APPROVED **[2024] IEHC 601**

THE HIGH COURT
JUDICIAL REVIEW

2024 123 JR

BETWEEN

TRACEY GILLIGAN

APPLICANT

AND

CRIMINAL ASSETS BUREAU
CHIEF APPEALS OFFICER
MINISTER FOR SOCIAL PROTECTION
MINISTER FOR JUSTICE
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 29 October 2024

INTRODUCTION

1. The Applicant in these judicial review proceedings submitted a claim for a form of social welfare payment known as "*disability allowance*". The claim had been submitted to the Department of Social Protection. The Applicant was subsequently informed that the claim had been referred to the Criminal Assets Bureau for assessment.

2. The Applicant contends that none of the statutory criteria which would allow for the referral of the claim to the Criminal Assets Bureau have been satisfied. The

Applicant seeks to have her claim for the payment of disability allowance determined in the ordinary way, i.e. by a social welfare officer pursuant to the statutory procedure prescribed under the Social Welfare Consolidation Act 2005.

3. This judgment addresses the proper interpretation of those provisions of the Criminal Assets Bureau Act 1996 which allow for the assessment of a social welfare claim by a bureau officer. It also addresses a preliminary objection raised by the Respondents to the effect that the judicial review proceedings are inadmissible by reason of delay.

LEGISLATIVE FRAMEWORK

4. To assist the reader in understanding the dispute which has arisen between the parties, it is necessary to outline the legislative framework. A claim for the payment of a social welfare benefit, such as, in this case, disability allowance, is normally made and determined pursuant to the procedures prescribed under the Social Welfare Consolidation Act 2005. The procedure provides for an initial decision by a social welfare officer, with a right of revision and a right of appeal to the Chief Appeals Officer.

5. Provision is made under the Criminal Assets Bureau Act 1996 for certain claims to be investigated and determined by bureau officers. Section 5 of the Act, in relevant part, reads as follows:

> "(1) Without prejudice to the generality of section 4, the functions of the Bureau, operating through its bureau officers, shall be the taking of all necessary actions—
>
> […]
>
> (c) under the Social Welfare Acts for the investigation and determination, as appropriate, of any claim for or in respect of benefit (within the meaning of [the

> Social Welfare Consolidation Act 2005]) by any person engaged in criminal conduct, and
>
> (d) at the request of [the Minister for Social Protection], to investigate and determine, as appropriate, any claim for or in respect of a benefit, within the meaning of [the Social Welfare Consolidation Act 2005], where [the Minister for Social Protection] certifies that there are reasonable grounds for believing that, in the case of a particular investigation, officers of [the Minister for Social Protection] may be subject to threats or other forms of intimidation,"

6. As appears, there are two circumstances in which a claim for a social welfare benefit may be investigated and determined by the Criminal Assets Bureau ("*CAB*" or "*the Bureau*"). The first is where the claimant is engaged in criminal conduct. The second is where the Minister for Social Protection issues a certificate to the effect that there are reasonable grounds for believing that officers of the Minister may be subject to threats or other forms of intimidation. The wording of the section indicates that the risk of intimidation must arise in "*the case of a particular investigation*", i.e. the investigation and determination of a particular claim for a benefit. This assumes an importance in the present proceedings in that, as explained below, the Respondents seek to rely on a Ministerial certificate issued in respect of an entirely different claim for a social welfare benefit which had been submitted by the Applicant decades earlier.

7. In the ordinary course, a claimant is entitled to appeal the refusal of a social welfare payment to the Chief Appeals Officer appointed by the Minister for Social Protection. However, this right of appeal is displaced where the first instance decision has been made by a bureau officer. In such a scenario, any appeal must instead be pursued before the Circuit Court. This is provided for under the *amended* version of the Social Welfare Consolidation Act 2005.

Section 307(1A) of the Act (as inserted by the Social Welfare Act 2019) reads as follows:

> "Whenever a person has, on or after the coming into operation of section 7 of the Social Welfare Act 2019, appealed a decision of a deciding officer who is a bureau officer, the Chief Appeals Officer shall cause a direction to be issued to the person who has submitted the appeal directing the person to submit the appeal not later than 21 days from receipt of the direction to the Circuit Court and the Circuit Court may, on hearing the appeal as it thinks proper, affirm the decision or substitute the decision of the deciding officer in accordance with this Act and on the same evidence as would otherwise be available to the Appeals Officer."

