# THE COURT OF APPEAL

**CIVIL**

**[approved]**

**[2024 No 113]**

**[2022 No. 283/JR]**

**The President** **Neutral Citation Number [2024] IECA 266**

**Meenan J.**

**O'Moore J.**

**BETWEEN**

**PETER NOWAK**

**APPELLANT**

**AND**

**THE COURTS SERVICE OF IRELAND**

**RESPONDENT**

**AND**

**THE DATA PROTECTION COMMISSION**

**THE SUPERIOR COURTS RULES COMMITTEE**

**NOTICE PARTIES**

**JUDGMENT of Costello P. delivered on the 8th day of November 2024**

**Introduction**

**1.** This is an appeal by Mr. Nowak ("the Appellant") against the judgment and order of the High Court (O'Donnell J.), refusing him an order of *mandamus,* directing the Central Office of the High Court to process four appeals against Circuit Court orders, which, in turn, dismissed his appeals in respect of decisions of the Data Protection Commission.

**Background**

**2.** In four separate decisions, the Data Protection Commission rejected complaints made by the Appellant against a variety of respondents concerning the processing of his personal data. The Appellant appealed these four decisions to the Circuit Court, and on 23 November 2021, the Circuit Court dismissed the appeals.

**3.** The Appellant wished to appeal to the High Court pursuant to s.26 of the Data Protection Act 1988 (as amended). The section provides that the decision of the Circuit Court, under s.26, shall be final, save that an appeal may be brought to the High Court on a point of law. It is not a full rehearing. In addition, s.26 acknowledges that the decision of the High Court is not final and may, in turn, be appealed.

**4.** The Appellant lives in Poland. In November 2021, there were significant restrictions on travel and access to public offices and buildings by reason of the Covid 19 pandemic. Accordingly, the Appellant sent four Notices of Appeal by registered post to the Central Office of the High Court. He did not attend the Central Office in person. The Notices of Appeal were received on 2 December 2021. This was nine days from the pronouncement of the decisions of the Circuit Court in open court. The time limit for appeals brought pursuant to Part IV of the Courts of Justice Act 1936 is ten days, and thus was due to expire on 3 December 2021. The four Notices of Appeal were processed by the Central Office on 2 December 2021. Ms. Catherine Herraghty, an official in the Central Office of the High Court, formed the opinion that the Notices of Appeal were incorrect and that she could not process them. In accordance with the information furnished by the Appellant, she wrote to him c/o 5 Smithfield Village, Smithfield, Dublin 7, explaining that the appeals were rejected because:

> "*Document content incorrect – the notice of appeal is the wrong format please see notice of appeal template enclosed – The title should be the same as the circuit court – If you are out of time a notice of extension of time to appeal is required please see template enclosed"*

**5.** The Appellant responded by email on 6 December. He said he would resend the Notices of Appeal for reprocessing "*as they were filed in time and rejected for no valid reason(s)*". On 7 December, he emailed, requesting a response to his email of 6 December. Shortly thereafter, an official in the Central Office replied, stating that the documents were returned correctly, and noted that in 2018, the template for a Notice of Appeal to the High Court had changed and she enclosed a copy of the new template. In ease of the Appellant, she said that if he wished to fill it out, the Central Office could use the Stamp Duty paid on the earlier Notices of Appeal which were returned.

**6.** The Appellant replied 17 minutes later, insisting that his Notices of Appeal "*contained the very information required by the new template*" and asserted that there was no need to draft new Notices of Appeal. He again requested the Central Office to process the original Notices of Appeal on the grounds that they were valid and in line with court rules.

