

APPROVED

[2021] IEHC 712



THE HIGH COURT
JUDICIAL REVIEW

2020 No. 521 J.R.

BETWEEN

FIONA ROCHE

APPLICANT

AND

TEACHING COUNCIL OF IRELAND

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 25 November 2021

INTRODUCTION

1. This judgment is delivered in respect of an application for leave to apply for judicial review. The application for leave had initially been moved on an *ex parte* basis on 27 July 2020. On that date, the High Court (Meenan J.) directed that the application for leave be made on notice to the respondent. The *inter partes* application for leave ultimately came on for hearing before me on 4 November 2021. Judgment was reserved until today's date.
2. The application for leave was opposed, principally, on the basis that the proceedings had been instituted outside the three month time-limit prescribed under Order 84, rule 21 of the Rules of the Superior Courts, and that the criteria for an extension of time are not met.

NO REDACTION REQUIRED

PROCEDURAL HISTORY

3. The applicant is currently registered with the Teaching Council through what is described as the further education route, and such registration remains in place. The applicant has since applied to be registered as a qualified teacher at post-primary level in the following subjects: Civic Social and Political Education (“*CSPE*”) and Religious Education. In these judicial review proceedings, the applicant seeks to challenge the Teaching Council’s refusal to register her on this basis.
4. The proceedings are taken against two related decisions: a first instance decision of the Qualifications Panel of the Teaching Council, and a subsequent decision by the Registration Review Group affirming the first instance decision.
5. The applicant has been provided with an extract of the minutes of the relevant meeting of the Qualifications Panel, which set out in detail the rationale for the first instance decision. The reason for refusal was summarised as follows:

“The reason for the refusal was the significant shortfall in Ms Roche’s qualifications taking into account her experience and lifelong learning, consistent with the views of the Advisors. This includes the following:

Initial Teacher Education

The education qualification completed by Ms Roche in 2017 (Higher Diploma in Further Education) focuses on adult and further education. This course does not cover post primary age range of 12 – 18. It was noted that the Advisor acknowledged relevant areas of study that were undertaken in this course, but generally apart from the two areas of Psychology and Sociology modules, the key studies in pedagogy relevant to teaching in a post-primary school were not evidenced. It was noted that the Initial Teacher Education in the Post Primary sector has a different focus, with a clearly defined and different target group of learners.

Ms Roche’s experience in a post primary setting was also taken into account. It was noted that her experience was

predominantly in the area of guidance counselling. It was decided that Ms Roche's experience did not adequately bridge the gap in the initial teacher education qualification requirements for post primary teaching and her qualification was not of an equivalent standard.

Curricular subject

With respect to CSPE, the Panel noted the Teaching Council's Registration Curricular Subject Requirements document (2017) and the requirements outlined in that document for the subject of CSPE. [...]

The Panel noted the view of the Advisor that the qualifying BA degree only carried a total of 13.5 credits specific to CSPE and that there is a shortfall of 46.5 credits when assessed against the Curricular Subject Requirements document.

It was also noted that the Advisor found that many of the modules completed by the applicant are not CSPE modules, and therefore the qualification does not appear to provide a basic understanding of the broader foundations of CSPE. The Panel also noted Ms Roche has some experience in teaching CSPE, but decided that this did not make up the deficits and that there was still a significant shortfall such that Ms Roche's qualification was not of an equivalent standard."

6. The applicant had also been provided with the reports of the advisors referred to above. An assessment carried out on 9 April 2019 contains the following general summary:

"Fiona has acquired a good range of qualifications, both undergraduate and postgraduate: these provide her with a solid foundation for working in the Further Education Sector. Pedagogy relevant to teaching in the Post Primary sector was not an element in any of the courses undertaken, as evidenced in the module descriptors provided. Andragogy and pedagogy are not interchangeable. To maintain standards in teaching in the Post Primary sector, it is necessary that the specific, relevant Initial Teacher Education qualification be attained."