8. As explained shortly, the existence of this legislative amendment had been overlooked for a time during the course of the processing of the Applicant's claim.

9. The position under the original, unamended version of the legislation had been more nuanced. The Chief Appeals Officer had enjoyed a statutory discretion to decide whether or not to entertain an appeal. More specifically, the Chief Appeals Officer had discretion to certify that the ordinary appeals procedures were inadequate to secure the effective processing of that appeal and to direct that the appeal be submitted to the Circuit Court instead.

10. In summary, under the original regime a claim, which had been dealt with at first instance by a bureau officer, might nevertheless go by way of an appeal before the Chief Appeals Officer. This discretion has been removed since November 2019.

PROCEDURAL HISTORY

11. The Applicant submitted a claim for a form of social welfare payment known as "*disability allowance*". The claim was submitted to the Department of Social

Protection. The claim is date stamped as having been received on 20 February 2023.

12. The Applicant was contacted, by way of telephone call on 28 February 2023, and informed that her claim would be assessed by the Criminal Assets Bureau. Thereafter, the Applicant received a letter from the Bureau on 3 March 2023. This letter confirmed that the claim had been referred to the Bureau for assessment. The only explanation provided for this course of action had been as follows:

> "Your applications have been referred to the Criminal Assets Bureau for means assessment pursuant to its statutory remit and with particular reference to the provisions of sections 5 and 8 of the Criminal Assets Bureau Act, 1996, as amended."

13. The letter went on then to request the Applicant to submit certain documentation to the Bureau.

14. The Applicant responded by way of letter dated 22 March 2023. In this letter, the Applicant made the point that she had not been provided with the reasons for which the claim had been referred to the Criminal Assets Bureau for assessment. The Applicant submitted documentation to the Bureau. Thereafter, she attended for an interview with a bureau officer in mid-April 2023.

15. The Criminal Assets Bureau wrote to the Applicant on 18 April 2023. As part of this letter, the following explanation was provided for the referral of the claim to the Bureau:

> "Please note that this application has been referred to the Criminal Assets Bureau for investigation pursuant to its statutory remit and with particular reference to the provisions of Section 8(4) and 8(8) of the Criminal Assets Bureau Act, 1996."

16. As appears, there is no mention made in this letter to the provisions of section 5 of the Criminal Assets Bureau Act 1996. It will be recalled that section 5 is the provision which allows for the issuance of a Ministerial certificate.

17. The Criminal Assets Bureau issued a decision in mid-June 2023 refusing the claim for disability allowance. The decision is formally recorded in a certificate of decision dated 22 June 2023. This superseded an earlier version of the certificate of decision which had contained a clerical error.

18. The covering letter purported to notify the Applicant of her procedural rights as follows:

> "A decision has been made by a Deciding Officer, appointed under Section 299 of the Social Welfare (Consolidation) Act 2005, who is also a Bureau Officer within the meaning of Section 8(1) of the Criminal Assets Bureau Act 1996.
>
> If you believe that the decision is not correct it is open to you to submit any facts, evidence, information or contentions within 21 days that you wish, and a Deciding Officer will review your case.
>
> Separately, if you are not satisfied with the decision, you may appeal against it by writing to the Chief Appeals Officer, Social Welfare Appeals House, D'Olier House, D'Olier Street, Dublin 2, within 21 days, clearly stating the grounds for your appeal."

19. The above summary contains a number of significant legal errors. First, insofar as the statutory right to revision is concerned, the letter incorrectly indicates that this is subject to a twenty-one day time-limit. This is in error: as explained in the case law, there is no time-limit on the exercise of a right of revision. See, for example, *McDonagh v. Chief Appeals Officer* [2021] IESC 33, [2021] 1 I.L.R.M. 385 (at paragraph 65 of the unreported judgment).

20. Secondly, insofar as the statutory right of appeal is concerned, the letter incorrectly indicates that there is a right of appeal to the Chief Appeals Officer.

This is in error. In circumstances where a claim has been determined by a bureau officer, the right of appeal to the Chief Appeals Officer is displaced in favour of a right of appeal to the Circuit Court. It appears that the author of the covering letter overlooked the amendment introduced to the right of appeal under the Social Welfare Act 2019.

21. At this point, the Applicant retained solicitors and all further correspondence with the Criminal Assets Bureau and the Department of Social Protection was carried on by the solicitors. The solicitors sought to make an appeal to the Chief Appeals Officer on the Applicant's behalf on 5 July 2023.

