THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 373

[2022 No. 918 JR]

BETWEEN

JAMES ROCHE

APPLICANT

-AND-

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 21st day of June, 2024.

INTRODUCTION

1. This judgment concerns an application for judicial review relating to the granting of legal aid certificates in the District Court. Briefly put, the applicant seeks to quash an order of the District Court certifying a grant of legal aid on the basis that the certificate granted legal aid in relation to a charge sheet in respect of which an application had not been made. For the reasons explained in this judgment, the court will grant the relief that has been sought.

BACKGROUND

2. The applicant made the necessary *ex parte* application on 16 January 2023, and leave was granted to apply for the following reliefs:

a. An order of *certiorari* quashing the order of the District Court on 19 August 2022, granting the applicant a single Legal Aid (District Court) Certificate on foot of the prosecution on charge sheet 23800695 when no application for a certificate was made on foot of that prosecution; and,
b. An order remitting the matter to the District Court, to be dealt with by a District Judge other than the District Judge that made the impugned order.

3. In the Statement of Grounds, the applicant sets out that he was brought before the District Court in Nenagh on 19 August 2022. The applicant was facing a series of charges set out in seven charge sheets. One of the charges related to an offence that was alleged to have been committed on 24 December 2021, and the remainder related to offences that were alleged to have been committed on 10 August 2022. The applicant was represented by his solicitor, Mr. Hogan.

4. There was a contested bail application, which ultimately was refused by the District Judge. At the conclusion of that hearing, Mr. Hogan was informed by the District Judge that he had been "*assigned*". Mr. Hogan sought confirmation as to the charges in respect of which he had been assigned. The District Judge identified one of the charge sheets, which related to one of the offences alleged to have been committed on 10 August 2022. Mr. Hogan noted that there was also a charge sheet relating to 24 December 2021, and requested a second assignment in relation to that matter. The District Judge assented to that application and agreed to certify the assignment pursuant to Regulation 7(4) of S.I. No. 12 of 1965, the Criminal Justice (Legal Aid) Regulations, 1965 ("*the 1965 Regulations*").

5. Shortly thereafter, on 23 August 2022, Mr. Hogan received a certificate which was dated 19 August 2022. The certificate identified that legal aid had been granted in respect of two charges: (a) the 24 December 2021 matter, and (b) in the matter set out in the charge sheet ending -695. The charge sheet ending -695 was a different charge sheet to that identified by the District Judge when the application was made and granted, albeit that it also was in respect of an offence that was alleged to have been committed on 10 August 2022.

6. Arising from those facts, the applicant based his application on the legal argument that section 2 of the Criminal Justice (Legal Aid) Act, 1962 required an application to be made to the District Court prior to a certificate being assigned. As no application had been made in respect of the charge sheet ending -695, the applicant asserted that the District Judge had no jurisdiction to assign a certificate in relation to it.

7. The application was opposed by the respondent on grounds that can be summarised as follows:
    a. First, there was an argument that the application was out of time and should therefore be refused.
    b. Second, the respondent accepted that there was no application to the District Judge for a legal aid certificate in relation to the charge sheet ending -695. However, the respondent argued that the court should exercise its discretion to refuse relief on the following grounds:
        i. Any issues relating to the discrepancy between the identity of the charge sheets could have been ventilated at subsequent sittings of the District Court.

ii. Alternatively, the discrepancy should have been treated as a clerical error, which could have been remedied by an application pursuant to Order 12, rule 16 of the District Court Rules.

RELEVANT LEGAL PRINCIPLES

8. The statutory provision at the heart of this application is section 2 of the Criminal Justice (Legal Aid) Act 1962, as amended ("*the 1962 Act*"). Insofar as it is relevant to this case, section 2(1) of the 1962 Act provides:

> "*(1) If it appears to the District Court before which a person is charged with an offence …*
>
> *(a) that the means of the person before are insufficient to enable him to obtain legal aid, and*
>
> *(b) that by reason of the gravity of the offence with which he is charged or of exceptional circumstances it is essential in the interests of justice that he should have legal aid in the preparation and conduct of his defence before it,*
>
> *the said District Court … shall* <u>*on application being made to it in that behalf*</u>*, grant a certificate, in respect of him, for free legal aid …"* [emphasis added]

9. Regulation 7(4) of the 1965 Regulations provides that:

> "*Where two or more certificates for free legal aid are granted to a person and the cases in relation to which they are granted are heard together or in immediate succession, one certificate only shall (unless the Court, being satisfied that there is good reason for so doing, otherwise directs) be deemed, for the purposes of these Regulations to have been granted to the person*."

10. Hence, in the absence of the specified direction from the District Court, where multiple certificates were granted but the cases are heard together, the applicant's legal practitioner will only be paid on the basis that a single certificate was granted. It is important to note that the exercise of the discretion provided for in Regulation 7(4) of the 1965 Regulations presupposes that the certificates in question were granted in accordance with law. If the grant of the certificates was irregular, then the question of whether Regulation 7(4) applies does not arise.