7. The Registration Review Group expressly concurred with, and adopted, the rationale of the Qualifications Panel.

8. The Registration Review Group's decision was notified to the applicant by way of letter dated 4 June 2019. A number of weeks thereafter, solicitors acting on behalf of the applicant wrote to the Teaching Council on 18 June 2019, and stated that their client intended to apply to the High Court for a judicial review of the decision. In the event, however, the intimated judicial review proceedings were not instituted until 27 July 2020, that is, some thirteen months subsequent to the date of the impugned decision.
9. In the intervening period, the applicant had made a request to the Teaching Council for the disclosure of records pursuant to Article 15 of the General Data Protection Regulation (EU) 2016/679 ("*the data access request*"). The data access request was made on 26 August 2019, that is some nine days prior to the expiration of the three month time-limit prescribed for judicial review proceedings.
10. The data access request was ultimately responded to on 4 November 2019, following a series of what might be described as "*holding letters*" on behalf of the Teaching Council.
11. On the same date as the data access request was made (26 August 2019), the solicitors acting on behalf of the applicant wrote a second letter to the Teaching Council. The following passage is of relevance to the time-limit issue:

“As this is a matter of considerable urgency to our client, we look forward to hearing from you by return. We refer to our previous correspondence wherein we advised that our client would seek to have the decision of the Teaching Council judicially reviewed. We wish to advise that Counsel, both Senior and Junior, are currently on vacation and as a result we are not in a position to comply with the time requirements imposed by the Superior Court rules. In the circumstances we now wish to formally advise that depending on the replies to the within queries it may well be that it will be necessary for us to apply for an extension of time to seek leave to bring a Judicial Review application. In the event that you are of

the opinion that the Teaching Council will be in any way prejudiced by our proposed course of action please so advise by return.”

12. This letter was replied to on behalf of the Teaching Council by its solicitors on 10 September 2019. The letter seeks to characterise the letter of 26 August 2019 as an attempt to avoid or circumvent the time-limits for the institution of judicial review proceedings. It was further stated in reply that it is not permissible, months after the relevant events, to purport to raise queries in respect of matters that are obvious from earlier correspondence.
13. The letter on behalf of the Teaching Council concludes as follows:

“Please note that any judicial review proceedings will be fully contested as will any application to extend time for such proceedings. The Teaching Council, like any other public body, is entitled to proceed on the basis that its decisions and proceedings are lawful and, if not challenged within the relevant time period, no longer subject to review. It is quite clear that your client, having decided to institute judicial review proceedings in June of this year, took no meaningful steps to pursue that course.”
14. Further correspondence ensued between the parties. The applicant’s solicitors again stated, in a letter dated 22 November 2019, that their client intended to institute legal proceedings against the Teaching Council.
15. These judicial review proceedings were ultimately instituted by way of an *ex parte* application for leave on 27 July 2020. The High Court (Meenan J.) directed that the application for leave be made on notice to the respondent. A stay was imposed upon the Teaching Council’s decision. The *inter partes* application for leave ultimately came on for hearing before me on 4 November 2021. Judgment was reserved until today’s date.

CHRONOLOGY

16. The chronology of key events is summarised in tabular form below:

23 April 2019	First instance decision notified
4 June 2019	Appeal decision notified
18 June 2019	Applicant's solicitors letter notifying intention to apply for judicial review
26 August 2019	Data access request under Article 15, GDPR
26 August 2019	Applicant's solicitors letter
20 November 2019	Substantive response to data access request
22 November 2019	Objection raised to redactions in data
6 December 2019	Response to objection re: redactions
27 July 2020	Application for leave to apply for judicial review moved <i>ex parte</i>
23 October 2020	Notice of motion seeking leave to apply for judicial review
4 November 2021	Hearing of leave application

ORDER 84, RULE 21

17. The three month time-limit prescribed for judicial review proceedings assumes a particular significance in cases, such as the present, where an applicant seeks an order staying or suspending the effect of an administrative decision pending the determination of the judicial review proceedings. The entitlement of those public authorities who are given statutory power to conduct specified types of legally binding decision-making or action-taking is an important part of the structure of a legal order based on the rule of law (*Okunade v. Minister for Justice Equality and Law Reform* [2012] IESC 49; [2012] 3 I.R. 152 (at paragraph 92)). Whereas there is a right to question the validity of such decisions by way of judicial review, any such proceedings should normally be brought within the three months allowed. It would be contrary to the public

interest in good administration to allow stale claims to be brought, more than a year after the event, in the absence of good and sufficient reason.

18. Order 84, rule 21(3) and (4) confer 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.”

19. 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.

20. The Supreme Court in *M. O’S. v. Residential Institutions Redress Board* [2018] IESC 61; [2019] 1 I.L.R.M. 149 (“*M. O’S.*”) 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.