22. It is apparent from the correspondence over the period July to October 2023 that both sides were labouring under the misapprehension that there was a potential right of appeal to the Chief Appeals Officer.

23. The Chief Appeals Officer mistakenly sought to issue a certificate pursuant to the *unamended* version of section 307 of the Social Welfare Consolidation Act 2005. It was only on 13 October 2023 that the Chief Appeals Officer finally identified the correct statutory provision. A letter of this date cited section 307(1A) of the Social Welfare Consolidation Act 2005 (as inserted by the Social Welfare Act 2019). Following a further exchange of correspondence, the Chief Appeals Officer elaborated upon the legal position as follows by email dated 1 November 2023:

> "Section 7 of the 2019 Act came into operation on the 1st day of November 2019. In accordance with section 307(1A), I am compelled by the legislation to direct a person, appealing any decision of a deciding officer who was a bureau officer made since the 1st of November 2019, to submit such an appeal to the Circuit Court. I, as Chief Appeals Officer, have no discretion in this regard once the decision being appealed had been made by a bureau officer as defined in Section 2 of the Social Welfare Consolidation Act, 2005. The question as to whether such a decision as regards Ms Gilligan's

> entitlement to disability allowance is proper to a bureau officer is not for the Social Welfare Appeals Office to determine.
>
> I regret therefore that I am not in [a] position to reverse my decision of the 13th of October 2023."

24. The Applicant then sought, through her solicitors, to request a *revision* of the certificate of decision of June 2023 pursuant to section 301 of the Social Welfare Consolidation Act 2005. As part of the request, the solicitors raised the objection that none of the statutory criteria which would allow for the assessment of the claim by the Criminal Assets Bureau had been satisfied.

25. The outcome of the application for a revision was a decision dated 10 November 2023 to the effect that the certificate of decision stands.

26. These judicial review proceedings were instituted on 31 January 2024.

27. The Respondents have since sought to rely on the fact that a Ministerial certificate had been issued on 27 April 1998 in respect of a claim made by the Applicant for a form of benefit known as "*one parent family payment*". The intention to rely on this historical Ministerial certificate was raised for the very first time in the opposition papers. There is no mention made of same in any of the correspondence relating to the claim for disability allowance.

WHETHER PROCEEDINGS ARE WITHIN TIME

The Respondents' preliminary objection

28. The Respondents have raised a preliminary objection to the effect that the judicial review proceedings are inadmissible by reason of delay. More specifically, it is submitted that the Applicant failed to comply with the three month time-limit prescribed under Order 84 of the Rules of the Superior Courts. It is submitted that the proceedings are directed to the decision to refer the

Applicant's social welfare claim to the Criminal Assets Bureau for assessment. It is said that this decision was first notified to the Applicant on 3 March 2023. It is further said that time began to run against the Applicant from this date. In the alternative, it is submitted that, at the very latest, time began to run from the date of the (substantive) decision to refuse the social welfare claim on 22 June 2023. These judicial review proceedings were not instituted within three months of either of these dates. The proceedings commenced on 31 January 2024.

29. The Respondents seek to refute the Applicant's counterargument that time only began to run from the date of the decision on the application for a revision (10 November 2023) as follows:

> "As appears, this short letter does no more than confirm the existing decision, made on 22 June 2023. The letter of 10 November 2023 is not, as is suggested by the Applicant, a new decision pursuant to s. 301 of the 2005 Act. Section 301 provides for a power on the part of a deciding officer to, *sua sponte*, conduct a review of a prior decision. The deciding officer made no such decision to conduct a review of the decision of 22 June 2023. The fact that a disappointed Applicant writes seeking that a decision be reversed does not *ipso facto* render any response to that correspondence a review decision for the purpose of s. 301."

30. The gravamen of the delay objection is that a final and irrevocable decision to refer the Applicant's claim for the payment of disability allowance to the Criminal Assets Bureau had been notified to the Applicant on 3 March 2023. The implication being that, if the Applicant desired to challenge that referral, she could only do so by way of judicial review proceedings taken within three months of the date of referral.

Discussion

31. Order 84, rule 21(1) of the Rules of the Superior Courts 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*". In considering when the grounds first arose, it is necessary to have regard to the principle that an applicant for judicial review will normally be expected to exhaust their remedies within the statutory decision-making process before having recourse to the High Court. See, generally, *Petecel v. Minister for Social Protection* [2020] IESC 25.

