Neutral Citation Number: [2011] IEHC 37

THE HIGH COURT

[2010 No. 405 JR]

BETWEEN/

TD, ND (A MINOR SUING BY HER MOTHER AND NEXT FRIEND TD)

AND AD (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND TD)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 25th January, 2011

1. This application for a judicial review of the decision of the Minister for Justice, Equality and Law Reform to refuse to grant the applicants refugee status in the State pursuant to s. 17 of the Refugee Act 1996 raises important questions concerning the application of a domestic statutory time limit in the context of the application of EU law. The issue arises in the following way.

2. The applicants are South African nationals who arrived in Ireland in late April 2009. The first applicant is the mother of ND (who is now aged 10) and AD (who is now aged 7), the second and third applicants respectively. She claims to have suffered persecution in South Africa for reasons of race. Specifically, the applicant maintains that she was promised in marriage by her father to the son of a local chief as far back as 1988, but she actually married the husband of her choice in 1999. She further maintains that although the local chief learned of the marriage in 2000, these difficulties were only made manifest in December 2007 when she returned to her home area in Port Shepton in the Natal Province to open her own business.

3. The Refugee Appeals Commissioner ruled adversely against the application on credibility grounds on the 7th May 2009. This was affirmed by decision of the Refugee Appeals Tribunal on 15th July 2009. The Minister informed the applicants on 29th August 2009 that he was refusing their application for refugee status and that he proposed to make deportation orders in respect of them. An application for subsidiary protection was made, but this was refused by the Minister on 2nd March 2010.

4. The Minister ultimately made deportation orders in respect of the applicants on the 9th March 2010 and the applicants were notified of the making of these orders on 16th March 2010. The present proceedings were commenced on 1st April 2010.

5. While the applicants now challenge the deportation orders, they are also constrained to challenge the earlier decisions on which these orders are based, not least the decision of the Tribunal and that of the Minister refusing to grant refugee status under s.17 of the Refugee Act 1996 ("the 1996 Act"). The immediate difficulty for the applicants is that the present application to challenge these decisions is well outside the 14 day time limit prescribed by s. 5 of the Illegal Immigrants (Trafficking) Act 2000 ("the 2000 Act").

6. While an extension of time has been sought, it has to be said that no satisfactory explanation has been offered by the applicants in respect of this delay. The applicant merely states that she "totally depended on her former legal representatives", but no explanation has been offered for the very considerable delay which has taken place in the interval. It is clear from a series of decision of the Supreme Court that a laconic statement of this kind is insufficient to excuse the delay: see, *e.g.*, *CS v. Minister for Justice, Equality and Law Reform* [2005] 1 I.R. 343. Nor has any explanation been offered as to the precise nature of the difficulties with her legal advisers which she claims to have encountered. She does not even say that she wished to challenge these decisions within the 14 day period.

7. In the ordinary way, I would have not been prepared to grant an extension of time under s. 5 of the 2000 Act.

The Potential Impact of the Procedures Directive

8. The applicants maintain, however, that key aspects of the 1996 Act are incompatible with Article 23 and Article 39 of the Procedures Directive, Council Directive 2005/85/EC. For the purposes of the present application, it is common case that, subject to the time limit issue, the applicants have presented substantial grounds that this is so. In those circumstances, it would appropriate to grant leave on this point if the applicants can show that the s.5 time limit is inapplicable in the circumstances of this application.

9. In this regard, it is important to observe that the applicants maintain that in these circumstances the respondents cannot rely on the provisions of s. 5 of the 2000 Act where - as they contend - the Procedures Directive has not been properly transposed into domestic law. In this regard, the applicants rely in the first instance on the decision of the Court of Justice in Case C-208/90 *Emmott v. Minister for Social Welfare* [1991] ECR I – 4269.

10. *Emmott* is, in many respects, quite a singular case. While the Court of Justice stated in emphatic terms that no time limit could be applied by Member States to deprive a citizen of directly effective rights flowing from a directive in circumstances where that directive had not been properly transposed into national law, this appears to be the only instance of where that principle has actually been applied.

