences of Anisminic are such that “[a]ll errors of law made by a tribunal are now reviewable by way of judicial review. Jurisdictional error, even when it had been made within the jurisdiction of the tribunal, was no longer immune from challenge.”

In *O’Reilly v Mackman* [1983] 2 A.C. 237, Lord Diplock stated: “The breakthrough that the Anisminic case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported ‘determination’ not being a ‘determination’ within the meaning of the empowering legislation was, accordingly, a nullity.”

**Distinction between Anisminic and Mahoney**

The distinction between the approach in Anisminic on the one hand, and Mahoney on the other, is that Anisminic countenances no defence of error within jurisdiction, whereas Mahoney does. Now that we have considered the distinction between the two approaches to error of law, is proposed to look at how Irish law has evolved in this important area.

**Evolution of Irish law**

*State (Davidson) v Farrell*

In *State (Davidson) v Farrell* [1960] IR 438 a highly technical challenge was brought against a District Court decision in respect of the amount of rent permissible under a tenancy. The applicant was a tenant in respect of two rooms in a tenement in Dublin 2. She was entitled under her tenancy to use a shared sanitary area on her floor. These sanitary facilities were located in an annexe to the building. The landlords had entirely rebuilt the annexe and they had applied to the District Court for an order fixing the rent and, in doing so, taking account of the costs incurred in

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59 P. 278.
rebuilding the annexe, under the Rent Acts. The District Court Judge granted an amount in addition to the basic rent, in respect of the additional costs incurred by the landlords in rebuilding the annexe. This was appealed to the Circuit Court, which upheld the District Court decision.

_Certiorari_ was sought in the High Court on the basis that _inter alia_ there was an error of law on the part of the District Court in allowing these additions. The provisions on which the District Court decision was based, provided that the sum that the District Court could set, included:

"(g) in case the landlord... expends an amount in excess of two-thirds of the basic rent of the premises _on putting the premises into a reasonable state of repair_, a sum equal to fifteen per cent per annum of such excess or excesses of expenditure."

The term "premises" was also defined by that act, as follows: "any premises being a dwelling or business premises." "Dwelling" was defined as follows "a house let as a separate dwelling, or a part, so let, of any house, whether or not the tenant shares with any other persons any portion thereof or any accommodation, amenity or facility in connection therewith."

What was argued in the High Court was that there was no jurisdiction to award any sum for improvements as the _annexe_ was not rented to the tenant/applicant. The High Court decision to grant _certiorari_ was overturned by a majority Supreme Court decision.

Taking the judgment of Davin P in the High Court a little out of sequence, the Judge was satisfied that there was an error of law. He said:

"It seems to me that the expression, 'the premises,' as used in para. (g) cannot include more than the premises which the tenant holds under his or her contract of tenancy and in respect of which he pays rent."

Davin P later said:

"By virtue of her contract of tenancy Mrs. Davidson has the legal right to the exclusive possession at all times of her two rooms, 17 and 18. She also has the right, at certain but undefined times and for certain but undefined periods, to the exclusive use of so much of the sanitary accommodation on the appropriate floor of the return building as she can at any one time herself occupy. While this right can properly be said to be part of her premises, I cannot convince myself that any part of the physical structure of the return building can be rightly considered as portion of her premises."

As to whether this error of law was within or outside of jurisdiction he noted that the Judge noted that the lower courts would have to find, as a prerequisite to jurisdiction forming, that permissible expenditure occurred. It was said:

"... the fact of the expenditure of such a sum upon putting the premises into a reasonable state of repair must be established as an essential prerequisite to the exercise by the Court of its jurisdiction to determine that any lawful addition under this head may be made to the basic rent, or to determine the amount of such addition. It follows that the Court cannot, by finding erroneously that there has been such an expenditure, give itself such jurisdiction. It is, I think, equally clear that in this case the District Court and the Circuit Court must each
have determined that there had been such an expenditure upon Mrs. Davidson's premises; and this finding is challenged by her as erroneous."

Davin P granted certiorari on the following basis:

"I come reluctantly to the conclusion that the first ground upon which the conditional order was granted has been established. In my opinion, the District Court and the Circuit Court were both in error in finding, as they must have done, that there had been any expenditure upon putting Mrs. Davidson's premises into a reasonable state of repair. Neither accordingly had any jurisdiction to determine that the... increase was a lawful addition to the basic rent."

This was overturned by the Supreme Court in a majority verdict. The majority judgment was written by Maguire C.J.

He began in a manner that echoed the approach of the High Court in identifying as relevant whether or not the lower courts had "given" themselves jurisdiction through making incorrect findings, or whether the court was simply exercising its discretion. He said:

"The question whether certiorari lies turns on whether in deciding that such a sum might be included the District Justice was deciding a question the decision of which was an essential preliminary to give him jurisdiction—or was exercising a jurisdiction conferred upon him by the Rent Restrictions Act, 1946." 60

He found that the District Court was at large in arriving at the basic rent and allowable additions, under the act in question. 61 After approving of R (Martin) v Mahoney he said, before allowing the appeal (with my own emphasis):

"Basically the ground relied upon here is that there was no evidence that the repairs in respect of which the allowance was made were carried out in the premises which were let. If it be claimed that the District Justice erred in his decision as to this it could be, and in this case was, questioned on appeal. Furthermore, the point of law argued so strenuously could have been brought to the High Court on a case stated. In my opinion, however, the District Justice and, on appeal, the Circuit Judge, in deciding that an allowance should be made under s. 11, sub-s. 2 (a.), and in fixing the figure to be allowed, were lawfully exercising a jurisdiction entrusted to them by the Statute. Their decision was made in the course of a proceeding upon which they had properly entered. The complaint is not of want of jurisdiction but of error in the exercise of it. For this certiorari does not lie."

