THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 595

2023/179JR

BETWEEN/

J.S.S., J.S.J., T.S., D.S., & P.S.

APPLICANTS

-AND-

A TAX APPEALS COMMISSIONER

RESPONDENT

-AND-

CRIMINAL ASSETS BUREAU

NOTICE PARTY

JUDGMENT (*ex tempore*) of Mr. Justice Conleth Bradley delivered on the 1st day of November 2023

INTRODUCTION

The application

1. The present application is a contested *inter partes* hearing (between the applicants and the notice party) where the applicants seek *leave* to challenge by way of judicial review, pursuant to O.84 of the Rules of the Superior Courts, 1986 (as amended) ("RSC 1986"), a decision of the respondent dated 1st December 2022.

2. The following two primary reliefs[1] are sought by the applicants in their Statement of Grounds in relation to this decision.

3. First, an order of *certiorari* is sought quashing the decision of the respondent made on the 1st December 2022. This decision is characterised in the applicants' Statement of Grounds (at paragraph D. *Reliefs Sought*) as concerning "*Tax Appeals reference numbers TAC Ref:-184/16, TAC Ref:-185/16; TAC ref:-186/16, TAC ref:-187/16, TAC Ref:-188/16 relating to each of the Applicants respectively and refusing to alter her decision of [sic.,]…13th October 2022 that the burden of proof of non-residence in the jurisdiction was for the Applicants to discharge rather than for the Respondent to establish that the Appellants were chargeable persons."*

4. Second, the applicants seek an "*Order pursuant to O.84, r. 20(8) of the RSC 1986 staying the further hearing of the Appeals before the respondent pending the determination of the proceedings.*"

[1] The applicants also seek '4. Such further or other Order as this Honourable Court shall deem just or appropriate; 5. Costs.'

5. The following single ground subtends each of the above reliefs.

6. The applicants argue (at paragraph E(a). *Grounds upon which relief is sought* of the Statement of Grounds) that the "…*Respondent's decision contains an error of law on the face of the record in holding that when an appellant, appealing a tax assessment on themselves, raises an issue of tax residency before the Tax Appeals Commissioner, the onus of proving that the tax payer is not within the jurisdiction of the State is on the appellant rather than on the Revenue Commissioners to show that they have jurisdiction to raise an assessment to tax on that person*."

Applicable threshold on a leave application

7. Counsel for the applicants (Tim Dixon BL) and counsel for the notice party (Benedict Ó'Floinn SC and David Quinn BL) agree that the applicable threshold for this leave application is the standard of 'arguability', namely a stateable case – an arguable case in law. Thus, notwithstanding that this is a contested leave application, the applicable threshold remains that set out in *G v The DPP* [1994] 1 I.R. 374 which is, relatively speaking, a low threshold.[2]

[2] Initially an application was made *ex parte* to stop time running or deeming the application to have been opened or moved. Thereafter the Court directed that the application be made on notice to the other parties. (In general, see the decision of the Court of Appeal (Donnelly J.) in *Heaney v An Bord Pleanála* [2022] IECA 123 (at §§ 57 to 65) where it was held that the date of application to court is either the date that the application is moved in court when it is required to be brought *ex parte* (as was the case here) or the date on which the motion is issued and served on relevant parties where the application is required to be brought by originating notice of motion.

8. What this means in terms of the present application is that the applicants have to persuade the court that the single ground (quoted above at paragraph 6 of this judgment) is 'arguable' or 'stateable' in the manner in which that term is understood in *G v The DPP*. In her judgment in *G v The DPP* [1994] 1 I.R. 374 at 381, Denham J. (as she then was) observed that the preliminary process of requiring leave to apply for judicial review was to effect a preliminary *screening* or *filtering* process to prevent an abuse of the process, trivial or unstatable cases proceeding, and thus impeding public authorities unnecessarily (in a similar vein to the prior procedure of seeking conditional orders of the State-side/ prerogative writs).

9. Denham J. adopted the following passage from Lord Diplock in *R v IRC, ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at pp 643 and 644 in describing the lighter burden of proof which applies at the leave stage compared to the altogether heavier burden at the substantive hearing:

> *"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence*

is in and the matter has been fully argued at the hearing of the application."[3]

10. As mentioned above, the fact that leave application is on notice and is opposed, in this case, by the notice party does not change the applicable threshold.

THE ISSUE

Respective positions

11. The central issue which arises, at this stage, in this contested application for leave to apply for judicial review can be simply put.