11. The decision in *Emmott* arose following the earlier ruling of the Court of Justice in Case 286/85 *McDermott and Cotter* [1987] ECR 1453 concerning the interpretation of the Equality Directive. That Directive had prohibited all discrimination on grounds of gender in social welfare matters, yet when Ms. Emmott complained that she was receiving lesser benefit payments as compared with a man in a situation identical to hers, the Minister for Social Welfare responded in June 1987 that since the Directive was still the subject of litigation before the High Court "no decision could be taken in relation to her claim which would be examined as soon as that court had

given judgment": see para. 11 of the judgment.

12. Yet when Ms. Emmott commenced judicial review proceedings almost a year later, the Minister relied on the time limits contained in O. 84, r. 21 with a view to barring her claim. The Court of Justice would not allow the Minister to rely on this delay since it was plain that Ireland had failed properly to transpose the Directive in question. The Court then articulated (at paras. 21-23) the following propositions:

> "21. So long as a directive has not been properly transposed into national law, individuals are unable to ascertain the full extent of their rights. That state of uncertainty for individuals subsists even after the Court has delivered a judgment finding that the Member State in question has not fulfilled its obligations under the directive and even if the Court has held that a particular provision or provisions of the directive are sufficiently precise and unconditional to be relied upon before a national court.
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> 22. Only the proper transposition of the directive will bring that state of uncertainty to an end and it is only upon that transposition that the legal certainty which must exist if individuals are to be required to assert their rights is created.
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> 23. It follows that, until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time."

13. Looked at in isolation, it is hard to avoid the impression that the Court had concluded that a Member State could never plead a time bar as a response to a claim that a Directive had not been properly transposed, at least where that Directive had conferred directly effective rights. Yet, as we have already noted, this proposition has never been applied by the Court of Justice in any subsequent case.

14. This is illustrated by the next decision of the Court of Justice in Case C-338/91 *Steenhorst-Neerings* [1993] ECR I - 5475. This was another case involving the Equal Treatment Directive and time-limits. Here, however, the Court of Justice upheld the compatibility with EU law of a Dutch rule according to which employment disability benefits were payable no more than one year after the date of the claim. The Court distinguished *Emmott* on the following grounds (at paras. 19-24):

> "19 The Court held in *Emmott* that so long as a directive has not been properly transposed into national law individuals are unable to ascertain the full extent of their rights, and that therefore until such time as a directive has been properly transposed a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive, and that a period laid down by national law within which proceedings must be brought cannot begin to run before that time. However, the facts in *Emmott* are clearly distinguishable from those of this case.
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> 20. In *Emmott*, the applicant in the main proceedings had relied on the judgment of the Court in Case 286/85 *McDermott and Cotter* [1987] ECR 1453 in order to claim entitlement by virtue of Article 4(1) of Directive 79/7, with effect from 23 December 1984, to invalidity benefits under the same conditions as those applicable to men in the same situation. The administrative authorities had then declined to adjudicate on her claim since Directive 79/7 was the subject of proceedings pending before a national court. Finally, even though Directive 79/7 had still not been correctly transposed into national law, it was claimed that the proceedings she had brought to obtain a ruling that her claim should have been accepted were out of time.
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> 21. It should be noted first that, unlike the rule of domestic law fixing time-limits for bringing actions, the rule described in the question referred for a preliminary ruling in this case does not affect the right of individuals to rely on Directive 79/7 in proceedings before the national courts against a defaulting Member State. It merely limits the retroactive effect of claims made for the purpose of obtaining the relevant benefits.
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> 22. The time-bar resulting from the expiry of the time-limit for bringing proceedings serves to ensure that the legality of administrative decisions cannot be challenged indefinitely. The judgment in *Emmott* indicates that that requirement cannot prevail over the need to protect the rights conferred on individuals by the direct effect of provisions in a directive so long as the defaulting Member State responsible for those decisions has not properly transposed the provisions into national law.
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> 23. On the other hand, the aim of the rule restricting the retroactive effect of claims for benefits for incapacity for work is quite different from that of a rule imposing mandatory time-limits for bringing proceedings. As the Government of the Netherlands and the defendant in the main proceedings explained in their written observations, the first type of rule, of which examples can be found in other social security laws in the Netherlands, serves to ensure sound administration, most importantly so that it may be ascertained whether the claimant satisfied the conditions for eligibility and so that the degree of incapacity, which may well vary over time, may be fixed. It also reflects the need to preserve financial balance in a scheme in which claims submitted by insured persons in the course of a year must in principle be covered by the contributions collected during that same year.
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> 24. The reply to the first question must therefore be that Community law does not preclude the application of a national rule of law whereby benefits for incapacity for work are payable not earlier than one year before the date of claim, in the case where an individual seeks to rely on rights conferred directly by Article 4(1) of Directive 79/7 with effect from 23 December 1984 and where on the date the claim for benefit was made the Member State concerned had not yet properly transposed that provision into national law."