The next written judgment was that of Kingsmill Moore J. He also approved of the approach in R (Martin) v Mahoney and refused certiorari. The Judge wrote (with my own emphasis):

"Here the record does not disclose on its face any error of law or of facts. That there may have been an error of law, or of fact, or of both is made plain only when we consider the affidavits and, except where jurisdiction is at issue, we are not at liberty to go behind the record and enquire as to the course of the proceedings. But it is only in matters as to which

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60 P. 448.
61 At p 448-449.
the magistrates have jurisdiction that the Court cannot admit a review by way of certiorari. A magistrate or other inferior Court cannot wrongfully extend the ambit of their jurisdiction by deciding that a case falls within their jurisdiction when it does not, unless it appears that there has been given to him, or it, as part of the jurisdiction, the power to decide, authoritatively as opposed to incidentally, whether the case does or does not fall within jurisdiction. It may be that the jurisdiction of a magistrate to entertain a case depends on the existence or non-existence of a certain state of facts. Before he entertains the case he must endeavour to ascertain whether such facts do or do not exist. If such ascertainment is merely incidental to establishing whether he has jurisdiction or not, and if he comes to a wrong determination, then a superior Court, if on extrinsic evidence it appears that such determination was wrong, either in law or because it was without or against the weight of evidence, may grant certiorari. But if the jurisdiction of the magistrate, by virtue of the statute giving him jurisdiction, extends to determining as part of his decision, and not as a mere preliminary incidental to entertaining the case, the existence or non-existence of the state of facts, then his erroneous decision cannot be challenged by certiorari. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more: R. v. Commissioners for Special Purposes of the Income Tax.62

He was satisfied that the District Court was acting within jurisdiction owing to provisions found within the act that provided that the District Court was permitted to set the basic rent and additions.63 It appears that once the District Court was acting to that end, it was acting within jurisdiction. He continued onwards to say as follows:

“...To calculate the correct amount of the lawful addition under this head the Court must enquire how much money has been expended in the relevant periods in putting premises into a reasonable state of repair. This is not a preliminary to jurisdiction, it is of the essence of the jurisdiction imposed, and a wrong determination of amount or wrong calculation of the figure of the lawful addition could not be queried on certiorari however gross the error. But though the determination of the amount of the money expended is clearly a matter entrusted to the jurisdiction of the Court it is suggested that the determination whether any amount has been expended is merely a matter preliminary or collateral to jurisdiction. I am unable to draw the distinction. Whether a Court has or has not jurisdiction must be decided as of the inception of the enquiry. It seems to me clear that there is entrusted to the Court at the inception of the enquiry an investigation as to whether money was expended on the premises under s. 11, sub-s. 2 (g). The Court may make an error in law in interpreting the word "premises" or an error in fact in determining that money has been expended when it has not, but these are errors within the jurisdiction conferred. I hold that it is part of the jurisdiction of the Court to enquire and determine if any, and, if so, how much money has been expended in the manner indicated by the section. This being so, if the Courts go wrong either in law or fact in arriving at their determination certiorari does not lie to quash the proceedings on such grounds. I have referred in the earlier part of my judgment to the facts averred in the affidavits used on the motion for the conditional order, as they were read,
and the question as to the proper interpretation of s. 11, sub-s. 2 (g), and the meaning to be attached to the word "premises" was argued at great length.\textsuperscript{64}

O’Daly J disagreed with the majority. In his dissenting judgment he began by stating that he was satisfied that there was an error of law.

In terms of the nature of the District Court “order” and whether the error appeared on its face, the Judge applied a sophisticated syllogism. The order of the District Court referred only to the rent applicable to the two rooms that the applicant rented (even though the calculations clearly applied to the two rooms and the shared area). The Court, he said, had been informed by counsel (it would seem unavoidably so), that the application to, and order of, the District Court was in respect of both the two rooms that the applicant rented and the shared sanitary area. However, the landlords had not applied to have that order amended to reflect the reality. Because of this, the order looked regular on its face. If however the order was amended to reflect the fact that the rent set included an allowance for additions it would then have been an error on the face of the record.

The fairly ingenious logic of the Judge brought the error in question into a realm that was classically prone to certiorari. O’Daly J wrote:

“...The ‘premises’ in respect of which the District Court order was made was the premises consisting of separate accommodation plus shared accommodation. The order before us is in respect of another ‘premises,’ i.e., separate accommodation only. The order before us is in respect of an entity which is a premises within the meaning of the Rent Restrictions Act, 1946. The order that was in fact pronounced was in respect of a different entity (separate plus shared accommodation) not a ‘premises’ within the meaning of the Act. I know of no better ground for quashing an order of an inferior tribunal than that it is not the order which the tribunal made”\textsuperscript{65}

This case was one which was adhesive to the logic in Mahoney. It was a decision that was hostile to the courts going behind decisions of lower courts to ascertain if the conclusions arrived at were deduced from adequate (or any) evidence. The rule that a decision that has no error on its face is immune to certiorari was reinforced. Despite the presence of a fairly ingenious decision of O’Daly J that “got around” the issue of an error that is not patent on the face of the record, the case does not move beyond Mahoney at all.