12. The applicants seek to challenge the decision of the respondent dated 1st December 2022. They maintain that after the first decision in time was given on the 13th October 2022, the respondent was prepared to 'revisit' matters which had been addressed in that first decision and thereafter invited and received submissions and then determined the application in the second decision in time dated the 1st December 2022.

13. Against the aforesaid contention, it is submitted on behalf of the notice party that the grounds for the applicants' challenge first arose on the 13th October, 2022 and that no application for leave to apply for judicial review was brought within 3 months of the date of that decision and that the time limit for that decision was not extended by asking the respondent to revisit its ruling and furthermore no application has been made to

[3] *R v IRC, ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 per Lord Diplock at pp 643 and 644.

extend time (pursuant to O.84 RSC 1986). The notice party in oral and written argument submits that time runs from the date of the impugned decision – which it argues was the 13th October 2022.

14. While it is common case that the applicants have challenged the decision made on the 1st December 2022 within 3 months of the date of that decision, the notice party contends that the applicants remain in non-compliance with O.84, r.21(1) RSC 1986 in relation to the decision made on the 13th October 2022. It is this decision – the 13th October 2022 (that addresses the onus of proof) – which the notice party says is governed by O.84, r.21(1) RSC 1986 (which 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) and it is on this basis that the notice party submits that the applicants were required to apply for an extension of time per O. 84, r. 21(1) –(7) RSC 1986, but failed to do so.

15. Reliance is placed by the notice party on the interpretation of O.84, r.21 RSC 1986 in a number of authorities including the decisions of the Court of Appeal in *Arthropharm (Europe) Ltd v Health Products Regulatory Authority* [2022] IECA 109[4] (particularly at §§141-145) which applies the decision of the High Court (Carroll J.) in *Finnerty v Western Health Board* [1998] IEHC 143 approved of by the Supreme Court (McKechnie J., Clarke J and Dunne J.) in *Sfar v Revenue Commissioners* [2016] IESC 15 (at §§ 39-42 of the judgment of McKechnie J.).

[4] The Court of Appeal was comprised of Murray, Costello and Haughton JJ; the judgment of the court was delivered by Murray J.

16. In summary, these authorities provide the basis for the legal proposition that a decision which is a reiteration of a previous decision is not a new decision and that time begins to run when the final decision is first made and that the running of time cannot be stopped by entering into correspondence with the decision-maker after the decision and then seeking to characterise a reiteration of the initial decision as a new decision from which time then runs.

17. The applicants respond that no application for an extension of time is needed because the respondent had agreed to revisit matters and decided the matter afresh on the 1st December 2022.

18. The ancillary or consequential relief sought by the applicants is an order staying the further hearing of the appeals before the respondent pending the determination of these proceedings. The parties agree that the legal test for the granting of a stay in the context of a judicial review application is that set out by the Supreme Court (Clarke J.) in *Okunade v Minister for Justice & Ors* [2012] IESC 49, [2012] 3 I.R. 152 which seeks effectively to ensure that the least injustice is done pending the determination of the dispute which is before the court.

Relevant facts in relation to this application

19. As referred to in the Affidavit of Eugene Dolan sworn on the 24th February 2023 (at §13), the contextual background to this application for judicial review arises from a judgment of the Court of Appeal (Power J.) in *J.S.S., & Ors v Tax Appeal Commission & CAB* [2020] IECA 73 where the Court of Appeal (Donnelly, Ní Raifeartaigh and

Power JJ.) allowed an appeal from a decision of the High Court (Twomey J.) and granted an order of *certiorari* in respect of a series of decisions made by an Appeal Commissioner of the Tax Appeal Commission following a preliminary hearing on whether certain tax appeals sought by the appellants should be admitted.

20. The Commissioner had admitted appeals in respect of years where the appellants had delivered tax returns and had refused to admit appeals in respect of years in which either no tax returns had been delivered and/or no self-assessed tax liabilities had been paid. Judicial review proceedings were instituted in respect of the decision to refuse to admit certain appeals and on appeal from the decision of the High Court which had initially refused to grant an order of *certiorari*, the Court of Appeal – applying authorities such as *Connelly v An Bord Pleanála* [2018] IESC 31, [2021] 2 I.R. 752, *A.P. v Minister for Justice and Equality* [2019] IESC 47 and *Nano Nagle Schools v Daly* [2019] IESC 63, [2019] 3 I.R. 369 – found that this was a case in which it was impossible to know why the Commissioner had rejected the applicants' core legal argument that a 'chargeable person' did not include a non-resident person and to know why he had come to that view i.e. the Commissioner had failed to provide reasons for his decision not to admit the aforesaid appeals – and granted the order of *certiorari* sought.