15. I have to confess that, with great respect, the Court's analysis of Irish procedural law which is contained in the above passage is a little surprising insofar as it suggests that O. 84 would have precluded Ms. Emmott from relying on the terms of Directive 7/97. Confronted with a refusal to adjudicate on her claim, Ms. Emmott could - and, on one view, perhaps should - have commenced mandamus proceedings compelling the Minister to make a decision. In those proceedings, she would have been fully entitled to rely on Directive 79/7, albeit perhaps that the six month time limit contained therein would have limited her right to recover benefits which were wrongly denied to her in the past on a retroactive basis. Thus, as Advocate General Gulmann observed in Case C-410/92 *Johnson* [1996] ECR I -5475, if one analyses the differences between *Emmott* and *Steenhorst-Neerings* "it might at first glance appear difficult to understand why the national time-limits in question were treated differently under Community law." In that case, Advocate General Gulmann concluded that *Steenhorst-Neerings* was the governing authority, so that there was accordingly "no

reason for the Court to enter into an examination of the scope of the judgment in the *Emmott* case and of the possible need to amend that judgment."

16. In fact, the true basis for *Emmott* appears to have been that of quasi-estoppel in that the Court would not permit a defaulting Member State to rely on the applicant's delay where the Minister had declined to make a decision pending the outcome of *Cotter and McDermott* and, furthermore, where he had assured her that the matter would then later be re-examined on its merits. At all events, *Steenhorst-Neerings* has subsequently been endorsed in a consistent line of subsequent case-law, perhaps even to the point whereby *Emmott* has been all but overruled. Thus, for example, in Case C-445/06 *Danske Slagterier* [2009] ECR I – 2119 the Court upheld the application of a national three year limitation period so as to bar a *Francovich*-style damages action in the German courts by a Danish association of slaughter-house companies which claimed that its members had suffered financial loss as a result of the failure by Federal Republic of Germany properly to transpose a directive dealing with veterinary standards which had resulted in a six year import ban on certain pork products.

17. It is true that *Emmott* has not, of course, actually been formally overruled but this can either be put down to the fact that no case with similar facts has subsequently come before the Court of Justice or (as seems more likely) the failure to do so simply reflects the fact that the Court of Justice does not apply the doctrine of precedent in quite the same way as a common law court might. Either way, *Emmott* cannot now be safely regarded as an authority for the wide propositions apparently contained in that judgment and contended for here. Put another way, *Emmott* cannot now be invoked to say that time can never run as against a litigant where the State has failed properly to transpose a directive into domestic law.

The Principles of Equivalence and Effectiveness

18. It follows that even if it were ultimately to transpire that the Procedures Directive had not properly been transposed into our domestic law, this would not, subject to one important caveat, prevent the application of s. 5 of the 2000 Act so as to bar the claim of the applicants in the present case. The subsequent case-law has made it clear that a Member State is entitled to apply a national limitation period even in respect of those cases where the Member State in question has failed properly to transpose the relevant Directive, provided – and it is a critical proviso - that the limitation period must itself comply with the principles of both equivalence and effectiveness: see, *e.g.*, Case C-323/96 *Levez* [1998] ECR I-7835. As to equivalence, the national court must compare the applicable limitation periods "as regards their purpose, cause of action and essential characteristics": see Case C-63/08 *Pontin* [2009] ECR I-000, para. 55.