**7.** As the Appellant heard nothing further from the Central Office, on 10 December, he sent an email, asking why matters had been delayed and requiring the Central Office to "*process the appeals immediately*". On Monday 13 December, he followed up that email, reiterating his position that the Central Office had no reason not to process his appeals. He concluded:

> "*In light of the above, please explain to me why the appeals (which were sent to you on 2 December and resent on 7 December) have not been processed to date? Since you have no valid explanation, I demand you do same IMMEDIATELY."*

**8.** On 20 December 2021, the Central Office replied, referring to previous responses and stated:

> "*As regards your query, this has been dealt with and we cannot put this matter further."*

**9.** On 22 December 2021, the Appellant's response simply stated:

> "*Please note that if you do not process the Notices of Appeal immediately, I will seek an Order of Mandamus by way of judicial review application directing you to do so."*

**10.** On 29 December 2021, the Appellant prepared, signed and dated his statement required to ground the application for judicial review. However, he did not proceed to move the application early in 2022. The proceedings were first listed in the Judicial Review *Ex Parte* List on 16 May 2022. For the purposes of this appeal, I will presume that it was formally moved on that date, and therefore the proceedings were brought on 16 May 2022. Thereafter, the application was adjourned to 25 July 2022 and 24 October 2022. On that occasion, the High Court directed that the application for leave be on notice to the Respondent. The Appellant failed to serve the application papers on the Respondent, and on 20 December 2022, when the matter was listed for mention in the High Court, the application was adjourned on a peremptory basis against the Appellant to 13 January 2023. On 11 January 2023, the Appellant made an application to the High Court (the nature of which was not clarified) and the application for leave to seek judicial review was then adjourned for mention to 17 February 2023.

**11.** By agreement of the parties, the application for leave to seek judicial review and the substantive judicial review application were heard in a single combined hearing. O'Donnell J. refused the reliefs sought on substantive grounds, and in addition, at para. 27 of his judgment, he held:

"*. . . the proceedings clearly are out of time and there is no application to the court or evidential basis for the court to grant an extension of time.*"

**The Appeal**

**12.** The Appellant appealed, alleging that the High Court erred in holding:

(a) That Part IV of the Courts of Justice Act 1936 governs appeals brought pursuant to s.26 of the Data Protection Acts 1988 and 2003.

(b) That the 1936 Act provides the general framework for the processing of appeals from the Circuit Court.

(c) That there is a need for the Notice of Appeal [from the Order of the Circuit Court] to identify whether oral evidence was given and/or the Circuit Court in which the decision under appeal was made, which the notices [filed by the Appellant] failed to identify.

(d) That in the absence of any rule applicable to appeals under s.26, O.61 of the Rules of the Superior Courts governs such appeals.

(e) The proceedings were out of time, there was no application to the court nor any evidential basis for the court to grant an extension of time.

**13.** In his written and oral submissions, the Appellant contended that the extension of time for leave for him to appeal the decisions of the Circuit Court was not necessary because he was seeking an order of *mandamus*. He initially submitted that no time limit applied to an application for such relief. He subsequently stated that the time limit "*is a matter of judgement*" and conceded that there might be some limitation period. He confirmed that he was not asking the court for an extension of time on the grounds that his application for judicial review was not out of time.

**14.** When asked to explain when his cause of action first arose, he said he was waiting for the Central Office to "*change their mind"* from the position they had adopted in December 2021, but he would not otherwise identify a period. Inferentially, it was a matter for him to determine how long he would wait for this change of mind before he could conclude that it was necessary for him to seek an order of *mandamus.*

**Discussion and Decision**

**15.** Order 84, r.18(1) of the Rules of the Superior Courts provides, in part, that:

> "*An application for an order of . . . mandamus . . . shall be made by way of an application for judicial review in accordance with the provisions of this Order."*

Rule 21(1) provides:

> "*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."*

**16.** This time limit applies to applications for *mandamus*. It follows that the Appellant's submission that there is no time limit, or that it is a matter for judgement where an order of *mandamus* is sought, is manifestly incorrect.

**17.** The issue in this case is when time started to run. The rule provides that it runs "*from the date when grounds for the application first arose*". The Central Office refused to process the Notices of Appeal from the Circuit Court on 2 December 2021, and consistently maintained this position. By email dated 20 December, the Appellant was told that the matter "*has been dealt with and we cannot put this matter further*". In light of the prior exchange between the Appellant and officials in the Central Office, it was abundantly clear that the officials in the Central Office considered the matter to be closed and gave no indication whatsoever that they were likely to "*change their mind*".