21. In its written submissions in this leave application, the notice party points out that the matters were then remitted by the Court of Appeal to the Tax Appeal Commissioner.

22. Mr. Ó'Floinn SC fairly accepted that for the purposes of this leave application, and in the absence of any other affidavits filed by any other parties, the factual position which

informs this application is that set out in the grounding affidavit of Eugene Dolan, tax consultant on behalf of the applicants.

23. In that affidavit, Mr. Dolan avers to the following matters at paragraphs 18 to 21:

> *"…18. In a decision dated the 13th October 2022 the Respondent held that the Appellant bears the onus of proof.*
>
> *19. By correspondence dated 25th November the Commission acknowledged the Appellants' request for a further and updated decision in relation to the onus of proof, to be delivered at the commencement of the resumed hearing on 1 December 2022, taking into account the additional authorities submitted on behalf of the Appellants.*
>
> *20. This request was granted and the Commissioner undertook to endeavour to deliver an updated decision on 1 December 2022. I beg to refer to true copies of the written submissions delivered by both parties on this issue upon which pinned together and marked with the letters "ED3" I have signed my name prior to the swearing hereof.*
>
> *21. On 1st December 2022 the Respondent delivered an updated decision refusing to vary the decision of 13th October in light of the new authorities adduced on behalf of the Applicants. I beg to refer to a true copy of the Respondent's decision dated [sic.] upon which marked with*

the letters "ED4" I have signed my name prior to the swearing hereof…"

24. The respondent's decision dated 1st December 2022 is exhibited at Exhibit "ED4"to the Affidavit of Eugene Dolan sworn on the 23rd February 2023.

25. At the beginning of the decision it states (in bold and underlining): "**Please note that this decision should be read in conjunction with my preliminary decision on onus dated 13 October 2022, attached at Appendix I of this decision**."

26. It recites that it is in relation to the appeals in reference numbers 184/16 – 188/16 and is in consideration of revised submissions of the Appellants furnished to the TAC on 22nd November 2022 and of the Respondent's submissions of 29th November 2022 by the Commissioner.

27. The decision then sets out the background to the proceedings.

28. In summary, the decision recites that the appeals were set down for three days hearing on 10th, 13th and 14th October 2022 and that a large amount of time was taken up with the applicants' advisors' submissions in relation to the onus of proof and it was necessary for the Commission to rule on these submissions and on the 13th October the Commissioner issued her preliminary written decision on the onus of proof in these appeals.

29. Nothing turns on the use of the word 'preliminary' in the decision as it relates to the determination of an issue – the question of the onus of proof – within the appeals.

30. The decision then refers to the fact that the appeals were set down for continued hearing for 1st, 2nd, 20th, 21st and 22nd December 2022 and that those dates were notified to the parties and agreed by them in October 2022. The decisions then recites the following: "*On 22 November 2022, eight days prior to the resumption of the hearing on 1 December, Mr. Dolan on behalf of the Appellants*[5] *sent to the Commission, revised submissions (not previously requested by the Commission) together with legal authorities not previously furnished to the Commission. Mr. Dolan on behalf of the Appellants, requested that I consider same and that I issue a further and updated decision in relation to the onus of proof, taking into account the new authorities he now placed reliance upon and that I do so at the commencement of the resumed hearing on Thursday, 1 December, 2022. The two new authorities furnished are Untelrab Ltd v McGregor [1986] STC and Cesena Sulphur Co. Ltd v Nicholson 1 TC 888 (the additional authorities).*"

31. The Commissioner then states as follows:

> *"…While it was open to me to refuse to consider the additional authorities, I decided in the interests of fairness and to ensure that the Appellants were not prejudiced by the omission of authorities their representatives wished to have considered, that I would consider whether the authorities were relevant to my preliminary decision of 13*

[5] The applicants to this judicial review application.

October, 2022. On 25 November, 2022, I confirmed that I would consider the additional authorities and that I would endeavour to deliver an updated decision. Liberty was granted to the Respondent to file a brief written submission in relation to the additional authorities furnished. The Respondent furnished submissions and authorities on 29 November, 2022. This decision addresses the relevance of the additional authorities, to my preliminary decision regarding onus of proof dated 13 October, 2022 which is attached herein at Appendix I…"

32. The decision then analyses the two authorities which had been submitted.

33. During this contested leave application, some emphasis has been placed on a paragraph on page 3 of the Commissioner's analysis where after referring to a number of UK legal authorities the respondent states that :

"The position at law in the UK on the subject of onus, is not the subject of this decision herein. This decision is concerned with whether the additional authorities furnished by the Appellant approximately six weeks after I issued my written decision in relation [to] [sic.] onus on 13 October, 2022, have any relevance to that decision…"

34. The decision, in the context of addressing the question of the onus of proof in Ireland, then quotes from paragraphs 13-17 of the respondent's decision of the 13th October, 2022.

