THE HIGH COURT

[2023] IEHC 449

[Record No. 2023/267 JR]

JANA GOGOVA

APPLICANT

AND

THE RESIDENTIAL TENANCIES BOARD, JAMES DONOGHUE AND THE WORKPLACE RELATIONS COMMISSION AND CATHERINE BYRNE

RESPONDENTS

AND

ATTORNEY GENERAL

NOTICE PARTY

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 21st day of July 2023

INTRODUCTION

1. This matter comes before me as an application for leave to proceed by way of judicial review. The application was made on notice to the Residential Tenancies Board [hereinafter "the RTB"]. The Residential Tenancies Act, 2004 (as amended) [hereinafter "the 2004 Act"] provides for the protection of tenant's rights under Irish law and establishes dispute resolution mechanisms in respect of landlord and tenant issues arising under that Act. The application before me is the latest in a series of Court applications brought by the Applicant arising from a Determination Order made in respect of her tenancy in a privately owned property pursuant to the provisions of the 2004 Act. The Tenancy Tribunal's original decision, which is at the

heart of each of the several challenges which have been successively taken by the Applicant, was made on the 12th of August, 2021.

BACKGROUND

2. A Notice of Termination was served on the Applicant on 31st of October, 2019 by the Applicant's Landlord in respect of her tenancy in a dwelling on the South Circular Road, Dublin 8. The Notice of Termination was served based on the Landlord's intention to sell the property as provided for pursuant to the Table in s. 34 of the 2004 Act. The Applicant challenged the validity of the said Notice of Termination using the dispute resolution mechanisms established under the 2004 Act which provides for a two-stage process. A first stage decision was made by an adjudicator to dismiss the Applicant's claim. The Applicant proceeded to the second stage by appealing against this decision to the Tenancy Tribunal where an oral hearing was convened.

3. The Applicant made various arguments before the Tenancy Tribunal during an oral hearing in early August, 2021. These arguments included that the Notice of Termination should be declared invalid because the Landlord had not in fact sold the property within 9 months of the notice period set out in the Notice of Termination, that the sale had to be completed in order for the Notice of Termination to be valid and that the Landlord had failed to alert the prospective purchaser that the property had tenants in situ. It appears, at least from the terms of the Tribunal decision, that the Applicant's primary grievance before the Tribunal related to the fact that when her appeal came before the Tribunal more than nine months had passed since the Notice of Termination had been served on her without any sale of the property being concluded. She further contended that vacant possession was not necessary for a sale to conclude.

4. Under s. 34 of the 2004 Act, the Landlord is permitted to terminate a so-called Part IV tenancy where he or she intends, within 9 months after the termination of the tenancy, to enter into an enforceable agreement for the transfer to another, for full consideration, of the whole of his or her interest in the dwelling or the property containing the dwelling and the Notice of Termination is accompanied by a statutory declaration referred to in s. 35 of the Act. Section 35(8) of the Act prescribes a requirement in the said statutory declaration to declare that the landlord intends to enter an enforceable agreement to transfer to another, for full consideration, of the whole or part of his or her interest in the property containing the dwelling. The Act also

prescribes certain formalities which are to be complied with for a valid Notice of Termination and the notice period to which the tenant is entitled which varies depending on the length of the tenant's occupation.

5. Following the conclusion of the oral hearing, the three-member Tenancy Tribunal ruled that the Notice of Termination was valid, and the Applicant was given 35 days to vacate. For the reasons set out in its decision which included reference to relevant case-law, specifically *Gunn v. RTB* [2020] IEHC 635 and *Hennessy v. RTB* [2016] IEHC 174 and to ss. 34, 35(8), 62 and 66 of the 2004 Act, the Tribunal concluded that it was satisfied that the Notice of Termination was valid. The Tribunal decision carefully records an outline of the evidence it considered in relation to the intention to sell and clearly summarises the legislative requirements in its reasoned and clear decision. The Tribunal found that the Applicant's case was misconceived in that the obligation under the 2004 Act was to have an intention to sell, not a concluded sale and where a sale is not concluded within 9 months of the notice period set out in the Notice of Termination or the final determination of a dispute referred to the RTB, then the Landlord is required to offer the Tenant a tenancy.