\textit{State (Holland) v Kennedy}

A potential shift in Irish law occurred in \textit{State (Holland) v Kennedy} [1977] IR 193. In this case, the District Court judge imposed a sentence on a minor in apparent contravention of statute. The minor had been convicted of assault. The governing statute limited the circumstances in which a young person should be imprisoned; it read (with my own emphasis):

"A young person shall not be sentenced to imprisonment for an offence or committed to prison in default of payment of a fine, damages, or costs, unless the court certifies that the

\textsuperscript{64} P. 455.

\textsuperscript{65} P. 458.
young person is of so unruly a character that he cannot be detained in a place of detention provided under this Part of this Act, or that he is of so depraved a character that he is not a fit person to be so detained."

On the basis of the evidence at trial, the District Court judge made a certification under that provision and proceeded to sentence him to a period of imprisonment. The District Court judge conducted no enquiry into his character generally. The certificate and imprisonment was challenged on the grounds that no proper inquiry was made into the accused's character.

The High Court granted certiorari, and the Supreme Court dismissed the appeal. In the High Court Hamilton J ruled that "very definite and specific evidence of the unruly nature of the general character of a convicted young person would be necessary before he was committed to prison rather than to a place of detention." As this was absent, he granted certiorari. He also commented that, had the District Court judge engaged in such an enquiry, the High Court would not have interfered with it, "if there was any evidence to support it."

Henchy J, in the Supreme Court stated that although there was clearly evidence from the trial that showed we was unruly at the time of the assault, there was no evidence as to his general character, and that was required before he could be imprisoned. Accordingly, there was no evidence to support the issue of the certificate. However, he proceeded to ask the question as to whether the order of the District Court is reviewable on certiorari at all because the order appeared "good on its face."

He ruled:

"I am satisfied that the error was not made within jurisdiction. The respondent District Justice undoubtedly had jurisdiction to enter on the hearing of this prosecution. But it does not necessarily follow that a court or a tribunal, vested with powers of a judicial nature, which commences a hearing within jurisdiction will be treated as continuing to act within jurisdiction. For any one of a number of reasons it may exceed jurisdiction and thereby make its decisions liable to be quashed on certiorari. For instance, it may fall into an unconstitutionality, or it may breach the requirements of natural justice, or it may fail to stay within the bounds of the jurisdiction conferred on it by statute. It is an error of the latter kind that prevents the impugned order in this case from being held to have been made within jurisdiction.""

In a significant statement, he stated, very clearly, that an order made without evidence is not valid:

"In the present case the certificate, having been made without evidence, is as devoid of legal validity as if it had been made in disregard of uncontroverted evidence showing that the young person is not what he has been certified to be."
He rejected the notion that such an error could be saved by a rule the purported to prevent review where there is no error on the face. As the Judge put it:

"In so far as The State (Smyth) v. Fawsitt determined that an order which is good on its face but which was made in disregard of a statutory prerequisite may not be quashed on certiorari, it was wrongly decided."

Kenny J stated, essentially that the High Court is entitled to enquire into the evidence before the District Court and that the absence of evidence in this case dismantled the District Court’s ability to impose a prison sentence. In two important paragraphs Kenny J ruled:

"As a question of jurisdiction arises, in my opinion the High Court may enquire whether there was evidence upon which such a certificate could have been given and, if there was not, the certificate is invalid and so the respondent went outside her jurisdiction when she sentenced the prosecutor to imprisonment. It follows that there was no jurisdiction to impose the sentence which was given and an order of certiorari should be granted."70

Later, he said as follows:

"If the statute giving jurisdiction to the inferior court requires that certain matters be proved to give power to make the order and there is no evidence to support a finding that these statutory conditions precedent existed, then the order should be quashed by certiorari."71

These two paragraphs are contrary to the position set out in R v Mahony; but the Court stopped short of overturning it in the below passage:

"What is in question is the punishment imposed, not the guilt or innocence of the accused of the offence charged. I reserve for future consideration the question whether the decision in R. (Martin) v. Mahony (that the High Court will not grant certiorari when there was no evidence upon which the accused could be found guilty) is still the law in criminal trials having regard to Article 38 of the Constitution."72

State (Abenglen Properties) v Corporation of Dublin

If Holland was a forward step, then State (Abenglen Properties) v Corporation of Dublin [1984] IR 381 was retrograde one. It appeared to go back into the theory that a decision is not invalid unless there is an error on the face of the record.

This case involved an application for planning permission. Permission was granted, but with significant conditions attached. The conditions had the effect of reducing the floor space applied for, of 48,000 sq feet for offices and 12,000 sq feet for residential, to 16,000 sq feet for offices and 24,000 sq feet for residential use. The applicant, Abenglen, sought to argue that the planning authority had misinterpreted a provision of the development plan (planning authorities were, and are still generally, required to follow the terms of development plans). Abenglen sought to

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70 P. 204.  
71 P. 204.  
72 P. 204.
use the judicial review process strategically. By waiting until almost the last day permitted under statute for the making of a decision by a planning authority, they sought to take advantage of a provision in the planning acts that stated that a failure to make a decision within two months of an application was deemed to be a decision in favour of the proposed development. By obtaining an order of certiorari they intended to argue that the absence of a lawful decision within the statutory time period was to be, in effect, the same as a scenario in which “no decision” had been taken at all. They would contend that they were entitled to deemed permission to carry out the proposed development.73

The approach of the Supreme Court in that case was largely to deal with the issue of discretion. In other words, the Supreme Court hypothesized that the planning authority may indeed have taken a decision that was ultra vires, but addressed the question whether the applicant would be entitled to certiorari in that case.

