APPROVED **[2021] IEHC 283**

THE HIGH COURT
JUDICIAL REVIEW

2020 No. 262 J.R.

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

SAMANTHA TYNDALL

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 30 April 2021

INTRODUCTION

1. This judgment is delivered in respect of an application for an extension of time in judicial review proceedings. The proceedings have been taken by the Director of Public Prosecutions ("***the Director***"). The Director seeks to quash an order of the Circuit Court made on an appeal from the District Court. In brief, the Director alleges that the Circuit Court exceeded its jurisdiction in allowing the appeal in full, notwithstanding that the appeal was against the severity of sentence only and not an appeal against conviction.

2. Order 84, rule 21 of the Rules of the Superior Courts provides that an application for judicial review shall be made within three months from the date of the impugned judgment or order. It is common case that the Director's application was made some two months out of time. That is not, of course, an end of the matter in that the High Court has discretion under Order 84, rule 21(3) to extend time.

PROCEDURAL HISTORY

3. The District Court made an order on 4 July 2019 convicting the respondent ("***the accused***") of an offence contrary to section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001. The theft involved goods (toys) with a value of less than €100. A two month custodial sentence was imposed. This sentence was reversed, on appeal, by the Circuit Court at a hearing on 19 November 2019. The Circuit Court order is recorded as follows.

> "Upon the hearing of an appeal at Wexford Circuit Court on the 19th of November, 2019 it was further adjudged that the sentence of 2 months detention imposed at Gorey District Court on 4th July, 2019 be reversed."

4. The Director seeks to challenge the order of the Circuit Court on the grounds that the Circuit Court exceeded its jurisdiction in allowing the appeal in full, notwithstanding that the appeal was against the severity of sentence only and not an appeal against conviction. It is alleged, in particular, that the Circuit Court exceeded its jurisdiction under section 50 of the Courts (Supplemental Provisions) Act 1961.

5. The judicial review proceedings were instituted by way of an *ex parte* application for leave to apply for judicial review on 20 April 2020, that is, some five months subsequent to the date of the Circuit Court's order. The High Court order granting leave did not include an extension of time.

6. The affidavit grounding the application for an extension of time has been sworn by the State Solicitor for County Wexford. The affidavit puts forward two reasons for the delay. The first reason concerns the digital audio recording ("***DAR***") of the hearing before the Circuit Court. It is averred that it had been "necessary to seek the DAR as part of carrying out proper enquiries in contemplation of" the application for judicial review.

7. It appears from the grounding affidavit that the requisite court application to take up the DAR had not been made until 28 January 2020, i.e. some two months after the hearing before the Circuit Court. There is a vague reference in the grounding affidavit to an earlier "request" having been made for the DAR on 9 December 2019. It is not explained, however, to whom this "request" was made. Certainly, the "request" did not involve an application to court. The procedure for taking up the DAR is prescribed under Order 67A of the Circuit Court Rules and necessitates an application to court on notice. This application was not made until 28 January 2020. At all events, the grounding affidavit confirms that the DAR had been obtained on 14 February 2020.

8. The second reason concerns a delay in obtaining a copy of the Circuit Court order. It is averred that the order was ultimately obtained on 14 February 2020.

9. As of 14 February 2020, therefore, both of the perceived difficulties had been resolved. The three-month time-limit under Order 84, rule 21 had not yet expired as of this date. No explanation whatsoever has been offered on affidavit for the two-month delay thereafter, i.e. the delay between 14 February 2020 and the making of the application for leave to apply for judicial review on 20 April 2020.

ORDER 84, RULE 21

10. Order 84, rule 21 of the Rules of the Superior Courts provides that an application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose. In the case of a challenge to a court order, the date when grounds for the application first arose shall be taken to be the date of that order (Order 84, rule 21(2)).

11. Order 84, rule 21(3) and (4) confers discretion on the High Court to extend time as follows.

> "(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:
>
> (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 in sub-rule (1) either:
>
> (i) were outside the control of, or
>
> (ii) could not reasonably have been anticipated by
>
> the applicant for such extension.
>
> (4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party."

12. The obligations to be complied with by an applicant who seeks an extension of time are prescribed under Order 84, rule 21(5). This rule provides that an application for an extension of time shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed, and shall verify any facts relied on in support of those reasons.

13. The Supreme Court in *M. O'S. v. Residential Institution Redress Board* [2018] IESC 61; [2019] 1 I.L.R.M. 149 has confirmed that an applicant, who does not apply for leave to issue judicial review within the time specified, is required to furnish good reasons which explain and objectively justify the failure to make the application within the time-limit and which would justify an extension of time up to the date of institution of the proceedings. The perfunctory affidavit filed on behalf of the Director in the present case fails to meet these requirements.