21. The majority judgment in *M. O'S.* (at paragraph 60 thereof) contains the following statement of general principle as to the exercise of the court's discretion:

“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.”

22. I turn next to apply these principles to the circumstances of the present proceedings.

DISCUSSION AND DECISION

23. The application for an extension of time is advanced by reference to four factors. For ease of exposition, I propose to address each of these in turn under separate headings below.

(a). Data access request / GDPR

24. The applicant contends that it had been necessary for her to obtain documentation from the Teaching Council, by way of a data access request pursuant to the General Data Protection Regulation, prior to the institution of these judicial review proceedings. An attempt is then made to criticise the Teaching Council for alleged delay on its part in complying with the request.
25. I am satisfied that the applicant’s decision to await the outcome of a data access request does not justify the grant of an extension of time. First, the applicant did not require sight of the historic documentation held by the Teaching Council in order to formulate her grounds of judicial review. The legal challenge related to the decision not to recognise the applicant’s qualifications in an alternative route to the route through which she had already been registered. The applicant had been provided with a detailed minute of the Qualifications Panel’s decision and with copies of the advisor’s reports. See paragraphs 5 and 6 above.
26. The Qualifications Panel’s reasoning was expressly concurred with, and adopted by, the Registration Review Group in their letter of 4 June 2019. Moreover, this letter expressly addresses, *inter alia*, one of the principal grounds since raised in

- the judicial review proceedings, namely that the applicant should not be subject to the Teaching Council (Registration) Regulations 2016 (S.I. No. 444 of 2016).
27. The applicant was thus fully armed with all relevant documentation necessary to formulate an application for judicial review as of 4 June 2019.
 28. More generally, a person who intends to pursue judicial review proceedings is expected to do so within the time-limit prescribed, and is not entitled to delay instituting the judicial review proceedings while they assemble each and every piece of documentation which they think might have a possible bearing on the proceedings. The correct approach is to institute the proceedings within time, and, if necessary, to put any additional documentation, which is obtained subsequently, before the court by way of a supplemental affidavit.
 29. Secondly, and in any event, the applicant was guilty of unreasonable delay both before and after the making of the data access request. The request was not submitted to the Teaching Council until 26 August 2019, that is just shy of the expiration of the three month time-limit. This was so notwithstanding that the applicant, through her solicitors, had indicated an intention to apply for judicial review as early as 19 June 2019. The applicant had not been entitled to wait until the three month time-limit had almost expired before making the request.
 30. The data access request was complied with on 4 November 2019. There was then a further period of culpable delay on the part of the applicant of some nine months. The judicial review proceedings were not instituted until 27 July 2020.

(b). Applicant's health

31. The applicant has sought to rely on her own ill-health as an explanation for the delay in the institution of the proceedings. The court has, of course, sympathy for the applicant, and appreciates that the impugned decision may well have

caused her stress and anxiety. However, there is nothing in the affidavit evidence put before the court which suggests that the applicant's health would have precluded her from instituting judicial review proceedings promptly. As correctly observed by counsel on behalf of the Teaching Council in his submission to the court, most of the health-related issues relied upon by the applicant in her affidavit do not coincide with the relevant time period. For example, the applicant describes in some detail the stress and anxiety which she suffered following the publication of media reports of her initial *ex parte* application for leave to apply for judicial review on 27 July 2020. By definition, events which occurred *subsequent* to the institution of the proceedings cannot be relevant to the assessment of pre-commencement delay. It is the period between 4 June 2019 and 27 July 2020 which falls to be considered in the context of the issue of delay.

32. Similarly, the medical treatment referred to on affidavit, and in respect of which certain documentation has been exhibited, relates to a period other than the relevant time period. The treatment referred to was received during the period October 2017 to January 2018. The only other medical document exhibited is in respect of a dermatological condition.
33. It is also a fact that the applicant had been able to instruct a solicitor, within a matter of weeks of the decision of 4 June 2019, to write to the Teaching Council and expressly state that the applicant intended to apply to the High Court for a judicial review of the decision.

(c). Availability of counsel

34. The applicant seeks to attribute much of the initial delay to the supposed non-availability of counsel. The applicant has averred on affidavit that she

“*understands*” that there is a convention in legal practice not to issue new instructions during the months of August and September, and to pause litigation until the new legal term resumes in October. Presumably, the applicant’s understanding in this regard is premised on something said to her by her solicitor. Certainly, the content of the solicitor’s letter of 26 August 2019 is indicative of an understanding on his part that the non-availability of counsel is a good and sufficient reason for an extension of time.