11. There is ample authority for the proposition that section 2(1) of the 1962 Act requires that an application must be made before a legal aid certificate can be granted, and that where there are multiple charges a District Judge cannot grant certificates in respect of charges for which no applications were made. That position was made clear in the High Court in *DPP v. Cully* [2020] IEHC 438, and *King v. DPP* [2022] IEHC 74. No argument was made that this court should depart from the principles set out in those cases.

12. In *Coffey v. A Judge of the District Court & Anor* [2018] IEHC 62, Meenan J. made clear that the granting of legal aid certificates and the extent of the discretion that can be exercised by the District Court in that regard were matters governed by statute and regulations, and that the statutory process had to be adhered to. A similar approach to the scheme for legal aid in the District Court led to Meenan J.'s decision in *DPP v. Cully*. In that case, an application for a certificate was made in relation to one charge only, but the District Court granted certificates in respect of three additional charges. The DPP succeeded in the application for judicial review on the basis that the District

Court could not grant certificates for charges in respect of which no applications were made.

13. The approach taken by Meenan J. in the above cases was adopted by Phelan J. in *King v. DPP* [2022] IEHC 74. Aside from the fact that these issues are governed by clear statutory provisions that must be complied with, Phelan J. also highlighted that underlying the provisions and their application is the important principle that an accused person is entitled to legal representation in the criminal process, and an entitlement to have that right vindicated by the proper application of the statutory provisions regarding representation.

14. Accordingly, it is quite clear that in this case the grant of the certificates was irregular. There was no application for a legal aid certificate in relation to the charge sheet ending-695, and the District Court should not have granted the certificate. Prima facie, the applicant is entitled to relief claimed. The question is whether the additional issues raised by the respondent lead to a different outcome.

THE DELAY ISSUE

21. The issue here is that the impugned certificate which was received by Mr. Hogan on 23 August 2022 was made on 19 August 2022, and these proceedings were commenced by an *ex parte* application to the High Court on 16 January 2023, some five months later. Prima facie, the proceedings were commenced substantially outside the three-month time limit provided for in Order 84 of the Rules of the Superior Courts ("*the RSC*").

22. There has been a change in the underlying rules of court in relation to the fixing of the date when an application for judicial review has been deemed to commence. However, the events in this case relate to matters in 2022, the case was commenced by an *ex parte* application on 16 January 2023, and it was heard before the commencement of the new regime. Accordingly, the question of delay must be determined by reference to the Rules that applied in January 2023.

23. The position in which the applicant found himself is set out in a supplemental affidavit sworn by Mr. Hogan on 9 February 2024. That affidavit was made after the issue of delay had been raised by the respondent in her opposition papers, and was the subject of argument at the directions stage. Ultimately, the court (Hyland J.) agreed to allow the affidavit to be lodged, subject to provision being made for costs. There was no replying affidavit from the respondent, but she relied on her argument that the delay should lead to a refusal of relief.

24. Mr. Hogan sought an extension of time for the applicant. He explained that when the judicial review papers were prepared they were filed with the Central Office on 26 October 2022. Mr. Hogan averred that his office was informed by the Central Office that the next available date for making a leave application was 16 January 2023, and his office confirmed that date. Mr. Hogan states candidly that it was "*an oversight on my part not to have mentioned the matter prior to the 16th of January 2023 for the purposes of stopping time.*" He erroneously assumed that the lodging of the papers was sufficient to stop time. He also asserted that there was no prejudice to the respondent.

25. It can be noted that the respondent did not assert that any prejudice flowed from the delay. The primary argument made by the respondent regarding delay was that the application for an extension of time does not meet the relevant test set out in the RSC.

26. The decisions of the Supreme Court in *KSK Enterprises Ltd v. An Bord Pleanála* [1994] 2 IR 128 and *Reilly v. DPP* [2016] IESC 59, confirm that, under the Rules that applied at the time, filing judicial review papers will not stop time running. In *KSK*, Finlay C.J. made clear that there "*can be no doubt in my mind that an application to the Court made by motion ex parte cannot be said to be made until it is actually moved in Court.*" Accordingly, the application here certainly was made out of time.

27. Order 84, rule 21(1) to (6) of the RSC, provides that an application for judicial review shall be made within three months from the date when grounds for the application first arose. The court may, where an application is made for that purpose, extend the period within which an application for leave to apply for judicial review may be made. In such a case, the court may extend the period only 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 requisite period either were outside the control of, or could not reasonably have been anticipated by, the applicant for such an extension. In considering an application for an extension the court must have regard to the effect which an extension of the period of time might have on a respondent or a third party. O. 84 r. 21(5) provides that an application for an extension shall be grounded upon an affidavit sworn by, or on behalf of, the applicant is required to set out the reasons for the failure to make the application within the period prescribed for the making of leave applications.