32. If the potential ground of judicial review is one which is capable of being corrected during the course of the decision-making process, then the applicant should seek to have it corrected. For example, if an error by the first-instance decision-maker is capable of being corrected by way of an administrative appeal, then an appeal should be pursued prior to any judicial review proceedings. Generally, it will only be where the potential ground of judicial review is one which is irremediable within the overall decision-making process that it will be appropriate to seek judicial review earlier. An applicant who exhausts the administrative decision-making procedures will not normally be held to have delayed: had they moved earlier, any judicial review proceedings are likely to have been dismissed as premature.

33. It is necessary, therefore, to consider the proper procedure by which a claimant might challenge a decision that their claim for a social welfare benefit is to be assessed by the Criminal Assets Bureau. The proper procedure will depend on the basis upon which it is asserted that CAB has competence to assess the claim. If a bureau officer has purported to take seisin of the claim pursuant to section 5(1)(c) of the Criminal Assets Bureau Act 1996, i.e. on the grounds that the claimant is a person engaged in criminal conduct, then this initial decision would appear to be amenable to the revision procedure and the appeals procedure

prescribed under Part 10 of the Social Welfare Consolidation Act 2005. To elaborate: an individual officer may have a dual function as a bureau officer and a deciding officer: see section 8 of the Criminal Assets Bureau Act 1996. Relevantly, the decision of a bureau officer, *qua* deciding officer, on every "*question*" arising in relation to a claim for the payment of a social assistance benefit under Part 3 of the Social Welfare Consolidation Act 2005 is subject to the revision procedure prescribed under section 301 of that Act. The nature of the revision procedure has been described as follows by the Court of Appeal in *F.D. v. Chief Appeals Officer* [2023] IECA 123 (at paragraph 42):

> "The breadth of the revision provisions is, possibly, unique in the field of the administration of public law. The Act provides extensive rights to seek to revise the decisions of both the deciding officers and the appeals officers. It is noted that s. 301 provides the deciding officer with not only the jurisdiction to, inter alia, revise on new facts or new evidence, but also to revise by reason of some mistake having been made in relation to the law or the facts. […]".

34. There is a respectable argument that a bureau officer's initial decision to take seisin of the claim involves the determination of a "*question*" relating to the claim and, as such, is amenable to the revision procedure. Put otherwise, if the Criminal Assets Bureau has improperly taken seisin of a social welfare claim, this is an error which is, potentially, capable of being corrected within the decision-making framework under Part 10 of the Social Welfare Consolidation Act 2005, without any necessity for judicial review proceedings. If this is so, then a claimant will be expected to exhaust the right of revision prior to having recourse to judicial review proceedings.

35. The legal position might be different in circumstances where a claim has been referred to CAB pursuant to a Ministerial certificate issued pursuant to section 5(1)(d) of the Criminal Assets Bureau Act 1996. In such circumstances,

CAB's competence to assess the claim is founded upon the actions of the Minister. It must be doubtful whether a bureau officer *qua* deciding officer could go behind the Ministerial certificate and reach their own findings as to whether there are reasonable grounds for believing that there is a risk of intimidation. The certificate would have been issued by a member of the executive branch of government pursuant to an express statutory power under the Criminal Assets Bureau Act 1996. The exercise of that particular power does not appear to be amenable to revision or appeal under the provisions of the Social Welfare Consolidation Act 2005. If this is the correct analysis, then it would appear that the appropriate time at which to challenge a referral to CAB pursuant to section 5(1)(d) of the Criminal Assets Bureau Act 1996 would be within three months of the claimant being notified of the Ministerial certificate. It would also appear that the challenge could only be by way of judicial review proceedings.

36. Of course, it might be argued that even if the validity of the referral cannot be questioned within the decision-making framework under Part 10 of the Social Welfare Consolidation Act 2005, it might nevertheless be reasonable for a claimant to await the *substantive decision* on the merits of their social welfare claim, prior to making an application for judicial review. If the substantive decision is in favour of the claimant, then it might be argued that the procedural objection becomes moot.

37. It is not necessary, for the resolution of the present proceedings, to reach a concluded view on the proper procedure for challenging a Ministerial certificate. This is because no such certificate was, in fact, ever issued in respect of the Applicant's claim for the payment of disability allowance. Moreover, CAB had abandoned any reliance on section 5 of the Criminal Assets Bureau Act 1996.