O’Higgins CJ pointed out that the applicant could have opted for a full de novo appeal before An Bord Pleanala (who were not required to follow the terms of the development plan). The then Chief Justice proceeded to rule that the appropriate exercise of jurisdiction in this case would have been to refuse to grant certiorari having regard to “the object and purpose of Abenglen’s application for certiorari was to by-pass the scrutiny of planning proposals provided by the Planning Acts and, thereby, to frustrate their operation in this instance.”74

Walsh J gave more consideration to the question of whether the decision was ultra vires in the first instance and concluded that it was ultra vires as the conditions attached were so significant that they were outside those permitted to be adopted by a planning authority.75 The Judge continued on to address the exercise of discretion. Since he was satisfied that the applicant could not take advantage of certiorari to obtain deemed permission (Walsh J was satisfied that even a decision that was subsequently deemed unlawful was a decision for the purposes of the default provisions76), he ruled that the Court should refuse to exercise its discretion to quash the decision of the planning authority.77

Henchy J addressed two main strands in the case; first, if there was an error, was it within jurisdiction or not, and second, how should the Court exercise its jurisdiction?

In dealing with the first issue, Henchy J ruled that, if the respondent erred in interpreting the development plan, they were errors within jurisdiction and did not attract certiorari. He said:

“If they did so err, their errors do not appear on the face of their decision. The alleged errors arose in the course of identifying and construing the relevant development plan. There is no doubt but that, on a true reading of the relevant Acts and regulations, the respondents, as the appropriate planning authority, had jurisdiction to identify and construe the relevant development plan in its relation to Abenglen’s application. If, therefore, the respondents erred in either respect, they erred within jurisdiction and any error that they may have

73 Pp. 391 - 392.
74 P. 395.
75 P. 397.
76 P. 397.
77 P. 397.
made does not appear on the face of the record. In such circumstances, the remedy of certiorari does not lie... Where an inferior court or a tribunal errs within jurisdiction, without recording that error on the face of the record, certiorari does not lie. In such cases it is only when there is the extra flaw that the court or tribunal acted in disregard of the requirements of natural justice that certiorari will issue. In the present case, there is no suggestion that the respondents, in dealing with Abenglen's application, acted in disregard of any of the requirements of natural justice. They went wrong in law, if at all, in answering legal questions within their jurisdiction, and they did not reproduce any such legal error on the face of the record of their decision. Consequently, in my view, they did not leave themselves open to certiorari in respect of their decision.778

On the second issue, Henchy J advanced two reasons as to why the Court should refuse to exercise its discretion in favour of granting certiorari. First, because the decision would still be “a decision” for the purposes of the default provisions that the applicants sought to exploit, a grant of certiorari would not aid the applicant779, and second, the applicant could, and should, have taken an appeal on the facts of the case before him.80

**State (Keegan) v Stardust Victims’ Compensation Tribunal**

The respondent, in *State (Keegan) v Stardust Victims’ Compensation Tribunal* [1986] 1 IR 642, was a body established by statute to assess and offer compensation in respect of a tragic fire at the Stardust dancehall in 1981. The applicant and his wife submitted two applications for compensation to the respondent: an application for compensation in respect of the deaths of their two daughters and an application on their own behalf in respect of nervous shock suffered arising from the deaths and the serious injuries sustained by another daughter of theirs. The relevant Act provided that the respondent tribunal be entirely responsible for determining compensation, if any, under the scheme. In respect of nervous shock, the respondent awarded compensation only to the applicant’s wife, but not the applicant. There was no argument put forth that the respondent failed to observe natural justice.81 It was urged by the applicant that the decision to not award compensation to him was wrong as a matter of law having regard to the medical reports tendered.82 The Court stated that even if the respondent so erred, it was an error within jurisdiction. Blaney J wrote:

"The view I take of the case is that if the Tribunal did go wrong in refusing to make an award in favour of Mr. Keegan, the error was within jurisdiction and so certiorari does not lie."83

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778 Pp. 399 - 400. This was his "primary reason" for declining the relief sought (see page 405). Part of this statement of law was approved by the High Court in *State (Keegan) v Stardust Victims’ Compensation Tribunal* at page 649.

779 P. 400.

80 P. 404.

81 P. 647.

82 P. 648.

83 P. 649. In the Supreme Court the case took on a different slant in that it was argued on the grounds of irrationality under the Wednesbury principles. The Supreme Court decision is not entirely relevant to the questions being explored within, however one may note that the High Court decision was upheld.
State (Hayes) v Criminal Injuries Compensation Tribunal

State (Hayes) v Criminal Injuries Compensation Tribunal [1989] ILRM 210 concerned an application brought by the widow of an individual that was killed by a bomb at Dublin airport. The respondent tribunal was set up by statute to make awards of compensation in favour of victims of criminal violence. Statute permitted dependant individuals to bring applications under the scheme. She brought an application for compensation before the tribunal. The applicant took issue with the manner in which the respondent tribunal calculated the compensation payable. Essentially, the respondent reduced the amount of compensation payable by the actuarial value of social welfare payments to which the applicant was entitled into the future.