19. So far as the principle of effectiveness is concerned, this was explained thus by the Court of Justice in *Danske Slagterier* (at paras. 31-33)

> "31. In that regard, it is settled case-law that, in the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law. It is thus on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss or damage caused, provided that the conditions, including time-limits, for reparation of loss or damage laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it in practice impossible or excessively difficult to obtain reparation (principle of effectiveness) (see, *inter alia, Francovich and Others*, paragraphs 42 and 43, and Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 27).
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> 32. As regards the latter principle, the Court has stated that it is compatible with Community law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the taxpayer and the authorities concerned (Case C-228/96 *Aprile* [1998] ECR I-7141, paragraph 19 and the case-law cited). Such time-limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law. In that regard, a national limitation period of three years appears to be reasonable (see, in particular, *Aprile*, paragraph 19, and Case C-62/00 *Marks & Spencer* [2002] ECR I – 6325, paragraph 35).
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> 33. However, it is also apparent from *Marks & Spencer*, paragraph 39, that in order to serve their purpose of ensuring legal certainty, limitation periods must be fixed in advance. A situation marked by significant legal uncertainty may involve a breach of the principle of effectiveness, because reparation of the loss or damage caused to individuals by breaches of Community law for which a Member State can be held responsible could be rendered excessively difficult in practice if the individuals were unable to determine the applicable limitation period with a reasonable degree of certainty."

20. These principles were applied by the Court in Case C-63/08 *Pontin* [2009] ECR I -000, a case concerning a provision of Luxembourg labour law which prescribed a 15 day time limit in the case of actions for nullification of the dismissal and re-instatement brought by female employees who claimed that they have been wrongly dismissed by reason of pregnancy, whereas a three month time limit was prescribed in the case of damages actions arising out of the same events. Moreover, a two month time limit was prescribed in the case of an action for dismissal on account of marriage.

21. The Court seemed to think that, in an employment context, these remedies were sufficiently similar. As, moreover, the limitation period for re-instatement was "substantially shorter than the three-month limitation period applying to an action for damages", the Court did not think these rules complied with the principle of equivalence, although it stressed that this a matter for national court.

22. So far as the principle of effectiveness is concerned, the Court observed:

> "62. However, it should be noted in that regard that…the fifteen-day period for bringing an action for nullity and reinstatement must be regarded as being particularly short, in view *inter alia* of the situation in which a woman finds herself at the start of her pregnancy.
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> 63. In addition, it appears from the case-file that some of the days included in that fifteen-day period may expire before the pregnant woman receives her letter of dismissal and is thus notified of the dismissal. According to an opinion expressed by an association of private-sector employees on the draft law that inserted Article L. 337'1 into the Labour Code, the terms of which are reproduced in the order for reference, the fifteen-day period begins to run, according to the case-law of the Luxembourg courts, from the time the letter of dismissal is posted.
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> 64. The Luxembourg Government, it is true, has pointed out that under Article 1 of the Law of 22 December 1986 on restoring rights that have been lost as a result of the expiry of a time-limit for bringing legal proceedings (*Mémorial* A 1986, p. 2745), limitation periods do not start to run if the female employee has not been in a position to act.

65. However, even if that provision were to limit the effects of that case-law relating to the posting of the letter of dismissal, which, where necessary, it is for the referring court to decide, it would however be very difficult for a female worker dismissed during her pregnancy to obtain proper advice and, if appropriate, prepare and bring an action within the fifteen-day period.

66. Moreover, since. ….the requirement to refer the matter to the 'President of the court having jurisdiction in employment matters' seems to be given a particularly strict interpretation, a pregnant worker who, for whatever reason, has allowed the fifteen-day period to expire, ceases as was noted by the referring court to have a legal remedy available in order to assert her rights following her dismissal.