6. Thereafter, the Applicant sought to challenge this decision of the Tribunal by way of an appeal on a point of law under s. 123 of the 2004 Act but she failed to do so in accordance with the 21 days statutory time limit therein prescribed. The application was listed before Bolger J. in July, 2022. Bolger J. made an order refusing to extend time to appeal the Determination Order on a point of law on the basis that she did not possess jurisdiction to grant such relief.

7. The Applicant appealed to the Court of Appeal against the Order of Bolger J. and the matter was listed in the Court of Appeal in October, 2021. The Court of Appeal directed the Applicant to s. 123(4) of the 2004 Act which provides that an appeal to the High Court shall be "*final and conclusive*", and Costello J. ruled that the Court had no jurisdiction to hear the appeal.

8. Notwithstanding the foregoing, the Applicant brought further proceedings in November, 2022 in which she again sought to appeal against the Determination Order of the Tribunal. These further proceedings were again opposed by the RTB on the basis that the time limit prescribed under s. 123(4) of the Act is an absolute one and the Court did not have

jurisdiction to extend time for an appeal. It was further contended that in the light of the order of Bolger J., the matter was *res judicata*.

9. The second statutory appeal pursuant to s. 123 was listed for hearing before Hyland J. in February, 2023 as an application for an order extending the time to appeal a decision of the Tenancy Tribunal and the Determination Order and an attempt to appeal against same. Hyland J. refused all the reliefs sought by the Applicant and the action was dismissed for being frivolous and vexatious and captured by the doctrine of *res judicata*. The DAR transcript of Hyland J.'s ruling was contained in the papers provided by the Applicant. In her ruling Hyland J. further found, as Bolger J. had before her, that she had no power to extend time and that the time limits prescribed under s. 123 of the 2004 Act constituted an absolute time limit.

10. In a separate and further attempt to challenge the Determination Order made under the 2004 Act in her case, the Applicant lodged a complaint with the Workplace Relations Commission in May, 2022 pursuant to the provisions of the Equal Status Act, 2000 [hereinafter "the 2000 Act"] alleging discrimination on various grounds against the RTB. The matter came on for hearing before an Adjudication Officer on the 16th of January, 2023. The Adjudication Officer nominated to determine the dispute (the Fourth Named Respondent) found that there had been a failure on the part of the Applicant to comply with the statutory time limits prescribed under the 2000 Act. In her written, reasoned decision which was delivered on the 3rd of February, 2023, she declined to exercise her discretion to extend time for the referral of a complaint under the 2000 Act or to dispense with the notification requirement in s. 21 of the 2000 Act. Although an appeal lies from the decision of the Adjudicator under the provisions of the 2000 Act, the Applicant did not appeal against this finding of the Adjudicator. Instead, she seeks to challenge it by way of judicial review in this current application.

11. Enforcement proceedings before the District Court stand adjourned and it is understood that the Applicant may be seeking legal representation in respect of same and may have a separate dispute with the Legal Aid Board.

APPLICATION FOR LEAVE

12. As a lay litigant and a non-native English speaker, it is not surprising that the precise nature of the Applicant's claim is difficult to discern despite the large volume of papers handed

into Court. Although the application before me is moved by way of application on notice to the RTB for leave to proceed by way of judicial review, the application is headed up as an application to the Supreme Court for leave for an order of *mandamus* requiring the Attorney General to investigate the failure of the RTB for its part to investigate its failure to register the Applicant as tenant within one month. The Applicant also presents her application on the basis that she is seeking the opinion of the Supreme Court as to the constitutional validity of the RTB's procedures.

13. In addition to the foregoing, I deduce from the papers and the arguments outlined by the Applicant orally that the Applicant seeks leave for further relief by way of judicial review broadly as follows:

(i) against the Applicant's former landlord for alleged fraud;

(ii) against the RTB for unfair procedures in determining her dispute by reason, *inter alia,* of the absence of an interpreter and legal representation;

(iii) against the decision of Hyland J. for purported irregularity in the making of her order either by reason of the absence of an interpreter, legal representation or otherwise;

(iv) against the RTB for taking enforcement proceedings against her before the District Court;

(v) against the WRC in respect of her discrimination claim against the RTB.