In relation to the amount of compensation payable the applicable statute stated that, subject to limitations and restrictions contained in the Act, compensation is to be awarded in a manner consistent with the Civil Liability Acts. The limitations included a provision that the compensation was to be reduced by any amounts of social welfare receivable. The applicant argued, in the High Court, that the Civil Liability Acts provided that awards of compensation shall not be reduced by any social welfare payments.

The Court disagreed that such was the correct interpretation of the applicable Act. For that reason, Finlay P ruled that: "I am satisfied that the tribunal was acting in accordance with the scheme and therefore within its jurisdiction in determining that the amount payable to the prosecutrix should be reduced to the extent it (the tribunal) might determine in respect of the entitlement of the prosecutrix to receive Social Welfare benefits."84

A further argument was put forth by the applicant that the Social Welfare deduction should have been itself reduced to take account of the prospect of the applicant remarrying. The President ruled:

"If the tribunal erred in its method of assessing the amount to be set off for Social Welfare contributions it is not an error which in my view would be reviewable by the High Court. For the information of the tribunal and the parties however, it seems to me only proper that I should express the view which I have reached and which is that the tribunal was correct in its approach to this matter. There is not any statutory provision in this country inhibiting a Court from making a deduction from compensation in a fatal injury case in respect of the possibility of re-marriage by a widow dependent. In this case it is clear from the actuary's report and the figures determined by the tribunal that the tribunal did not in fact make any deduction from the gross compensation by reason of the possibility of re-marriage by the prosecutrix. Not having done so it seems to me just and equitable and a proper exercise by them of their discretion not to make a similar deduction from the Social Welfare contributions either."85

84 P. 213.
85 P. 214.
**Killeen v DPP**

In *Killeen v DPP* [1997] IR 218, a warrant was issued for the arrest of the applicant. The warrant misdescribed the offence; it referred to an offence contrary to section 33(1) of the Larceny Act, 1916, whereas it should have referred to an offence contrary to section 32(1) of that Act. The accused was brought before the District Court, whose function it was to assess the evidence before it to determine whether or not there is a “sufficient case” to try the accused on indictment. The District Judge discharged the accused because he believed that the error on the warrant precluded him from entering into an assessment of the evidence at all. This was held to be an error of law because earlier cases had provided that an error in a warrant did not affect the District Court’s ability to send an accused forward on indictment.\(^{86}\)

Keane J in the Supreme Court, in granting *certiorari* for want of jurisdiction, ruled as follows:

“It is thus clear that, while submissions were made to the District Judge that, in any event, the statements were insufficient to put the Applicants on trial, the District Judge did not purport to adjudicate in any way on the actual question remitted to him i.e. as to whether the materials before him were sufficient to put the Applicants on trial. He confined his adjudication to a determination that, because of the defect in the warrant, the Applicants were entitled to be discharged. For the reasons already given, I am satisfied that this order was based on an erroneous view as to the jurisdiction being exercised by him and must be set aside.”\(^{87}\)

The Judge suggested that if the District Court judge had ruled on the statutory question (i.e. the question was there a sufficient case to put the accused on trial) then that could not be set aside by *certiorari*.\(^{88}\) Keane J also approved of the *Mahoney* judgment that one cannot say, simply because there is a lack of evidence before a Court, that the Court had no jurisdiction to enter into the inquiry.

**Farrell v Attorney General**

*Farrell v Attorney General* [1998] 1 ILRM 364 is perhaps the strongest endorsement of the *Anisminic* principles in Irish law. The case concerned an inquest carried out by the coroner into the death of an individual in the course of a routine operation at Saint Vincent’s hospital. The inquest concluded that death “was probably due to circulatory failure from acute anaphylaxis to [penicillin].” The deceased individual’s relative wrote to the Attorney General expressing dissatisfaction with the inquest. The Attorney General corresponded with the applicant coroner and formed the view that a new inquest was required. The applicant sought to quash the decision of the Attorney General to order a new inquest. One of the grounds on which that challenge was based was essentially an “error of law” point.

The Attorney General had invoked s. 24(1) of the Coroners Act 1962 in ordering the second inquest. That provision stated:

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\(^{86}\) P. 228.  
\(^{87}\) P. 230.  
\(^{88}\) P. 226.
"Where the Attorney General has reason to believe that a person has died in circumstances which in his opinion make the holding of an inquest advisable he may direct any coroner (whether or not he is the coroner who would ordinarily hold the inquest) to hold an inquest in relation to the death of that person, and that coroner shall proceed to hold an inquest in accordance with the provisions of this Act (and as if, not being the coroner who would ordinarily hold the inquest, he were such coroner) whether or not he or any other coroner has viewed the body, made any inquiry, held any inquest in relation to or done any other act in connection with the death."

Essentially the point made was that the statutory provision that the Attorney General invoked, did not confer any authority on him to order a second inquest in circumstances where the original inquest had not been legally challenged (i.e. the original decision had not been quashed by the High Court).

In the High Court, the decision to order the second inquest was quashed because inter alia that provision did not permit the Attorney General to order an inquest in circumstances where the original inquest and verdict stood unimpeached. In other words, it quashed his decision as an error of law.

The Supreme Court dismissed the appeal. While this error was probably one that could be said to in excess of jurisdiction from the outset, in that statute simply never allowed the second inquest, and accordingly one might say that the issue of within jurisdiction never arose, the Supreme Court nonetheless addressed the issue of error within jurisdiction.