Whereas the section had been cited in the initial letter of 3 March 2023, mention of the section has been omitted from subsequent correspondence. This was done after the Applicant had, in her letter of 22 March 2023, expressly queried the basis upon which the referral had been made.

38. The Applicant's case thus does not entail a challenge to any action on the part of the Minister. Rather, the decision to take seisin of the social welfare claim appears to have been at the instance of a bureau officer. In the circumstances, it would appear that the correctness of the decision to take seisin of the claim constitutes a "*question*" which is amenable to the revision procedure prescribed under section 301 of the Social Welfare Consolidation Act 2005. It was entirely proper, therefore, for the Applicant to have requested such a revision and to have awaited the outcome of same prior to the commencement of these judicial review proceedings.

39. The Respondents have sought to characterise a revision decision as one made *sua sponte*, i.e. by the deciding officer of their own motion as opposed to upon the application of the relevant claimant. It is also implied that a decision not to revise the original decision does not constitute a revision decision. With respect, these submissions cannot be reconciled with the recent case law in relation to the revision procedure. The Supreme Court has described the nature of the revision procedure in detail in *McDonagh v. Chief Appeals Officer* [2021] IESC 33, [2021] 1 I.L.R.M. 385. Relevantly, this judgment confirms that a claimant is entitled to apply for a revision of the original decision; that there is no time-limit on bringing an application for a revision; and that a decision *to refuse* to revise the original decision is as much a "*decision*" as a decision to revise the original decision: both are amenable to the statutory right of appeal.

By extrapolation, a decision *to refuse* to revise is, in principle, amenable to judicial review. Having regard to the almost unique nature of the statutory revision procedure, such a decision cannot simply be dismissed, for time purposes, as merely the reiteration of the original decision (cf. *Arthropharm (Europe) Ltd v. Health Products Regulatory Authority* [2022] IECA 109 at paragraph 141).

40. There is a logical inconsistency in the Respondents' submissions. Having accepted that the judicial review time-limit might run from the date of the original decision to refuse the claim for disability allowance, the Respondents nevertheless seek to argue that the *subsequent decision* to refuse to revise the original decision has no significance for the time-limit. This argument is made notwithstanding that the bureau officer expressly notified the Applicant of her right to seek a revision (albeit that they incorrectly stated that this was subject to a twenty-one day time-limit). The Respondents' argument necessitates treating the revision decision as a non-decision. This is incorrect having regard to the judgment in *McDonagh* (above). If, as the Respondents appear to accept, the original decision sets the clock running for the purpose of the judicial review time-limit, then it follows that the revision decision resets the clock. A revision decision represents a standalone decision, capable of being appealed or judicially reviewed in its own right.

41. Separately, it should be recorded that the Respondents have not advanced an argument that the Applicant should have been required to pursue an appeal *to the Circuit Court* prior to the institution of judicial review proceedings. This approach seems sensible. The Applicant has included, as part of her statement of grounds, a plea to the effect that the provision of a different form of appeal,

to claimants whose claims for social welfare benefit have been assessed by the Criminal Assets Bureau, represents unlawful discrimination contrary to the equality guarantee under Article 40.1 of the Constitution of Ireland. It would have been difficult for the Respondents to have convincingly argued that the Applicant should be compelled to exhaust an appeals procedure which she contends is invalid. See, by analogy, *Zalewski v. Adjudication Officer* [2019] IESC 17, [2019] 2 I.L.R.M. 153.

42. In summary, it was appropriate for the Applicant to have availed of the revision procedure under section 301 of the Social Welfare Consolidation Act 2005 *prior* to having recourse to judicial review proceedings. An error on the part of the Criminal Assets Bureau in taking seisin of a social welfare claim is an error which is, potentially, capable of being corrected within the decision-making framework under Part 10 of the Social Welfare Consolidation Act 2005. There is a respectable argument that a bureau officer's initial decision to take seisin of the claim involves the determination of a "*question*" relating to the claim and, as such, is amenable to the revision procedure. The grounds of judicial review cannot be said to have arisen until this procedure has been exhausted.

43. The decision on the application for a revision of the original decision was notified to the Applicant on 10 November 2023. The judicial review proceedings were commenced within three months of that date and are, therefore, within time.

EXTENSION OF TIME WOULD HAVE BEEN GRANTED IF NEEDED

44. For the reasons explained under the previous heading, I have concluded that the application for judicial review was made within the time-limit prescribed under Order 84, rule 21. For completeness, and lest this conclusion be in error, it

should be recorded that had the application been out of time, I would have extended time for the reasons which follow.