28. The manner in which those rules operate has been the subject of extensive consideration by the courts and, in particular, in a decision of the Court of Appeal, *Arthropharm (Europe) Limited v. Health Products Regulatory Authority and Ors* [2022] IECA 109. As noted by Murray J. at para. 68 of his judgment, time runs for the purposes of O. 84 r. 21(1) from the point at which there is a formal consequence adverse to the interests of the applicant, this being when a decision having legal effect is made. In this case that date was the date of the impugned certificate.

29. Later in the judgment, at para. 87, Murray J. having considered the text of the rule and the decisions relating to the rule, stated that the following propositions were now clear:-

> *"(i) The period fixed by Order 84 Rule 21(1) is not a limitation period properly so called (Sfar v. Revenue Commissioners [2016] IESC 15 at para. 19 (per McKechnie J.)). The requirement to proceed within that time instead derives from a rule of court which, while having the force of law, is subject to the possibility of an extension if the court is satisfied in accordance with the relevant law that time should be extended (MO'S at para. 69 per Finlay Geoghegan J.).*
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> *(ii) The effect of the rule is clearly to place an obligation on the party seeking an extension of time to identify on oath the reasons the application was not brought during the period fixed by Order 84 Rule 21(1) and during the time between the expiry of that point and the date on which the application was eventually brought (MO'S at para. 60). It is the obligation of the court when presented with such reasons to assess them 'carefully and critically' (SC SYM*

Fotovoltaic Energy SRL v. Mayo County Council (at para. 72(7)). It should undertake this exercise conscious of the purpose underlying the rule in its present form: the present version of Order 84 Rule 21 'is framed in terms which indicate a clear intent to reduce delay and to further limit time periods which previously existed for applications for judicial review' (Heaphy v. Governor of Cork Prison) at para. 99 per Whelan J.).

(iii) Before it can extend time, the court must be satisfied that the reasons so given explain and objectively justify the delay in bringing the application and are sufficient to justify the court in exercising its discretion in favour of the applicant… . In this regard the addition of the word "sufficient" to the "good reason" previously required by the rule will not in most cases add to the pre-existing test (MO'S at para. 60), although it may be relevant in situations where the explanation given is in theory a good one, but the evidence adduced in support of it is insufficient to sustain it (AB v. XY at para. 44).

(iv) In conducting that exercise the court must take account of all relevant circumstances, including the decision that is sought to be challenged, the nature of the claim that it is invalid and "any relevant facts and circumstances pertaining to the parties" (MO'S at para. 60). In applying the factors so found, the essential function of the court is to engage in a 'balancing exercise' (AB v. XY at para. 46).

(v) In this regard, factors of which account may be taken will include the nature of the order or actions the subject of the application, the conduct of the

applicant, the conduct of the respondent, the effect of the decision it is sought to challenge, any steps taken by the parties subsequent to that decision, and the public policy that proceedings relating to the domain of public law take place promptly except where good reason is furnished… . The "blameworthiness" of the applicant is relevant, albeit as only one such factor to be weighed in the balance (Kelly v. Leitrim County Council [2005] IEHC 11, [2005] 2 IR 404 at para. 19(d)).

(vi) It follows that the court may be required to balance the rights of an applicant with those of a respondent or notice party, taking into account also the prejudice to either consequent upon the failure of the applicant to proceed to make its application within the time fixed by the rules. This, in particular, requires the court to take account of the effect of the extension of time upon a third party affected by the decision in question (see AB v. XY at para. 47).

(vii) It is 'probable that in most instances where a court has been satisfied of good and sufficient reason to extend time it will also be in a position to make a positive finding under sub-rule (3)(b) in relation to the circumstances which resulted in the failure to apply within the three month period (MO'S at para. 100).

(viii) That said, the rule clearly positions an inquiry as to whether the applicant had within its 'control' the effluxion of time; it is clear from the rule that in addition to being satisfied that good and sufficient reasons exist for an extension of time, the court must be satisfied as a matter of fact that the circumstances

which resulted in the delay were outside the control of the applicant,… . Where a delay arises from circumstances which were within the control of the applicant, the court may not extend...

(ix) The court is also free to take account the interests underlying the proposed proceedings. Commercial cases – in which the requirements of certainty may be particularly pressing and in which it is reasonable to assume that the parties are well resourced and in a position to readily obtain access to legal advice – may justify a stricter approach then in other types of challenge (MO'S at para. 62; Hogan and Morgan 'Administrative Law' (5th ed. 2019 at para. 18-179).