14. I shall endeavour to address the arguments made and to be as complete as possible. Insofar as I do not cover every argument which might arise on the papers, this is because I am unable to discern a sufficient basis for a claim with which to engage. A failure on my part to address substantively any argument should be understood as a refusal of leave to bring proceedings on that basis because I have not identified it as an arguable ground of claim, despite my best efforts to marshal the full basis advanced by the Applicant for the challenge she seeks to bring in these judicial review proceedings.

TEST FOR LEAVE IN JUDICIAL REVIEW PROCEEDINGS

15. The relevant rule to be applied on an application for leave (save for special statutory exceptions) to proceed by way of judicial review is that set out in O.84, r.20 of the Rules of the

Superior Courts, 1986. The application of the test was considered by the Supreme Court in its decision in *G v Director of Public Prosecutions* [1994] 1 I.R. 374. Unlike here, the Supreme Court in *G v. DPP* was dealing with an unopposed application where leave had been refused in the High Court. Finlay C.J., with whom the other two judges agreed, set down the test in the following terms at pp. 377 to 378:

> *"An applicant must satisfy the court in prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:- (a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20(4). (b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review. (c) That on these facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks. (d) That the application has been made promptly and... within the ... [relevant] time limits... (e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be in order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, in all the facts of the case, a more appropriate method of procedure."*

16. In *Gordon v Director of Public Prosecutions* [2002] 2 I.R. 369 this test has been described as a "*low threshold*", per Fennelly J. at p. 372. The aim of the leave application is to effect a screening process of litigation against public authorities and officers so as to prevent an abuse of the process or trivial or un-stateable cases proceeding, thus impeding public authorities unnecessarily. It is intended as a preliminary filtering process for which the Applicant is required to establish a *prima facie* case. For a *prima facie* case to be established, it must be arguable. A point of law is only arguable if it could, by the standards of a rational preliminary analysis, ultimately have a prospect of success (see *O.O. v Min for Justice* [2015] IESC 26). For an applicant for leave to commence judicial review proceedings with the leave of the Court he or she must demonstrate that an argument can be made which indicates that the argument is not empty. In terms of evidence, the requirement for to establish a *prima facie* case is regarded as that which "*if not balanced or outweighed by other evidence, will suffice to establish a particular contention*"; Halsbury's Laws of England (5th edition) volume 11, paragraph 767, as quoted by Charleton J. in *O.O. v Min for Justice* [2015] IESC 26.

DISCUSSION AND DECISION

17. Acknowledging that the threshold is "*low*", I am satisfied that the Applicant meets the requirements for leave identified in *G v. DPP* [1994] 1 I.R. 374 at (a) of the test there set out in that she has a sufficient interest in the matter to which the application relates to comply with O.84 r. 20(4). Leaving aside the merit of the grounds advanced having regard to the test set out (b) and (c) in *G v. DPP* and the arguability threshold which the Applicant must meet to which I will return, real issues manifestly arise in this case in relation to (d) the obligation to move within time and (e) the question of whether judicial review is the only effective remedy.

18. Insofar as the application was presented as an application for leave to bring certain matters before the Supreme Court, I explained to the Applicant in exchanges during the hearing that as a judge of the High Court I have no role in determining how the Supreme Court exercises its appellate jurisdiction, save in those limited circumstances in which the High Court has a statutory function or a power under the Constitution (such as that provided in Article 40.4.3 in respect of the constitutionality of legislation on foot of which a person is deprived of their liberty which formerly allowed a case to be stated for the opinion of the Supreme Court and now the Court of Appeal and is a power exercised by Barrington J. in *State (Gilliland) v, Governor of Mountjoy Prison* cited by the Applicant in support of her application). Given that this is not a case in which the High Court has any role in certifying grounds of appeal or giving leave to appeal, the application to me is misconceived.

19. As summarised above the within application is not, however, confined to seeking leave to appeal to the Supreme Court but raises other issues involving a range of parties to which I now turn.