35. Ultimately in the decision of the 1st December 2022 the respondent rejects in emphatic terms the submission made on behalf of the applicants which was based on the two UK judgments proffered and determines that they are not relevant to the decision of the 13th October 2022. The decision also indicates that the hearings would continue to their next stage (described as 'step 2').

36. At Exhibit "ED3" to the Affidavit of Eugene Dolan sworn on the 23rd February 2023 at pages 47 to 49 of the Booklet (prepared for this application), a letter from the Chief State Solicitor on behalf of the notice party in relation to TAC References: 184/16, 185/16, 186/16, 187/16, 188/16 to the Tax Appeals Commission refers *inter alia* to: "*…the email correspondence of 25th November, 2022, by which the Commission acknowledged the Appellants' request for a further and updated decision in relation to the onus of proof, to be delivered at the commencement of the resumed hearing on 1 December 2022, taking into account the additional authorities submitted on behalf of the Appellants. We note that the request of the Appellants' advisors has been granted and that the Commissioner will endeavour to deliver an updated decision on 1 December 2022*…"

37. With the agreement of the parties I requested, and was furnished with, the correspondence dated 25th November, 2022.

38. This comprised an e-mail dated the 25th November 2022 from an official on behalf of the respondent to the representatives of the appellants and the notice party in relation to TAC Appeals Reference Numbers 184/16, 185/16, 186/16, 187/16, 188/16 which appeals involve the applicants.

39. The communication of the 25th November 2022 *inter alia* stated that:

> *"…[t]he Commission acknowledges the Appellants' request for a further and updated decision in relation to the onus of proof, to be delivered at the commencement of the resumed hearing on 1 December 2022, taking into account the additional authorities submitted on behalf of the Appellants. This request is granted and the Commissioner will endeavour to deliver an updated decision on 1 December 2022.*
>
> *Liberty to the Respondent to file a brief written submission in relation to the matter of the onus of proof and in relation to the additional authorities furnished, to be furnished to the Commission, if possible, by close of business, Tuesday the 29th of November. Please note that this is not a direction to file submissions but liberty granted to the Respondent should they wish file a submission in relation to the revised submission of the Appellants' in this regard including additional authorities furnished.*
>
> *The Commission acknowledges the Respondent's letter of 22 November 2022, noting the content thereof and the Respondent's agreement to make available documents in categories (a) and (c).*
>
> *This hearing will resume on 1 December next…"*

ASSESSMENT & DECISION

Grant of leave

40. The decision of the Respondent on the 25th November 2022 (i) to accede to a further and updated decision in relation to the onus of proof and (ii) to set out a process which involved directions for the receipt of submissions from the applicants and the notice party in relation to the onus of proof distinguishes it from the line of authority referred to by Mr. Ó' Floinn SC (for the notice party) which is often referenced by the observation of the High Court (Carroll J.) in *Finnerty v Western Health Board* [1998] IEHC 143 that "*a decision which is a reiteration of a previous decision is not a new decision*."

41. In *Finnerty* Mr. Finnerty had been informed by a letter dated the 9th April, 1994, that he did not satisfy the criteria for entry to the General Medical Services (GMS) scheme. He wrote to the Minister for Health in September, 1994, who in reply supported the Health Board's decision. Mr. Finnerty's request to the CEO of the Health Board on the 11th May, 1995 for matters to be reconsidered was rejected and the Health Board's previous decision was reaffirmed. There then followed a solicitor's letter, again contesting the decision and calling on the CEO to admit the applicant to the scheme, failing which proceedings would issue. This letter was acknowledged on the 26th June, 1995, and replied to on the 31st July, 1995 wherein the CEO repeated what previously had been stated, namely that the applicant did not satisfy the necessary criteria for entry to the scheme. An application for judicial review was then made seeking an order of certiorari quashing the Board's rejection in '*a letter of 31st July, 1995'*.

42. The High Court (Carroll J.) summarised the position as follows:

> "*The Applicant knew from July 1991 that his eligibility for the GMS scheme under the five year rule was in question. When he applied to enter the scheme*

he was refused by letter dated 9th April, 1994. This decision was supported by the Minister in the letter of 17th November, 1994. It was confirmed by the CEO on 29th May, 1995 and again on 31st July, 1995. A decision which is a reiteration of a previous decision is not a new decision. Time therefore begins to run when the final decision is first made. For [the] purposes of this action the decision of 29th May, 1995 was the final decision."