30. There is a clear intention under the RSC to reduce delays. In this case, the applicant through his legal representatives was aware that there was a potential difficulty with the certificate, and active steps were taken to prepare and file judicial review papers well within the time limits imposed by the RSC. Mr. Hogan has not sought to gloss over the error that led to the application being made outside time. Here, it is also clear as explained above that there was nothing speculative about the underlying rationale for commencing judicial review proceedings. The District Court clearly erred in law in granting a certificate for which no application had been made. Likewise there was no prejudice to the respondent or any third party caused by the delay in the commencement of the proceedings.

31. The difficulty is that the events that are relied on by the applicant largely were not matters outside his control. The events were the result of errors on the part of his legal representatives and as such are imputed to the applicant himself. If the legal

representatives had chosen to do so, an application could have been made to the High Court to open the application and stop time, and the full application for leave to apply for judicial review could have been made on 16 January 2023, as scheduled.

32. Insofar as events were affected by the then difficulties caused by the Covid 19 restrictions and its consequences, the respondent referred to the decision of Simons J. in *DPP v. Tyndall* [2021] IEHC 283. In that case Simons J. rejected an argument by the DPP that the public health measures provided a justification for a delay in commencing judicial review proceedings. As noted by the court, despite the public health measures the High Court continued to sit and to hear certain types of business including applications for leave to apply for judicial review. The court also noted that ordinarily the strengths and weaknesses of the case sought to be made should not be a weighty consideration. However, that was caveated by the observation that there have been cases where the underlying merits of the case are clear. As noted above, this is a case where the underlying merits are very clear.

33. In the circumstances, I am prepared to grant the extension sought. The critical factors in reaching that decision are:

    a. The applicant clearly formed the intention to bring the proceedings and actually filed the papers within time;
    b. There is no prejudice to the respondent;
    c. The error occurred arose from a misapprehension on the part of the legal advisors. Ordinarily, that would not be a good or sufficient reason on its own. In this case, it can be excused not because there was a difficulty accessing the

courts – an application could have been made – but because of the clear effort to commence the proceedings within time.

d. The merits of the substantive case were very strong and grounded on very clear authority.

e. Further, while the issues may have the appearance of being relatively minor, they are intimately connected to the process for vindicating an accused person's right of access to the court. I consider this to be a very important factor.

THE REMAINING DISCRETIONARY ISSUES

34. I do not accept that what occurred here should be treated as a clerical error which can be corrected under the *slip rule*. While that may be *an* explanation for what happened, this is not the inevitable or only inference that can be drawn from the order of the District Court. The offence in the charge sheet ending -695 was one of the charges faced by the applicant. As such, it is not clear that this error was simply clerical.

35. The other alternative mechanism identified by the respondent for resolving this issue was rooted in an observation by McCarthy J. in the appeal that was brought (unsuccessfully) against the orders made by Meenan J. in *Coffey*. The appeal judgment was dated 25 February 2022, and has the neutral citation [2022] IECA 46. In that case McCarthy J. observed that there had been some initial uncertainty in the exchanges between the judge and counsel in the District Court regarding the granting of certificates. That element was not present in this case. McCarthy J. then noted that it was open to parties to speak to a District Court order and referred to the Supreme Court decision in *Richards v. O'Donohoe* [2017] 2 IR 157.

36. The difficulty with what has been suggested by the respondent is that the *Richards v. O'Donohoe* case was concerned, or partly concerned, with situations in which a party could re-mention a case in the District Court while the matter was still *in the breast of the court*. That is markedly different in scope to the slip rule and permits orders to be revisited and, if required, substantially altered before the court draws up its order. As noted by the applicant, the District Court is a court of record, and until an order is drawn up, subject to certain qualifications that do not arise here, there is the potential for matters to be revisited. In this case, the impugned order was drawn up before any application could be made. As noted above, until the certificate was received by Mr. Hogan there was no reason for him to believe that the order would not reflect what appeared to have been confirmed by the District Court when the application was made for a certificate. Hence, I do not consider that the difficulty in this case could have been remedied by an application made in the breast of the court.

37. I fully appreciate the respondent's concern that resources and scarce court time should not be expended on matters that ought to be capable of being resolved by a less cumbersome route. However, the respondent did not satisfy the court that there was such a clear alterative mechanism for resolving the issue. It is entirely a matter for a respondent to decide whether or not to contest an application for judicial review; but it can be observed that the process and hearings involved in this case could have been avoided if the case had been resolved at an early stage.

38. In the premises I am not satisfied that the issues raised by the respondent can lead the court to exercising its discretion to refuse relief. It seems to me that the primary legal issue raised by the applicant was clear and that he is entitled to the relief sought in the

notice of motion. As this judgment is being delivered electronically, I will express the provisional view that the applicant should be entitled to his costs. I will list the matter for final orders and any argument on costs before me at 10.30am on 28 June 2024 but I will invite the parties to seek to come to agreement in advance of that date on the final orders.