45. The principles governing an application for an extension of time in judicial review proceedings have been set out authoritatively by the Supreme Court in *M. O'S. v. Residential Institutions Redress Board* [2018] IESC 61, [2019] 1 I.L.R.M. 149. The majority judgment in *M. O'S.* contains the following statement of general principle (at paragraph 60 thereof):

> "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.'"

46. The principles governing the extension of time have been considered more recently by the Court of Appeal in *Arthropharm (Europe) Ltd v. Health Products Regulatory Authority* [2022] IECA 109. Relevantly, the Court of Appeal (*per* Murray J.) held that the 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.

47. The Court of Appeal also emphasised (at paragraph 125) that in the vast majority of applications for an extension of time, the court has no role in assessing the strength of the underlying merits of the proceedings. This is subject to a possible exception where an applicant's case was extremely strong to the point that the only extant issue in the proceedings was whether time should be extended. For the reasons explained under the next heading below, the Applicant's case on the merits is unanswerable.

48. The majority judgment in *M. O'S.* attaches weight to the fact that the administrative decision impugned in those proceedings had been made pursuant to legislation which was for the purpose of administering a no fault redress scheme for a class of vulnerable and injured persons. Whereas the social welfare legislation is of more general application than the legislation at issue in *M. O'S.*, the statutory scheme is such that it impacts on persons who may be vulnerable.

The social welfare benefit being claimed here, i.e. disability allowance, is one which is directed to persons who have an injury, disease or physical or mental disability that has continued, or may be expected to continue, for at least one year and who are, by reason of same, substantially restricted from doing work that would otherwise be suitable. The court in the exercise of its discretion to extend time must have some regard to the legislative context in which the decision is made.

49. The legislative context is also relevant to the issue of potential prejudice. The nature of the decision-making in respect of a claim for a social welfare benefit does not implicate third parties. The position is very different from other forms of decision-making which entail the grant of permits or licences such as, for example, development consents. A delay in instituting proceedings challenging a licence or permit may well adversely affect the rights of third parties. The same considerations do not arise in the context of social welfare claims. Similarly, the type of considerations which arise in the context of immigration proceedings, whereby a delay may result in an individual, who has been found, correctly, to be present in the Irish State unlawfully, contriving to remain here without permission, do not arise in the context of social welfare claims.

50. The Respondents' delay objection appears to be premised on a counterfactual, namely that the Applicant's claim had been referred to the Criminal Assets Bureau pursuant to a Ministerial certificate. As explained under the next heading, the Ministerial certificate sought to be relied upon does not, in fact, extend to the claim for disability allowance. The Ministerial certificate issued on 27 April 1998 in respect of an entirely different claim for a form of benefit known as "*one parent family payment*".

51. The logic of the Respondents' delay objection is that a referral pursuant to a Ministerial certificate may only be challenged by way of judicial review proceedings brought within three months. Even if one assumes for the sake of argument that this is correct, the time-limit could only be strictly enforced in circumstances where the claimant had been *notified* that a Ministerial certificate was being relied upon. If, conversely, the claimant is not notified, then they would have grounds for an extension of time. This is the position in respect of the present proceedings. The Applicant had no notice of any intention to rely upon a Ministerial certificate. The letter of 3 March 2023 makes no mention at all of a Ministerial certificate, still less does it identify a Ministerial certificate issued decades earlier.

52. Whereas section 5 of the Criminal Assets Bureau Act 1996 had been cited in the initial letter of 3 March 2023, mention of the section has been omitted from all subsequent correspondence. This was done after the Applicant, in her letter of 22 March 2023, had expressly queried the basis upon which the referral had been made. There was nothing in the contemporaneous correspondence to alert the reader that the Respondents would be relying on a Ministerial certificate to justify the referral of the Applicant's claim to the Criminal Assets Bureau. A public authority cannot withhold crucial information from a party and then seek to criticise that party for failing to institute judicial review proceedings within time. Such conduct represents a circumstance which had been outside the control of, or could not reasonably have been anticipated by, the Applicant within the meaning of Order 84, rule 21(3). Having requested the reasons for the referral to the Criminal Assets Bureau, the Applicant was entitled to anticipate

that if the Bureau intended to rely on a Ministerial certificate, the Bureau would have notified her of this fact in response to her letter.