The decision is perhaps the most audible endorsement of the Anisminic principles. It acknowledged the inherent power of the High Court to review and quash verdicts in inquests, and continued by making the following statement, in that context: "At one stage, this could only be done where there was fraud by the coroner, or an error by him going to jurisdiction, or where an error of law appeared on the face of the record (ibid.). Today, however, the jurisdiction to review judicially the proceedings in a coroner’s court is significantly wider and will extend to the circumstances identified by the House of Lords in Anisminic v. Foreign Compensation Commission [1969] 2 AC 147 and by this Court in State (Holland) v. Kennedy [1977] IR 193. Even where there is no error as to jurisdiction, no fraud on the part of the coroner and no error on the face of the record, there may have been some frailty in the course of the proceedings, such as an error in law or a want of natural justice and fair procedures, which would entitle the High Court to set aside the verdict in whole or in part."

It continued to endorse the Anisminic approach in the following passage:

"... it is essential to bear in mind that, even in the light of what might be described as the post-Anisminic Irish jurisprudence as to judicial review, it would not have been possible for the High Court to set aside an inquest verdict, solely on the ground that new evidence had come to light which rendered a further inquest necessary or desirable. Absent a want of jurisdiction or some other legal error or frailty of procedure vitiating the first inquest, the..."

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89 Pp. 372 - 373.
90 P. 377.
discovery of fresh evidence, of itself and without more, would not have entitled the court to grant an order of certiorari.\(^91\)

The manner in which the Supreme Court proceeded to dismiss the appeal, thereby upholding the High Court order quashing the decision to commence a second inquest, is slightly less relevant to the issue of Anisminic error. Keane J appeared to dismiss the appeal on the basis that the Attorney General had, at an earlier point in time, decided not to order a second inquest. His subsequent decision to order the inquest was not supported by any new evidence that was not available to him at the time of his original decision. Accordingly, his decision to order a new inquest was unreasonable and ultra vires.

**Slatterys Limited v Commissioner of Valuation**

*Slatterys Limited v Commissioner of Valuation* [2001] 4 IR 91 is a Supreme Court that involved three parties. First, the applicant, owner and occupier of the Oliver St. John Gogarty pub in Temple Bar, Dublin. Second, the respondent, an authority established under statute to determine *inter alia* the rateable valuation of premises and the remission available under certain schemes. The notice party was concerned with the collection of rates.

The question that arose was whether the applicant was entitled to an entire or a partial remission rates under the applicable statutory scheme. The scheme in question provided that certain Ministers were permitted to devise schemes that provided for the remission, in part or in whole, of rates. The Scheme provided as follows:

"Rates leviable in respect of premises to which this scheme applies shall be remitted as follows:

(a) Where it is determined by the Commissioner of Valuation that the entire valuation of the hereditament which consists of or includes the premises is attributable to the erection, enlargement or improvement of the premises, the remission shall have effect in relation to the rates leviable on that valuation;

(b) where the valuation of the hereditament which consists of or includes the premises is increased and it is determined by the Commissioner of Valuation that the increase or part of the increase is attributable to the erection, enlargement or improvement of the premises, the remission shall have effect in relation to the rates leviable on that increase or that part of the increase;

(c) every remission shall have effect in respect of the ten local financial years next following that in which the valuation or increased valuation comes into force."

The notice party had attended the premises in question after works were completed and concluded that they were incapable of occupation. Upon hearing that they were to receive a remission of rates (of £295) as distinct from a full remission, the applicant wrote to the respondent claiming to be entitled to a full remission. At this time the notice party had instituted proceedings to obtain an increased rate. The District Court and the Circuit Court, on appeal,
acceded to the application. The respondent Valuation Commissioner was not party to the District and Circuit Court proceedings.

In the High Court Geoghegan J ruled (in an *ex tempore* judgment) as follows:

"The question for this court and the [first respondent] is whether the physical state of the applicant’s premises had a value or not. I conclude that it was not open to the [first respondent] to hold that the applicant was entitled to a partial remission of rates only following the completion of the works which had been carried out to the premises." 92

The respondent appealed to the Supreme Court. Keane CJ discussed jurisdiction in two contexts. The first of which was that the District and Circuit Courts had no jurisdiction to set aside the determination of the respondent, and even if they did, they could not exercise that jurisdiction without the respondent being party to the proceedings. 93

As far as the alleged error of law on the part of the Commissioner, Keane CJ held that it was within jurisdiction:

"I am satisfied that, even if it could be said that the decision of the first respondent on the facts of this particular case was that it was a case to which art. 5(b) applied was erroneous - and I am very far from saying that it was - it was nonetheless an error made within his jurisdiction and, accordingly, was not amenable to being set aside by way of *certiorari*. I respectfully cannot agree with the view of the learned High Court Judge that it was a decision which, under the principles laid down by this court in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 and other cases, was so irrational in nature as to entitle the High Court to set it aside. On the contrary, the material before the first respondent was such as to enable him, discharging the function imposed on him by a statute, to determine that the entire valuation of the hereditament was not attributable to the erection, enlargement or improvement of the premises within the meaning of art. 5(a). Indeed, given that he was dealing with a site which, even before the work of reconstruction began, plainly had a development potential, it might on one view be said to have been difficult for him to arrive at a conclusion that, if valued at the relevant time, it should have attracted a nil valuation" 94

Interestingly this case seems to equate irrationality (which is typically an argument based on the merits, not the legal aspects of a decision) with intra-jurisdictional error. That particular theory seems to have been departed from in the case of *Ryanair v Labour Court*.