35. With respect, the understanding of neither the applicant nor her solicitor is correct. There is no convention to the effect that the obligation to comply with the three month time-limit under Order 84, rule 21 is suspended during the summer months. Nor is it correct, as a matter of fact, to suggest that counsel generally are not available during this period. Whereas a number of individual barristers may be away on annual leave on any particular week during August or September, there is always a cohort of barristers available. Similarly, the judges of the High Court continue to work during this period, writing judgments in cases which have been heard and preparing for upcoming hearings. Relevantly, there are always judges available during the summer recess to hear applications for leave to apply for judicial review. Indeed, such applications form a staple part of the duty judge’s list.
36. Whereas the issues raised in the judicial review proceedings are, obviously, of great importance to the applicant personally, the grounds of challenge are not legally complex. There are numerous barristers who practice in the area of public law, any one of whom would have been competent to advise the applicant, and, if so instructed, to draft an application for judicial review. The fact, if fact it be, that the individual barristers whom the applicant’s solicitor might normally

have considered briefing were unavailable during August and September does not represent a good and sufficient reason for failing to comply with the three month time-limit.

37. It should also be observed that even if the lapse of time in August and September could be overlooked (which it cannot), it represents only a small proportion of the overall delay. The impugned decision had been notified to the applicant on 4 June 2019. There is no explanation for the delay between that date and 31 July 2019. Moreover, it is apparent from the applicant's supplemental affidavit that counsel was not, in fact, instructed promptly upon the commencement of the new legal term in October 2019. Rather, there was a further delay of some four to five months, with counsel eventually being retained in February 2020. (It should be explained that the counsel who was retained is not the same barrister who had been approached in August 2019).

(d). Public health measures and court sittings

38. The applicant has sought to attribute part of the delay in the institution of these proceedings to the public health measures introduced in mid-March 2020 in response to the coronavirus pandemic. It is submitted that an application for leave to apply for judicial review could only have been properly made from mid-July 2020 onwards.
39. With respect, there is no factual basis for the applicant's submission in this regard. It is a matter of public record that the High Court continued to sit throughout the various iterations of the so-called "*lockdown*" introduced as part of the response to the coronavirus pandemic. Throughout the month of March 2020, there were a number of judges available each day in the Four Courts to hear applications including, *inter alia*, urgent judicial review applications.

Public notices to this effect were published by the Courts Service at the time. Thereafter, from the end of April 2020 onwards, proceedings in the judicial review list were capable of being heard by way of remote hearing, using an online platform.

40. It is simply incorrect, therefore, to suggest that the applicant was precluded from making an application for leave to apply for judicial review until July 2020. Certainly, there is no evidence that the applicant's solicitor made any attempt to contact the Central Office of the High Court with a view to having the application listed for hearing. Tellingly, the pleadings and affidavits necessary to make such an application were not, in fact, finalised until 23 July 2020. This is not a case where a putative applicant had been primed to move an application for leave earlier, but had been prevented from doing so.
41. At all events, the application for judicial review was already hopelessly out of time as of mid-March 2020, i.e. the date upon which the public health restrictions were first introduced.
42. For completeness, it should be noted that the High Court has refused an extension of time in similar cases where an applicant has sought to justify delay by reference to the existence of restrictions introduced in response to the coronavirus pandemic: *H. v. Director of Public Prosecutions* [2021] IEHC 215 (prison visits) and *Director of Public Prosecutions v. Tyndall* [2021] IEHC 283 (court sittings).

CONCLUSION AND FORM OF ORDER

43. The application for judicial review has been brought well outside the three month time-limit prescribed under Order 84, rule 21. None of the four factors relied

upon by the applicant represent a good and sufficient reason for an extension of time. Moreover, none of these factors were outside the control of the applicant and her legal advisers. The legal issues arising on the statement of grounds are not especially complex, and there should have been no difficulty in preparing the pleadings and verifying affidavit within the three months allowed.

44. This is not a case, therefore, where an extension of time is appropriate. Accordingly, the application for leave to apply for judicial review is refused.
45. These proceedings will be listed before me on 2 December 2021 at 10.30 am to address the issue of costs.

Appearances

James Lawless for the applicant instructed by Burns Nowlan

Remy Farrell, SC and Conor Feeney for the respondent instructed by Fieldfisher

Approved
Sandra S. Moss