53. The grounds for an extension of time are fortified by reason of the Applicant having been misinformed of her procedural rights. As explained at paragraphs 18 to 20 above, the Applicant was mistakenly informed that she had a right of appeal to the Chief Appeals Officer. This mistake was only corrected some months later on 13 October 2023. This was the first time it had been explained to the Applicant that the right of appeal to the Chief Appeals Officer had been ousted. The Applicant regards the form of appeal available under section 307(1A) to be inferior. The nature of the appeal was of crucial importance to her. The practical effect of refusing an extension of time would be that the Applicant would have already been barred from instituting judicial review proceedings by the date upon which the Respondents finally corrected their misstatement of the nature of the right of appeal. This would be unjust. It would allow a public authority to benefit from their own default in misstating the nature of the right of appeal.

54. Having regard to this procedural history, and to the legislative context, it would have been appropriate to grant an extension of time had same been necessary. It would be disproportionate to dismiss the judicial review proceedings on the grounds of delay in circumstances where: (i) the Applicant had not been informed that reliance was being placed on a Ministerial certificate; (ii) the Applicant had been misinformed in relation to her right of appeal; (iii) the principal ground of judicial review is very strong; and (iv) the delay has not caused any prejudice to the Respondents and does not adversely affect third parties or undermine any compelling public interest (cf. development consent

cases or immigration cases). These considerations represent good and sufficient reasons for an extension of time. The failure to notify the Applicant that reliance was being placed on a Ministerial certificate represents a circumstance which had been outside the control of, or could not reasonably have been anticipated by, the Applicant.

MERITS OF JUDICIAL REVIEW PROCEEDINGS

55. Having resolved the delay objection in favour of the Applicant, it is necessary next to embark upon a consideration of the underlying merits of the judicial review proceedings.

56. The Applicant contends that none of the statutory criteria which would allow for the assessment of the claim by the Criminal Assets Bureau have been satisfied. The main answer which the Respondents make to this is to rely on a Ministerial certificate issued on 27 April 1998. The Respondents' position is summarised as follows in the written legal submissions:

> "The said certificate has never been withdrawn or amended, nor challenged or queried by the Applicant to date, and as such the said certificate continues to apply and continues to satisfy the terms of s. 5(1)(d) in respect of the Applicant's social welfare affairs."

57. With respect, the Respondents' position is premised on a mistaken interpretation of the provisions of section 5(1)(d) of the Criminal Assets Bureau Act 1996. The relevant provisions have been set out in full at paragraph 5 above. As appears, the Minister for Social Protection may request the Criminal Assets Bureau to investigate and determine, as appropriate, any claim for or in respect of a benefit where the Minister certifies that there are reasonable grounds for believing that,

in the case of a particular investigation, officers of the Minister may be subject to threats or other forms of intimidation.

58. The Minister may make such a request in relation to the investigation of "*any claim*" for or in respect of a benefit. To actuate this request, the Minister must issue a certificate to the effect that there are reasonable grounds for believing that officers of the Minister may be subject to threats or other forms of intimidation "*in the case of a particular investigation*". The statutory language indicates that the risk of intimidation must arise in the context of the investigation of a specific claim for a social welfare benefit. The Minister is not authorised to issue a *blanket certificate* which applies to all future claims which might be made by a specific claimant. It follows, therefore, that the historical certificate issued by the then Minister in April 1998, in respect of a claim for the payment of a different form of social welfare benefit, cannot justify the referral, some three decades later, of an entirely new claim. Accordingly, the assessment of the Applicant's claim by the Criminal Assets Bureau was *ultra vires* in circumstances where none of the statutory criteria which would allow for the assessment of the claim by the Bureau have been satisfied.

59. The fact that the legislation requires a separate Ministerial certificate in relation to each specific claim for a social welfare benefit is fatal to the Respondents' alternative argument that the Applicant's supposed acquiescence to the exercise of the statutory power should disentitle her to relief by way of judicial review as a matter of discretion. The fact, if fact it be, that a claimant may not have challenged an *earlier* Ministerial certificate does not mean that the claimant is estopped from challenging the assessment of a subsequent claim by the Criminal Assets Bureau.