67. In those circumstances, it appears that rules such as those laid down in Article L. 337-1(1) of the Labour Code relating to an action for nullity and reinstatement, by giving rise to procedural problems likely to make exercise of the rights that pregnant women derive from Article 10 of Directive 92/85 excessively difficult, do not comply with the requirements of the principle of effectiveness. However, that is a matter for the referring court to determine."

23. More recently, in Case C-246/09 *Bulicke* [2010] ECR I-000 this issue was again considered by the Court of Justice in the context of German legislation governing age discrimination claims which provided for a two month limitation period running from the date of knowledge of the discrimination in question. However, as the referring court itself noted, there were many other provisions of German employment law (such as wrongful dismissal actions) which provided for limitation periods as short as three weeks.

24. The Court also noted that the time ran from the date the employee became aware of the discrimination. In that context, the Court concluded (at para. 39) that the two months period "would not appear liable to render practically impossible or excessively difficult the exercise of rights conferred by European Union law."

Whether the Section 5 Time Limit complies with the Principles of Equivalence and Effectiveness
25. The issue which accordingly now arises in light of the guidance given by the Court of Justice in cases such as *Pontin* and *Bulicke* is whether the s. 5 time limit would satisfy the principles of equivalence and effectiveness.

26. Of course, in one sense, the principle of equivalence is satisfied in that s. 5 applies to all (or, perhaps, it would be more accurate to say, nearly all) applications for judicial review of decisions taken in the asylum process, irrespective of whether the basis for the challenge rests on domestic or European law grounds. But it would seem from cases such as *Pontin* and *Bulicke* that a national court is required to take a broader view of what constitutes equivalence for this purpose and that the comparison must also be made with other broadly similar actions in the sphere of judicial review: see, by analogy, *e.g.*, paras. 55-59 of *Pontin* and para. 34 of *Bulicke*.

27. Adopting this somewhat wider approach with regard to the principle of equivalence, it should be noted that the s. 5 time limit for judicial review of asylum and immigration matters is significantly shorter than the general time limit for judicial review prescribed by O. 84, r. 21(1) RSC, namely six months for certiorari. It is true, however, that there is actually one shorter time limit, namely, the seven days prescribed by the Irish Takeover Panel Act 1997, s. 13(3)(a) in respect of applications for judicial review to challenge the validity of decisions taken by the Panel, but there have been but a handful of applications which have been governed by this provision, with none actually having proceeded to a written judgment. For the most part, however, the other statutory schemes regulating aspects of the judicial review procedure in specific subject areas have been governed by a general two months (or, in some instances, an eight week) time limit time limit: see, *e.g.*, s. 87(10) of the Environmental Protection Agency Act 1992; s. 50(8) of the Planning and Development Act 2000 (as inserted by s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006). Again, in some instances the Oireachtas has provided for a power to extend time rather than prescribe an absolute time limit.

28. There is no doubt but that there is a strong public interest in legal certainty and the speedy determination of the legal of administrative decisions in asylum and immigration matters: see, in particular, the judgment of the Supreme Court in *Re Article 26 and Illegal Immigrants (Trafficking) Bill* [2000] 2 I.R. 360. The appropriate comparator for s.5 of the 2000 Act is not, perhaps, the easiest to find, but in the light of the purpose and essential characteristics of legislation prescribing limitation periods in judicial review matters, I think that the eight week time limit in planning and environmental matters is probably the most appropriate. It is true that asylum matters are a world away from that of planning and development law. But the limitation periods share the following characteristic, namely, an overwhelming interest in legal certainty and a desire to protect third parties who might be affected by the invalidity of an administrative decision. It is also noteworthy that in both cases the Oireachtas has prescribed by statute that the validity of such administrative decisions can be challenged only by way of applications for judicial review under O. 84.