PRINCIPLES GOVERNING EXTENSION OF TIME

14. The principles governing an application for an extension of time in judicial review proceedings have been set out authoritatively by the Supreme Court in *M. O'S. v. Residential Institution Redress Board* [2018] IESC 61; [2019] 1 I.L.R.M. 149 ("***M. O'S.***"). The principal factor relied upon by the applicant in support of the extension of time in that case had been that there had been a significant change in the case law since the date of the administrative decision which it was sought to challenge in the judicial review proceedings. As of the date the administrative decision had been made, the state of the case law was that the High Court had already delivered two judgments in cases raising similar complaints to those which the applicant wished to pursue. In each instance, the application for judicial review failed because of the particular interpretation given to the relevant legislative provisions. Mr. O'S had been legally advised that if the same rationale were to be applied to his case, then an application for judicial review on his part would be unsuccessful. Mr. O'S decided not to pursue judicial review proceedings at that time.

15. A number of years later, the Court of Appeal delivered a judgment which effected a change to the interpretation of the relevant legislation. Mr. O'S then instituted judicial review proceedings. So significant was this change in the case law that the respondent to the judicial review proceedings accepted that were an extension of time to be granted, then Mr. O'S would be entitled to an order of *certiorari* setting aside the administrative decision. To put the matter another way, the applicant in *M. O'S.* would be entitled to succeed in his proceedings "but for" the time point.

16. The Supreme Court divided on the question of whether an extension of time should be granted. Whereas both the majority and minority judgments accepted that a change in the case law could, in principle, represent a good and sufficient reason for an extension

of time, the judgments differed on the outcome. Finlay Geoghegan J., writing for the majority, allowed an extension of time. The considerations relied upon in this regard included the fact that the applicant had taken legal advice at the time the administrative decision was made, and had determined not to seek judicial review based upon advice that he was not likely to succeed and that it was probable that an order for costs would be made against him if he failed. The judgment attaches weight to the fact that the impugned administrative decision had been made pursuant to legislation which was for the purposes of administering a no fault redress scheme for a class of vulnerable and injured persons.

17. Counsel on behalf of the Director of Public Prosecutions in the present proceedings placed emphasis on the following statement of general principle from the majority judgment in *M. O'S.* (at paragraph 60 thereof).

> "I have concluded that the case law cited above, insofar as it applies to the extension of the time specified under Ord.84 for the bringing of judicial review proceedings, makes clear that the jurisdiction which the court is to exercise on an application to extend time is a discretionary jurisdiction which must be exercised in accordance with the relevant principles in the interests of justice. It clearly requires an applicant to satisfy the court of the reasons for which the application was not brought both within the time specified in the rule and also during any subsequent period up to the date upon which the application for leave was brought. It also requires the court to consider whether the reasons proffered by an applicant objectively explain and justify the failure to apply within the time specified and any subsequent period prior to the application and are sufficient to justify the court exercising its discretion to extend time. The inclusion of sub-rule (4) indicates expressly that the court may have regard to the impact of an extension of time on any respondent or notice party. The case law makes clear that the court must also have regard to all the relevant facts and circumstances, which include the decision sought to be challenged, the nature of the claim made that it is invalid or unlawful and any relevant facts and circumstances pertaining to the parties, and must ultimately determine in accordance with the interests of justice whether or not the extension should be granted. The decision may require the court to balance rights of an applicant with those of a respondent or notice party. The judgments cited do not, in my view, admit of a bright line principle which precludes a court taking into account a relevant change in the

> jurisprudence of the courts when deciding whether an applicant has established a good and sufficient reason for an extension of time. Further, the judgments cited above do not envisage any absolute rule in relation to what may or may not be taken into account or constitute a good reason or a good and sufficient reason. The court, in an application for an extension of time, is exercising a discretionary jurisdiction and in the words of Denham J. in *De Roiste*, '[t]here are no absolutes in the exercise of a discretion. An absolute rule is the antithesis of discretion. The exercise of a discretion is the balancing of factors – a judgement.'"

18. These, then, are the principles which this court must apply in determining the application for an extension of time in this case.

19. Before leaving the judgment in *M. O'S.*, it is instructive to contrast the facts of that case with those of the present case. This is done subject to the caveat that reliance on the outcome of other cases is only ever of limited assistance. This is because, as emphasised in the passage cited above, the decision on an application to extend time entails the exercise of a discretionary jurisdiction. Each case must, therefore, be determined by reference to its own particular circumstances.