20. Firstly, as already observed by me to the Applicant while hearing oral argument, any case against the Applicant's landlord by way of judicial review for alleged fraud is untenable in judicial review. Judicial review proceedings are public law proceedings. The Landlord who is joined as Respondent in the title to the proceedings is neither a public body nor a person exercising public law powers and cannot properly be made amenable to relief in these proceedings, notwithstanding that he may be affected by relief granted and therefore entitled to notice of the proceedings and entitled to be heard in respect of the relief sought.

21. Insofar as the case against the RTB is concerned, it is not entirely clear to me to what extent the case sought to be agitated by way of judicial review in this application overlaps with the claim determined by Hyland J. and Bolger J. A more detailed scrutiny of the papers in each application would be necessary were I to refuse leave in reliance on the doctrine of *res judicata* or abuse of process and the papers in those appeals are not before me. I have the benefit, however, of the DAR transcript from the ruling of Hyland J. in February, 2023 and the orders drawn in respect of both High Court judges and Costello J. sitting in the Court of Appeal. From the orders drawn in both cases and the DAR transcript of the ruling of Hyland J. I note that both statutory appeals were dismissed on grounds of failure to comply with time limits. This means that the Court is unlikely to have engaged with the substance of the case to any real extent or in a manner which might finally determine an issue in the proceedings thereby making any matter other than the time issue *res judicata*. I have decided that I do not need to determine whether the doctrine of *res judicata* or abuse of process might preclude the maintenance of this further set of proceedings, however, in circumstances where it is manifest that proceedings by way of judicial review in respect of the procedures followed by the RTB in determining a complaint in 2021 are out of time.

22. These proceedings were opened before the High Court (Meenan J.) in March, 2023 to "*stop the clock*" and were clearly not taken within three months of the Determination Order made by the RTB which the Applicant seeks to challenge as unlawful as required under O.84, r. 21(1). I am satisfied that any case against the RTB for unfair procedures is doomed to fail unless the Applicant can demonstrate grounds upon which she can contend for an extension of time. Under the Rules of Court such grounds require "*good and sufficient*" reason why the Court should extend time for bringing of proceedings and should also demonstrate either that the failure to bring proceedings arose from circumstances outside the control of the Applicant or which from circumstance which could not reasonably have been anticipated in accordance with Order 84, rule 21(3) of the Rules of the Superior Courts, 1986.

23. The Applicant has neither sought an extension of time in the reliefs claimed nor demonstrated grounds in moving her application upon which it would be appropriate to exercise a discretion to grant same. I have no proper explanation for delay in proceeding to make this application. While the Applicant refers vaguely to medical difficulties dating to 2019, she does not set out a clear or cogent case for an extension of time by reason of any medical condition. I note in this regard that the Applicant has sought to pursue various other legal

routes but has been found to be out of time in each of them. Whatever her medical issues, it is clear they were not such as to prevent her pursuing other legal challenges.

24. In the absence of other persuasive explanation, I conclude that the Applicant has resorted to moving an application for leave to proceed by way of judicial review because the time limit under Order 84, rule 21 is not absolute but may be extended in accordance with the Rules and with established principles, unlike the position of the statutory appeal under s. 123 of the 2004 Act. While this is undoubtedly so, the Applicant is still required to satisfy me that there is a basis for contending that it could be an appropriate exercise of discretion to grant an extension of time before I can give leave to seek that relief. Despite the fact that the lateness of the application would be an issue for me in deciding on a leave application, the Applicant has not addressed the test for an extension of time under the Rules or presented any evidence or verified any factual grounds on Affidavit which might conceivably justify the grant of an extension of time in this case in respect of a determination dating to August, 2021. It seems to me that the case for an extension of time is not arguable on the basis of the case presented as grounded on affidavit. Where no arguable case is demonstrated for an extension of time in respect of a process which concluded almost two years ago, I am satisfied that it would not be an appropriate exercise of my discretion to grant leave.