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92 P. 97.
93 P. 99.
94 P. 100.
Ryanair v Labour Court

The Supreme Court case of Ryanair v Labour Court [2007] IR 199 is also worthy of review. Arising from the upgrade to the applicant’s fleet, a need arose whereby pilots needed to be trained in the use of the new aircraft. This gave rise to a disagreement between the pilots and the applicants. Statute permitted the respondent to intervene in certain disputes where it was requested to do so by trade unions. The applicant had an infamous policy of not negotiating with trade unions.

The same statute provided that the respondent be permitted to inquire and decide whether or not it has jurisdiction to hear a dispute. The applicant had contested the respondent's jurisdiction claiming inter alia that there was no "trade dispute", as required by the applicable statute. After considering the matter, the respondent decided that a trade dispute existed between the applicant and the notice party (i.e. the trade union). Accordingly, the respondent decided that it had jurisdiction to hear the dispute.

The applicant sought judicial review in the High Court. Hannah J denied certiorari. The matter was appealed to the Supreme Court. Before quashing the decision of the respondent, Geoghegan J summed up the case in the following way:

"Ryanair has challenged the decision of the Labour Court both on the grounds of unfair procedure and on the grounds of irrationality. However in the actual arguments made in relation to irrationality, Ryanair has essentially challenged the Labour Court's interpretation of the relevant legislation. It could be argued therefore that Ryanair's case is not so much irrationality as that the Labour Court was wrong in law. I do not think this makes any difference because what was involved was an inquiry as to the Labour Court's own jurisdiction and the Labour Court was not entitled to make legal errors in considering its own jurisdiction. I believe that the Labour Court was incorrect for the reasons which I have given in its interpretation of the words 'the practice of the employer to engage in collective bargaining negotiations' and also in its conclusion that 'the internal dispute resolution of procedures' had necessarily 'failed to resolve the dispute'."

It can be seen from the above that the Supreme Court appears to bifurcate between irrationality and error of law. By way of comment, this was an excellent opportunity for the Supreme Court to provide a principled answer to the question as to if and when errors of law are reviewable.

Cunningham v An Bord Pleanala

Cunningham v An Bord Pleanala [2013] IEHC 234 involved a challenge to a decision of the respondent to refuse to categorise a structure as "exempted development" for planning purposes. The structure involved was essentially a large shed built for the purposes of storing a tractor. The Board based its decision to not declare the structure exempt on the Planning and Development Regulations (S.I. No. 600 of 2001). In particular it based its decision on Article

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98 A designation that is advantageous to an occupier in meaning that no permission is required for the structure.
9(A)(1) that provided that an exemption would not apply if the carrying on of that development would represent a traffic hazard.

The technical point in this case revolved around the fact that undoubtedly the use of the site would represent a traffic hazard, but the Board did not address whether the carrying out of the development itself would generate a traffic hazard.

Hogan J stated that “the Board's decision really proceeds on the basis that the access point simply presented a traffic hazard. That, however, is in itself insufficient to justify the disapplication of the exemption, since Article 9(1)(iii) requires that not simply the Board identify the presence of a traffic hazard, but rather that ‘the carrying out of such development would ... endanger public safety by reason of traffic hazard.’ This latter test represents an altogether different test from that actually posed by the Board.”

The Judge also stated: "In the present case, it would accordingly have been necessary for the Board to go further and thereby identify how the carrying out of the development (i.e., in this instance, the construction of the shed) would endanger public safety."

In applying some of the cases that tended to be pro-Anisminic in their approach, he granted certiorari and ruled:

"It is clear, therefore, that the Board asked itself the wrong question and applied the wrong test so far as the application of Article 9(1)(iii) is concerned and this fact alone is fatal to the validity of the decision: see, e.g., the comments of Henchy J. in The State (Holland) v. Kennedy [1977] I.R. 193, 201-202 and those of Keane J. in Killeen v. Director of Public Prosecutions [1997] 3 I.R. 218, 229."

Mone v An Bord Pleanala

In Mone v An Bord Pleanala [2010] IEHC 395, McKechnie J considered the applicability of the case law in this area. This was yet another case with comparatively complex facts. Briefly the facts were that a Mr Jim Mone applied for retention permission in November 1998 in respect of a petrol station built on lands belonging to the developer.

Almost a year later Mr Mone changed his mind and decided that, instead, he wished to build a petrol station on his own lands. Essentially this petrol station was to be placed on the opposite side of the road to the first petrol station.

Accordingly, he withdrew his first application. When his architect sent in the letter to withdraw the application, the planning authority mistakenly placed it in the file that pertained to his later application. Owing to a technical rule, Mr Mone was not entitled to simply withdraw his appeal; instead he had to bring an appeal to An Bord Pleanala and then the matter could be withdrawn. He took all of these steps and withdrew the application.

However the local planning authority mistook the situation. It misread these events as simply causing his appeal to be withdrawn and not his first-instance retention application. It proceeded
to issue a grant of the first application for retention. This, it was accepted by all sides, was not something that the planning authority was entitled to do.

In 2000, the planning authority refused permission under the second, (i.e. the 1999) application. The developer proceeded and constructed the petrol station. Now there were two petrol stations on opposite sides of the road to each other.

More applications followed by the developer seeking to make changes to the unauthorised petrol station. An Board Pleanala reached a decision however that the petrol station was not unauthorised development under the Act. An opinion from counsel was on file that set out a legal basis for contending that the development was not unauthorised having regard to the earlier events.