29. In this regard, however, I cannot view the seven day limitation period prescribed by the Irish Takeover Panel Act 1997, as an appropriate comparator. Apart from the fact that applications under that Act are extremely rare, it must be recalled that decisions of the Irish Takeover Panel can have far-reaching implications for corporate mergers in particular and capital markets in general and, for this specific reason, the time period thus prescribed is exceptionally short. Furthermore, almost by definition, applicants under that legislation are likely to be extremely well-resourced corporate entities with access to specialist advice. Their circumstances are generally very different from that of the asylum seeker who is often likely to be dependent on public welfare; is generally unfamiliar with the Irish legal system and may well encounter linguistic and other practical difficulties in preparing for litigation in which the validity of the relevant administrative decisions will be under challenge.

30. In these circumstances, I am constrained to conclude that s. 5 of the 2000 Act does not comply with the principle of equivalence, since the 14 day period is considerably shorter than the eight weeks prescribed for planning and development matters by s. 50(2) of the Planning and Development Act 2000 (as amended).

31. So far as the principle of effectiveness is concerned, it may be noted in *Pontin* the Court appeared to consider that a 15 day limitation period made it excessively difficult for applicants to exercise their procedural rights. The difficulties which asylum seekers are likely to encounter in preparing for litigation governed by a very short time limit are probably at least as great in practice as those identified by the Court of Justice in *Pontin* in the case of female employees dismissed by reason of pregnancy. Both sets of litigants are not likely to find it easy to obtain appropriate advice and, where so advised, to prepare and commence proceedings all within that time period, although it must also be acknowledged that the vast majority of asylum seekers will have had access to legal advice as their case proceeds through the administrative adjudication and appeals system.

32. Indeed, experience in this jurisdiction has shown that the vast majority of applicants require an extension of time in order to bring applications under s.5 of the 2000 Act. It is true that the power to extend time is a generous one and one which is also liberally exercised in practice. It is also the case that the provisions of the Luxembourg law identified in *Pontin* did not contain such a power to extend time. But in view of the approach taken by the Court of Justice in C-456/08 *Commission v. Ireland* [2010] ECR I – 0000 it seems unlikely that a generous power to extend time will save a time limit whose duration is otherwise, objectively speaking, too short

to satisfy the requirements of the principle of effectiveness. As the Court observed in that case (at para. 81) in the context of the power to extend time under O. 84A, r. 4 RSC:

> "However, the possibility for national courts to extend periods for bringing actions, as provided for in Order 84A(4) of the RSC, is not such as to compensate for the shortcomings in that provision, having regard to the clarity and precision which Directive 89/665 requires in respect of the system of limitation periods. Even if the candidate or tenderer concerned takes into account the possibility that periods may be extended, it will still not be able to predict with certainty which period will be accorded to it for the purpose of bringing proceedings, in view of the reference to the obligation to bring an action at the earliest opportunity."

33. In other words, while the rigour of the 14 day period is tempered by the power to extend time, an applicant might still be in the position whereby he or she could not predict with certainty how that power to extend time could be exercised in any given case. That, in practice, is at least as true of the great wealth of case-law concerning the necessary extension of time under s. 5 of the 2000 Act. While common principles certainly emerge from the case law dealing with extensions of time - such as the duration of the delay, the reasons for the delay, the need to protect the integrity of the asylum system and potential prejudice - a system which depends on large measure on the application of these principles by individual judges in individual cases, each with their own special facts, will inevitably produce a certain lack of predictability and consistency.

34. In these circumstances, therefore, I consider that s.5 of the 2000 Act fails the principle of effectiveness identified by the Court of Justice in *Pontin*.

Conclusions

35. In conclusion, therefore, I am of the view that whereas the applicants would not otherwise be within time and would not merit an extension of time under s.5 of the 2000 Act, the situation is otherwise inasmuch and insofar as they challenge the operation of the 1996 Act by reason of its alleged non-compliance with the Procedures Directives.

36. An applicant in this situation may be barred from asserting European Union rights only if national procedural law complies with the principles of equivalence and effectiveness. As I have concluded that s. 5 of the 2000 Act fails these requirements, it follows that this limitation provision may not be impleaded or relied on as against the applicants so far as the claim based on the Procedures Directive is concerned. In these special circumstances and for these particular reasons I propose to grant the applicants leave to apply for judicial review.