25. While I have posited above that it is not necessary for me to consider the substance of the claim before Bolger J. or Hyland J. with a view to deciding whether this application should be refused as an abuse of process, I should add that where a statutory appeal is provided (as it is in respect of both decisions of the WRC and the RTB), it is normally understood that the appropriate remedy for a claimant who considers the decision to be legally flawed is that of the statutory appeal provided for that purpose. The fact that a statutory appeal exists but was not availed of in time is therefore an important factor in determining whether leave to proceed by way of judicial review should be granted as made clear by the test in *G v. DPP* at part (e) of the test there set down. Even if this application were brought within time, which it manifestly was not, a further factor which weighs against the grant of leave is the fact that an effective statutory remedy has not been availed of in accordance with law. I am satisfied that insofar as the Applicant seeks to challenge the lawfulness of the decision of the Tenancy Tribunal and subsequent Determination Order in these proceedings that she had an effective, alternative remedy available to her under s. 123 of the 2004 Act such that it would not be an appropriate

exercise of discretion to grant leave to proceed by way of judicial review against those decisions.

26. Insofar as the Applicant seeks leave to challenge the decision of Hyland J. in the statutory appeal pursuant to s. 123 of the 2004 Act on the grounds of unfairness or irregularity whether because of the absence of legal representation or translation services or otherwise, I am satisfied that it is not open to the Applicant to pursue an application by way of judicial review before one High Court Judge in respect of an alleged procedural unfairness in a court of the same jurisdiction. A remedy by way of judicial review is not available in respect of the procedures adopted in the High Court. Accordingly, I am satisfied that the Applicant does not make an arguable case for relief by way of judicial review in respect of the decision of Hyland J. in refusing her application in a second statutory appeal. For completeness, I note that the Applicant refers me to the decision of Clarke J. in *O'Tuama & Ors. v. Casey & Ors.* [2008] IEHC 49 in support of her application to set aside judgment on grounds that it was irregularly obtained which concerned an application to set aside a judgment obtained in default of appearance. The logic of the Court's jurisdiction to set aside in such circumstances is that the judgment should not have been obtained in the first place and therefore the party who obtained judgment should not have the benefit of the irregularly obtained judgment. In granting judgment in default of appearance, however, the Court makes no determination on the merits of the underlying proceedings. The effect of the set aside application merely clears the way for the Court to determine the merits. The set aside jurisdiction of the High Court is an entirely different jurisdiction to that at play here where relief by way of judicial review is sought in respect of a finding of a High Court judge. The set aside jurisdiction addressed in *O'Tuama* did not involve the Court in reviewing the conduct of a Court of the same jurisdiction in separate proceedings.

27. Similarly, no infirmity which might be amenable to challenge by way of judicial review has been identified in respect of the pending enforcement action before the District Court. Challenges to the Determination Order by way of an appeal on a point of law have been found to be out of time in two separate statutory appeals. The Determination Order has not been made subject to a stay. The mere fact that the Applicant still does not accept the validity of the Determination Order is not an impediment to its enforcement. She is free to make such case as may be open to her on the law and the facts as to why the Order should not be enforced before the District Court and the District Court has powers to refuse enforcement if satisfied to

do so in accordance with s. 124 of the 2004 Act. In this regard I do not profess to understand the Applicant's reliance on the decision in *Zalewski v. WRC & Ors.* [2021] IESC 24.

28. I note that the judgment contained in the book handed up to me is the High Court judgment. The core frailty identified in the majority judgment on appeal to the Supreme Court in *Zalewski* was the conduct of hearings in private and the absence of provision for the administration of the oath. Hearings before the RTB are, however, accessible to the public. A power to administer the oath is provided for under the 2004 Act and is recorded as having been exercised in this case in the report of the Decision of the Tenancy Tribunal.

29. If the argument is advanced in reliance on the *Zalewski* with reference to the WRC case, it is noted that statutory provisions have been introduced in response to the decision in *Zalewski* through the enactment of Workplace Relations (Miscellaneous Provisions) Act 2021 to address the issues identified by the Supreme Court in the majority judgment. This legislation was in force when the Applicant's claim proceeded before the WRC in 2023.