20. Subject to that caveat, it can reasonably be said that the present case is at the opposite end of the spectrum to *M. O'S.* The judgment of the majority in *M. O'S.* was informed by the legislative context, and, in particular, the remedial nature of the statutory redress scheme for those who had suffered abuse in residential institutions. No such considerations apply in the present case. Far from coming within a category of vulnerable person or a class of litigant who might be unfamiliar with procedural requirements, the Director of Public Prosecution is a seasoned litigant and has the benefit of a well-resourced office with highly experienced lawyers.

21. The majority judgment in *M. O'S.* had also been influenced, in part at least, by the overwhelming strength of the merits of the applicant's case. As explained earlier, the respondent to the judicial review proceedings in *M. O'S.* had conceded that, but for the time-limit issue, the applicant was entitled to relief. By contrast, the respondent in the

present case is contesting the application in full. A comprehensive statement of opposition has been filed.

22. I turn next to consider the specific factors called in aid by the Director in support of her application for an extension of time.

DISCUSSION AND DECISION

23. Counsel on behalf of the Director, in written and oral submission, put forward the following factors in support of the application for an extension of time.

(i) Digital Audio Recording / DAR

24. As appears from the grounding affidavit, the principal reason put forward for the delay relates to the taking up of the digital audio recording of the hearing before the Circuit Court.

25. The procedure for taking up the recording is prescribed under Order 67A of the Circuit Court Rules. This involves making an application, in the proceedings concerned, by way of motion on notice to the other party or the parties to those proceedings.

26. It appears from the grounding affidavit in the present case that the application to the Circuit Court was not made until 28 January 2020, i.e. some two months after the hearing on 19 November 2019. The digital audio recording was received by the State Solicitor for Wexford on 14 February 2020.

27. The fact that an applicant has deferred instituting judicial review proceedings pending receipt of a copy of the digital audio recording will not, generally, represent a good and sufficient reason for an extension of time. It is certainly not a good and sufficient reason in the circumstances of the present case.

28. It will rarely be necessary for an applicant to have an audio recording or transcript of the hearing before the District Court or the Circuit Court in advance of the making of an *ex*

parte application for leave to apply for judicial review. This is because, in most instances, the applicant for judicial review or his or her representatives will have been present in court at the time the events giving rise to the judicial review proceedings occurred. Save in those unusual cases where, say, the applicant had not been on notice of the hearing, an audio recording or transcript of the hearing before the court below will not be necessary for the purposes of a judicial review leave application.

29. There will not normally be any factual dispute as to what occurred in the court below. The controversy in the judicial review proceedings will normally centre instead on legal issues. In those unusual cases where a conflict of fact emerges once the opposition papers have been filed, the High Court itself can direct the production of a transcript of the record of the proceedings before the court below (Order 84, rule 27(2A) of the Rules of the Superior Courts).

30. Were a practice to be allowed to develop whereby applicants, as a matter of course, delayed instituting judicial review proceedings pending receipt of an audio recording or transcript, it would be open to abuse. As counsel for the accused correctly observed, such a practice would result in "fishing expeditions", whereby unmeritorious applicants would seek to take up the digital audio recording and subject same to close scrutiny in the hope of identifying some procedural error.

31. Turning to the specific circumstances of the present case, the Director has failed to establish that there was any necessity to take up the digital audio recording in advance of the institution of these judicial review proceedings. As appears from the grounding affidavit, the State Solicitor himself had been in attendance at the hearing before the Circuit Court. The State Solicitor would thus have been in a position to provide a first-hand account of what occurred.

32. The gravamen of the Director's complaint in the judicial review proceedings is that the Circuit Court exceeded its jurisdiction in an appeal against severity of sentence. This is quintessentially a legal objection. It does not turn on any factual nuance. There is, in truth, no factual dispute between the parties as to what actually occurred before the Circuit Court.

33. Tellingly, the Director has not exhibited the transcript of the hearing before the Circuit Court as part of these judicial review proceedings. It is difficult to understand how the digital audio recording could have been a *sine qua non* to the making of the application for leave to apply for judicial review in circumstances where it is, seemingly, of so little relevance that it has not been exhibited or referred to in any shape or form.