In quashing the decision as an error of law, McKechnie J discussed jurisdiction briefly. He said that “jurisdiction” is a term that requires to be used with precision. Yet he goes on to state that a manifest error of law is reviewable:

He said:

“Many of the challenges to decisions of public law bodies are based on an allegation that the decision is unlawful as such body acted entirely without jurisdiction: the typical ultra vires argument. This is to be contrasted with errors within jurisdiction where necessary precision will be required when using this term as the same has a number of principal and subsidiary meanings. Examples frequently arise where bodies lack the power or authority to enter into or embark upon the exercise which gives rise to the decision. Other situations, however, are also reviewable: situations even where at the commencement of the process, jurisdiction undoubtedly exists, see The State (Holland) v. Kennedy [1977] I.R. 193. An aspect of this power to review, makes clear that a determination reached by an administrative tribunal may be quashed in circumstances where that determination is premised on a manifest error of law. The locus classicus of the court’s jurisdiction in this regard can be seen in the House of Lords decision in Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147, as approved in this jurisdiction by the Supreme Court in Killeen v. Director of Public Prosecutions [1997] 3 I.R. 218. Lord Reid, considering the supervisory role of the court, noted at p. 171 of the report:

'It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word “jurisdiction” has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right
to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.’ (Emphasis added)’102

He also said that Irish law demonstrates: ‘... a clear acknowledgement of such errors being amenable to challenge, even when apparently committed within jurisdiction.”103

**SFA v Minister for Justice and Equality**

Recent High Court comment has been interesting and potentially progressive to the debate. In *SFA v Minister for Justice and Equality* [2015] IEHC 364, MacEochaidh J stated that the *Anisminic* approach had not been fully adopted in Ireland. He addressed the fact that certain decisions (like those that we reviewed at the outset concerning the insufficiency of evidence as being a possible error of law) are difficult to categorise properly. The Judge said:

“Decisions taken based on inadequate, as opposed to non application, of the law fall into a grey area. For example, a rule might say that a decision maker must consider the personal circumstances of an applicant. If some but not all of the personal circumstances have been considered, has jurisdiction been ousted? The answer must depend on what was omitted and on what the consequence of the omission was. The consequences of the mistake will assist with deciding whether the error destroys jurisdiction. Attempts to set a definition of what error will destroy jurisdiction is a fruitless exercise as the facts and circumstances of the case including the effects of the error will determine this question.”104

In a potentially progressive passage, he suggested that, instead of engaging in a tormented process of trying to identify the precise category of the error, that the matter might better be dealt with via the rules of discretion. He said as follows:

“The modern doctrine of jurisdictional error referred to by Hogan J posits that the decision in *Anisminic* fundamentally altered the rules in this area by deciding that all errors of law are errors of jurisdiction, though this does not mean that *certiorari* is automatic once an error as to law is found (see Wade, “Administrative Law” 11th Ed., pp. 219-226). For my part such an approach is attractive as it focuses on whether the remedy sought is truly required rather than dealing with the vexed question as what type of error was. It seems that the modern position following *Anisminic* has not been expressly adopted in Ireland, if I have correctly understood the decision of Keane J in Killeen (see para 14 above). I would prefer if the court’s enquiry were as to whether an error of law had occurred and if so whether *certiorari* was justified by reference to the principles governing exercise of discretion.”105

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102 P. 74.
103 P. 75.
104 P. 19.
105 P. 21. It seems based on p. 18 of the decision that the effect of the error will be a matter that impacts upon the exercise of discretion.
The merit of this approach is really that errors of law remain “on the table” as far as judicial review is concerned. Yet courts are afforded the opportunity to refuse review in circumstances in which they decide that certiorari is unsuitable.

**Nyhan v Judge Riordan**

In a High Court judgment handed down this week in *Nyhan v Judge Riordan* [2016] IEHC 170, the issue of within error jurisdiction arose again. Noonan J stated at para 11:

“It is equally true to say however that the mere fact that a decision maker makes an error of law in arriving at a decision does not automatically give rise to a right to seek judicial review. The question is often characterised as whether the error was one made within or outside jurisdiction.”

The Judge went on to hold that the Mahoney case has stood the test of time. The Court is entirely silent on the Anisminic case law and proceeded to hold that even if an error of law occurred in that case, it was within the jurisdiction of the decision maker.

**Conclusions**

English law is clear on this topic. Any demonstrable error of law is fatal to jurisdiction and brings about the possibility to quash the decision. Irish law is not clear. Its case law has ebbed and flowed one way and the other. There is certainly enough case law for applicants to argue that any particular error of law in the decision that they complain of is amenable to certiorari. However there is doubt as to which way precisely the courts will go in a given case. This doubt on such a fundamental and important question is unsatisfactory.

A significant difficulty with Irish case law, particularly High Court case law, is that it has developed without reference to a settled guiding principle on this very fundamental question. A pronouncement, one way or another, by the Supreme Court would bring welcome clarity to the question.

Until that occurs, the aforementioned comments of DeBlacam are helpful in that they suggest that in principle the courts must have the ability to quash a particular decision owing to an error of law. However those comments should be overlaid with those of MacEochaidh J in *SFA* where he stated that the question of the Anisminic approach had not been universally accepted in Ireland, but that the matter could be better dealt with via judicial discretion. This latter comment may progress the debate along and may be the manner in which the courts describe their approach to errors of law in future.

At present though, it seems that a certain level of uncertainty remains and a degree of circumspection should probably be imported into client advice.

*JAMES KANE BL*

*21st April 2016*