30. Furthermore, it is clear from the terms of s. 124 of the 2004 Act that enforcement applications brought before the District Court where there has been non-compliance with the terms of a Determination Order are not automatically granted. Section 124 vests the District Court with a statutory discretion to refuse to make an enforcement order where it considers there are substantial reasons (related to one or more of the matters mentioned in s. 124 (3)) for not making an order under that subsection including: (a) a requirement of procedural fairness was not complied with in the relevant proceedings under this Part, (*b*) a material consideration was not taken account of in those proceedings or account was taken in those proceedings of a consideration that was not material, (*c*) a manifestly erroneous decision in relation to a legal issue was made in those proceedings, (*d*) the determination made by the adjudicator or the Tribunal, as the case may be, on the evidence before the adjudicator or Tribunal, was manifestly erroneous.

31. No arguable grounds have been identified for seeking to interfere with proceedings currently pending before the District Court, which proceedings have yet to be heard. Insofar as there is a claim advanced that there has been non-compliance with the requirements of procedural fairness which is out of time for challenge by way of judicial review, there remains

an avenue of objection to enforcement available to the Applicant on these grounds with the result that she is not entirely without any remedy, even at this late remove, in respect of the Determination Order made by the Tenancy Tribunal.

32. Although the Applicant refers to lack of legal representation as an element of unfairness affecting the different proceedings she has participated in, including proceedings before the High Court, complaints in respect of the refusal of legal aid by the Legal Aid Board are not properly before me as these proceedings do not concern any refusal to grant legal aid by the Legal Aid Board. I make no determination in respect of the arguability of any claim the Applicant may have arising from a refusal of legal aid upon due application as that it not a matter before me in these proceedings.

33. Insofar as the Applicant raises an issue regarding the constitutionality of the 2004 Act by reason of a failure to vindicate a tenant's constitutional rights where the termination is for reason of sale, such a claim is not properly framed in these judicial review proceedings. While reference is undoubtedly made to Articles 6, 34 and 40 of the Constitution in the Applicant's papers, I have not identified a stateable claim of unconstitutionality in the case as currently pleaded. I appreciate that this may well be because the Applicant is not legally represented and therefore ill-equipped to identify and present what would be a complex legal challenge, but this does not excuse the Applicant from the requirement to demonstrate an arguable case which applies at leave stage in proceedings brought by way of judicial review.

34. If the Applicant is making a claim that the 2004 Act is unconstitutional or that the failure to make provision for funded legal representation constitutes a failure to vindicate constitutional rights, as she appears to intimate in her application before me, this should normally be done in properly framed plenary proceedings. While constitutional challenges to legislation or legislative lacuna resulting in a breach of constitutional rights may be advanced by way of judicial review, such claims are only appropriately advanced in judicial review proceedings where they arise together with an issue which is properly amenable to judicial review. A negative consequence from the Applicant's perspective of bringing a constitutional challenge as an "*add on*" to or combined with other claims in judicial review proceedings is that it is likely to be subject to judicial review time limits. Even assuming a claim could be properly identified from the Applicant's papers (perhaps with the benefit of skilled legal representation) and established as arguable by a better grounding of her application, judicial

review time limits would operate to preclude the claim being maintained in these proceedings absent an arguable basis for seeking an extension of time, which I have found to be absent in this case.

CONCLUSION

35. I have determined that the Applicant has not demonstrated a *prima facie* legal argument that has a reasonable prospect of success in the within application for leave to proceed by way of judicial review. The Applicant does not reach the threshold for the grant of leave for judicial review in respect of any challenge to the Decision of the Tenancy Tribunal and ensuing Determination Order in the first instance because she does not establish the basis for an arguable case for an extension of time. Furthermore, alternative appropriate remedies existed in the form of a statutory appeal under s. 123 of the 2004 Act, but the Applicant did not comply with statutory time-limits to avail of those remedies. Similarly, a statutory appeal lies against the refusal of the WRC to extend time for the Applicant's discrimination claim against the RTB. I have not identified any arguable ground of challenge which might properly be pursued in the within application for judicial review as against any of the Respondents.

36. Insofar as the Applicant raises issues of unconstitutionality and a failure to vindicate constitutional rights through the failure to make proper provision in law for legal representation or otherwise, any such claim is not properly advanced by way of judicial review in the within proceedings because, even if arguable grounds were identified and they have not been, they could only be properly pursued in judicial review proceedings if an otherwise viable basis for such proceedings had been identified.

37. For all the reasons set out, I refuse the application for leave to proceed by way of judicial review.