43. In *Sfar v Revenue Commissioners* [2016] IESC 15, on the facts of that case, Mr. Howley's letter of the 28th January, 2010, was a repetition of Mr. Buckley's letter of the 27th January, 2009.

44. Similarly in *Donnelly v Financial Services and Pensions Ombudsman* [2023] IEHC 228 the Ombudsman had clearly communicated that he had closed the file on the applicant's complaint against Danske Bank and explained his reasons for doing so.

45. In contrast to the above line of authority, in this case, *after* the first decision dated the 13th October 2022 was made, the respondent *agreed* to an *additional* process (which included the furnishing of submissions) in relation to the matter of the onus of proof leading to a *further* and *updated* decision in relation to the onus of proof which culminated in the decision dated the 1st December 2022.

46. The applicants are, therefore, in time to challenge the decision dated 1st December 2022. It is for the court hearing the substantive matter to assess the consequences, if any, of a challenge to the decision of the respondent dated 1st December 2022.

47. Turning to the question of arguability, which applies to the leave threshold and is also the first matter to be considered in the stay application (having regard to the series of steps outlined by Clarke J. in *Okunade*; see also the observations of O'Donnell C.J. in *O'Doherty & Anor v The Minister for Health & Ors* [2022] IESC 32 (at §39)), I am of the view that the applicants' main claim in these proceedings – that the respondent's decision of the 1st December 2022 contains an error of law on the face of the record in holding that when an appellant (namely the applicants herein), appealing a tax assessment on themselves, raises an issue of tax residency before the Tax Appeals Commissioner, the onus of proving that the tax payer is not within the jurisdiction of the State is on the appellant rather than on the Revenue Commissioners to show that they have jurisdiction to raise an assessment to tax on that person – is 'arguable' or 'stateable' in the sense understood by the decision of the Supreme Court in *G v DPP*.

48. Of course, this is no more than finding at this stage that the threshold of 'arguability' (which is a low threshold) has been reached.

49. Turning to the other steps which are required to be considered in a stay application, the notice party raises concerns over the consequences of a stay which might go beyond the appeals the subject of this application for judicial review. In essence this speaks to an important aspect of the test in *Okunade* which provides that in considering where the greatest risk of injustice would lie I should give all appropriate weight to the orderly implementation of measures which are *prima facie* valid and any related public interest considerations including the consequences of staying the hearing of the appeals. The notice party also rejects the characterisation on behalf of the applicants that there has been a *de facto* stay after the initiation of these proceedings.

50. In assessing where the greatest risk of injustice would lie, I also have to consider the consequences for the applicants of being required to comply with the respondent's decision of the 1st December 2022 in circumstances where it may be found to be unlawful. Further, this is not a case where damages (or an undertaking as to damages) is applicable.

51. Also, while characterised by the applicants as an error of law on the face of the record, the applicants' sole ground for challenge in this case – the finding by the respondent that in the context of a tax assessment appeal when an appellant raises an issue of tax residency before the Tax Appeals Commissioner, the onus of proving that the tax payer is not within the jurisdiction of the State is on the appellant rather than on the Revenue Commissioners to show that they have jurisdiction to raise an assessment to tax on that person – raises, at this stage, an 'arguable' ground as to the respondent's jurisdiction having regard to decisions such as *Killeen v DPP* [1997] I.R. 218.

52. In the circumstances, I consider that the greatest risk of injustice would lie if I refused the application for a stay in respect of the tax appeals in reference numbers TAC Ref:-184/16, TAC Ref:-185/16; TAC Ref:-186/16, TAC Ref:-187/16, TAC Ref:-188/16. Accordingly, in accordance with O. 84, r.20(8) of the RSC 1986 I will grant a stay in relation to these appeals until this application for judicial review is determined by the High Court.

ORDERS

53. I therefore grant the applicants leave to seek *certiorari* of the respondent's decision dated 1st December 2022 in the manner described at paragraph D.1 and on the grounds set out at paragraph E(a) of the Statement of Grounds.

54. As mentioned, I also consider it just and convenient to grant an order pursuant to O. 84, r.20(8) of the RSC 1986 staying the further hearing of the appeals limited to these applicants only in respect of tax appeals reference numbers TAC Ref:-184/16, TAC Ref:-185/16; TAC Ref:-186/16, TAC Ref:-187/16, TAC Ref:-188/16 until this matter is determined by the High Court.

55. I also request that the applicants notify the respondent of this judgment and ruling.

56. I propose to reserve the question of the costs of this leave application.