34. Even if, contrary to the findings above, it had been appropriate to take up the digital audio recording in advance of the leave application, this could and should have been attended to within the three month time-limit. The Director and her officials must be taken to have notice of the procedures to be followed where it is sought to take up a recording of court proceedings. The requisite court application should have been made earlier than 28 January 2020. As it happens, even with the delay in making the court application, the State Solicitor had received the digital audio recording within the three month time-limit. No explanation at all has been provided as to what occurred between 14 February 2020 and the making of the leave application on 20 April 2020.

35. Similarly, no proper explanation has been provided as to what efforts were made to take up a copy of the Circuit Court order prior to its receipt on 14 February 2020, nor as to the reason for the delay thereafter.

(ii). Public health measures

36. Counsel on behalf of the Director submitted that the delay is attributable, in part, to the restrictions on court sittings imposed as part of the public health measures introduced in

response to the coronavirus pandemic. With respect, there is no factual basis for this submission. First, there is no suggestion whatsoever in the grounding affidavit that this was a reason for the delay. Public health measures were not introduced until mid- March 2020. As of that date, the application for judicial review would already have been out-of-time. As it happens, the affidavit makes no reference at all to events subsequent to 14 February 2020 and, by definition, does not address the public health measures. There is no suggestion, for example, that the *ex parte* application would have been moved earlier "but for" the public health measures.

37. Secondly, it is a matter of public record that the High Court continued to sit throughout the period of delay (March and April 2020) to hear certain types of business including, relevantly, urgent applications for judicial review. Public notices to this effect were published by the Courts Service at the time.

38. It is regrettable that the Director should seek, without justification, to attribute blame for her own delay to the Courts Service.

(iii). Public interest in the prosecution of crime

39. Counsel on behalf of the Director has emphasised the public interest in the prosecution of crime, and in the correction of what the Director would characterise as "fundamental errors" made by courts of local and limited jurisdiction.

40. These are, indeed, important considerations. But countervailing public interest considerations are also engaged. There is a public interest in ensuring that criminal proceedings are heard and determined expeditiously. This is especially so in respect of summary proceedings in respect of minor offences. There is also a public interest in legal certainty and the finality of litigation.

41. The imposition of a three-month time-limit, subject to a discretionary jurisdiction to extend time, represents an attempt to balance these competing public interest

considerations. The time-limit is, of course, tempered by the discretion of the court to extend time. Indeed, the imposition of an inflexible time-limit would be disproportionate and constitutionally suspect (*White v. Dublin City Council* [2004] IESC 35; [2004] 1 I.R. 545).

42. An applicant in criminal judicial review proceedings will almost always be able to assert that there is a public interest in the proceedings which justifies an extension of time. If the applicant is an accused person, then they can assert that the judicial review proceedings are necessary to vindicate their constitutional right to a trial in due course of law. If the applicant is the Director, then it can be asserted—as is done in this case—that there is a public interest in the prosecution of offences.

43. The High Court, in exercising its discretionary jurisdiction, must seek to weigh these undoubtedly important considerations against the public interest in expedition, finality and certainty. On the facts of the present case, the scales come down against the granting of an extension of time. The accused had the benefit of an order of the Circuit Court reversing the custodial sentence imposed upon her by the District Court. This order was self-evidently a significant order, affecting the liberty of the accused. This order had been announced in public and in the presence of the State Solicitor. This had been a final order, in the sense that there is no right of appeal against the order to the High Court. The delay has been prejudicial to the accused in that, once the three month time-limit had expired, she had been entitled to assume that the Circuit Court order was final for all purposes and that she was not to be imprisoned. Parties are entitled to order their affairs on the assumption that criminal proceedings have concluded.

44. If the Director wished to apply to deprive the accused of the benefit of this order, then it behoved her to comply with the three month time-limit. In the absence of good and sufficient reasons which explain and objectively justify the failure to make the

application within the time-limit and which would justify an extension of time up to the date of institution of the proceedings, it is not sufficient for the Director simply to assert the public interest in the prosecution of offences.

45. The public interest considerations invoked by the Director are, of course, matters which must be considered in the balance. As the judgment of the Supreme Court in *M. O'S* indicates, the court must have regard to all the relevant facts and circumstances and must ultimately determine an application for an extension of time in accordance with the interests of justice. In the absence of a proper explanation for the delay, however, the considerations invoked by the Director are not sufficient, on their own, to justify an extension of time. Indeed, were it otherwise, the Director would, in effect, be absolved from compliance with time-limits, and from the obligations in terms of affidavit evidence prescribed under Order 84, rule 21.