**18.** Furthermore, the Appellant clearly understood that this was so, as on 22 December, he stated that if the Central Office did not process the Notices of Appeal "*immediately*", he would seek orders of *mandamus*. This email indicates that he did not anticipate any further debate between himself and officials in the Central Office, and that if they did not respond in the manner he demanded, he would then take action, and in fact, he did. He drafted a Statement of Grounds for an application to seek judicial review dated 29 December 2021.

**19.** In my judgement, the grounds for an application for *mandamus* arose in this case by 20 December 2021, at the absolute latest. Indeed, it could be said that it had arisen earlier, but it is not necessary for the purposes of this judgment to analyse the issue further.

**20.** That being so, the time had expired for the Appellant to bring an application for judicial review on 21 March 2022.

**21.** The earliest date on which it can be said that the Appellant moved his application for leave to seek judicial review was 16 May 2022, as an application for leave to seek judicial review at that time was not deemed to be made until it had been moved in open court. This was the first listing of the application in the High Court. This was outside the three months provided for in r.21(1). The application was thus out of time, and unless the court granted an extension of time, leave to seek judicial review could not be granted.

**22.** Order 84, r.21(3) empowers the court to extend the period within which an application for leave to apply for judicial review may be made, but the court's discretion in that regard is constrained. Firstly, there must be an application for an extension of time. Secondly, the extension of time must be grounded upon an affidavit sworn by or on behalf of the applicant which sets out the reasons for the applicant's failure to make the application for leave within the prescribed period and verifying any facts relied on in support of those reasons (subrule 5).

**23.** In addition, the court can only extend the period if it is satisfied that "*there is good and sufficient reason for doing so*", and furthermore, that the circumstances that resulted in the failure, either "*were outside the control of*" or "*could not reasonably have been anticipated by the applicant*".

**24.** In this case, there has been no application for an extension of time by the Appellant. He consciously and deliberately chose not to apply for an extension of time on the grounds that either no time limit applies, or that the application was moved within some undefined limitation period determined by the Appellant's assessment when the time allowed for a change of mind by the Central Office had expired. But, as is abundantly clear from the Rules of the Superior Courts, he was mistaken in this regard and there was, thus, no justification for his failure to act. Secondly, there is no affidavit grounding any such application. Thirdly, the Appellant has not explained why he did not bring his application shortly after the exchange of emails with the Central Office in December 2021, or in any event, within the three-month period thereafter, other than to state to this Court in oral submissions that he was waiting for the Central Office "*to change their minds*". In my judgement, this is entirely inconsistent with his drafting a Statement of Grounds on 29 December 2021, and the consistent position clearly stated in the emails sent by the officials in the Central Office. It falls significantly short of amounting to a good and sufficient reason for the court to extend the period of time to seek judicial review. In addition, the circumstances were clearly not outside the control of the Appellant, nor could they be described as circumstances which "*could not reasonably have been anticipated by"* him. Any one of these would suffice to hold that there was no basis for extending the time to seek leave to apply for judicial review: cumulatively they are insurmountable.

**25.** It follows that the High Court was correct to dismiss the application on the basis that it was out of time, that there was no application for an extension of time and that there was

no evidential basis for extending the time for the Appellant to seek judicial review. That being so, it is not necessary to consider the other grounds of appeal.

**26.** For these reasons, I would dismiss this appeal.

**27.** My preliminary view is that the Respondent has been entirely successful in this appeal and that it should be entitled to the costs of the appeal. If the Appellant wishes to contend otherwise, he may do so by serving a written submission of no more than 1,000 words to be filed within ten days of delivery of this judgment. The Respondent may file a replying submission, likewise of 1,000, within a further ten days.

**28.** Meenan and O'Moore JJ. have read this judgment in advance and have authorised me to indicate their agreement with same.