(iv). Underlying merits of judicial review proceedings

46. The case law indicates that some weight can be attached to the strength or weakness of the underlying merits of the judicial review proceedings. This typically only arises where it is alleged that the merits are *weak*. It has been said that if a claim is "manifestly unarguable", then there can normally be no good or sufficient reason for permitting it to be brought, however slight the delay requiring the exercise of the court's discretion, and however understandable the delay may be in the particular circumstances (*G.K. v. Minister for Justice* [2002] 2 I.R. 418 at 423).

47. It is rarer, however, that the *strength* of the underlying merits will be relied upon to justify an extension of time. One such example is provided by the judgment in *M. O'S* itself where, as noted above, the respondent had conceded that, but for the time-limit issue, the applicant was entitled to relief. Absent a concession of this type, however, it occurs to me that there are dangers in embarking upon an elaborate assessment of the underlying

merits on an application to extend time. The logic of any time-limit is that there will be "hard cases" where what might well otherwise have been a successful application for judicial review cannot be pursued precisely because the proceedings were not instituted within time. The objective of the three-month time-limit is to ensure that public law proceedings are prosecuted promptly.

48. Whereas the factual issues giving rise to the within proceedings are straightforward, the legal issues are not necessarily so. The impugned order is of a type which the Circuit Court would have jurisdiction to make had an appeal been pursued in a particular form. There does not appear to be an error on the face of the order in that it does not recite that the appeal had been confined to an appeal against severity of sentence only. Tellingly, there is nothing on the face of the order to the effect that the accused has been "acquitted". Rather, the order simply records that "it was further adjudged that the sentence of 2 months detention imposed at Gorey District Court on the 4th July, 2019 be reversed".

49. As evident from the Director's written legal submissions, the gravamen of the judicial review proceedings is that whereas the Circuit Court had original jurisdiction to embark upon the appeal, it "lost" jurisdiction.

50. Suffice it to say that it is not immediately obvious, by reference to the pleadings and the form of the order, that this is a case of a "fundamental error" such as to justify the grant of an extension of time notwithstanding the desultory explanation of the delay offered on behalf of the Director.

(v). Length of delay

51. The judgment in *M. O'S.* confirms that one of the factors to be considered is the length of the delay. The delay in the present case has to be seen in the context of the timelines prescribed under Order 84. An application for judicial review should normally be moved within three months. In cases where leave is granted, the applicant is required to issue

an originating notice of motion and serve papers on the respondent within seven days. Thereafter, the respondent has three weeks within which to file opposition papers. The originating notice of motion is to be made returnable for the first available motion day after the expiry of seven weeks from the grant of leave, unless the court otherwise directs.

52. The scheme of Order 84 envisages that, save where otherwise directed, judicial review proceedings should generally be ready for hearing within seven weeks. This tight timeframe reflects the need for promptness in public law proceedings.

53. Thus, whereas the delay at issue in this case, some two months, may seem modest, it is significant relative to the prescribed timeframe.

54. Some weight must also be given to the consequences for judicial review proceedings generally of an unduly lax approach to compliance with procedural requirements. As observed by Clarke J. (then sitting in the High Court) in *Moorview Developments v. First Active plc* [2008] IEHC 274; [2009] 2 I.R. 788, [14].

> "Where parties come to expect almost endless indulgence then such parties are likely to act on the not unreasonable assumption that they will be indulged again to the considerable detriment of the proper functioning of the timely administration of justice and with consequent significant potential injustice across a whole range of cases. That consequence is a matter which needs to be given all due weight in any consideration."

55. Were this court to allow an extension of time to the Director, in the absence of an objective justification for the delay, merely on the basis that the period of default is said to be short, the same indulgence would be expected by all potential litigants. This would undo the good of the amendments introduced to Order 84 in 2011.

CONCLUSION AND FORM OF ORDER

56. For the reasons explained herein, I refuse an application for an extension of time pursuant to Order 84, rule 21 of the Rules of the Superior Courts. In consequence, the judicial review proceedings will be dismissed.

57. Insofar as costs are concerned, counsel for the accused has indicated an intention to apply for a recommendation pursuant to the Legal Aid – Custody Issues Scheme. I have asked counsel to confirm that the proceedings come within the Scheme, as interpreted by the Supreme Court in *O'Shea v. Legal Aid Board* [2020] IESC 51. If so, I propose to make a recommendation. The parties have liberty to apply.

Appearances

Conor McKenna for the applicant instructed by the Chief Prosecution Solicitor
James Dwyer, SC and Kieran Kelly for the respondent instructed by John O'Donovan & Co.

Approved Garrett Simons