60. For completeness, it should be recorded that there is some suggestion in their written legal submissions that the Respondents are entitled to rely, in the alternative, on section 5(1)(c). This allows for the assessment of a social welfare claim in circumstances where the claimant is a "*person engaged in criminal conduct*". Crucially, however, the Respondents have failed to put forward any evidence to the effect that any bureau officer formed an opinion, in the context of the claim for disability allowance, to the effect that this criterion had been satisfied. Accordingly, there is no evidential foundation for saying that the Criminal Assets Bureau purported to take seisin of the claim on this basis. It is not necessary, therefore, for the purpose of resolving the present proceedings, to consider issues such as the extent, if any, to which the forming of an opinion by a bureau officer that a claimant is a "*person engaged in criminal conduct*" is subject to judicial review.

61. The foregoing findings in relation to the proper interpretation and application of section 5 of the Criminal Assets Bureau Act 1996 are sufficient to dispose of these judicial review proceedings. It is not necessary, therefore, to consider the alternative grounds pleaded by the Applicant in her statement of grounds. In particular, it is not necessary to embark upon an examination of the constitutional challenge. It will be recalled that the Applicant has included, as part of her statement of grounds, a plea to the effect that the provision of a different form of appeal to claimants, whose claims for social welfare benefit have been assessed by the Criminal Assets Bureau, represents unlawful discrimination contrary to the equality guarantee.

62. The legal consequences of striking down legislation are such that a court will generally only embark upon consideration of a constitutional challenge where it

is unavoidably necessary to do so in order to resolve the proceedings before it. If proceedings can be resolved on non-constitutional grounds, then a court will usually seek to dispose of the case on this narrower basis. This principle is sometimes referred to as "*judicial self-restraint*". There are several strands to the rationale underlying judicial self-restraint, and these are discussed in detail in *Kelly: The Irish Constitution* (Hogan, Whyte, Kenny and Walsh, 5th edition, Bloomsbury Professional, 2018) at §6.2.200 to §6.2.214. As the learned authors explain, the principle is informed by the presumption of constitutionality, and by the inherent limitations of the judicial process, i.e. the court only has jurisdiction to invalidate legislation; it cannot enact new legislation to fill the resultant gap in the law. The principle of judicial self-restraint is, however, subject to the overriding consideration of doing justice between the parties.

63. Having regard to these principles, I have concluded that it is neither necessary nor appropriate to determine the constitutional challenge raised in the present proceedings. It is sufficient to do justice for the Applicant to make an order setting aside the refusal of her claim for disability allowance with an order for remittal. There are a number of permutations under which the ultimate outcome of the reconsideration of the social welfare claim might be favourable to the Applicant. If, however, an unfavourable outcome eventuates, the Applicant is not precluded from raising a constitutional challenge in fresh proceedings.

CONCLUSION AND NEXT LISTING

64. In summary, it was appropriate for the Applicant to have availed of the revision procedure under section 301 of the Social Welfare Consolidation Act 2005 *prior* to having recourse to judicial review proceedings. An error on the part of the

Criminal Assets Bureau in taking seisin of a social welfare claim is an error which is, potentially, capable of being corrected within the decision-making framework under Part 10 of the Social Welfare Consolidation Act 2005. There is a respectable argument that a bureau officer's initial decision to take seisin of the claim involves the determination of a "*question*" relating to the claim and, as such, is amenable to the revision procedure. The grounds of judicial review cannot be said to have arisen until this procedure has been exhausted. The decision on the application for a revision of the original decision was notified to the Applicant on 10 November 2023. The judicial review proceedings were commenced within three months of that date and are, therefore, within time.

65. For completeness, and lest the foregoing conclusion be in error, it should be recorded that had the application for judicial review been out of time, I would have extended time pursuant to Order 84, rule 21(3) for the reasons explained at paragraphs 44 to 54 above.

66. As to the merits of the judicial review proceedings, it has not been established on the evidence that any of the statutory criteria which would allow for the assessment of the claim by the Criminal Assets Bureau have been satisfied. The wording of section 5(1)(d) of the Criminal Assets Bureau Act 1996 indicates that the risk of intimidation must arise in "*the case of a particular investigation*", i.e. the investigation and determination of a particular claim for a benefit. The Minister for Social Protection is not authorised to issue a *blanket certificate* which applies to all future claims which might be made by a specific claimant. It follows, therefore, that the historical certificate issued by the then Minister in April 1998, in respect of a claim for the payment of a different form of social

welfare benefit, cannot justify the referral, some three decades later, of an entirely new claim.

67. Accordingly, the Applicant is entitled to a form of order setting aside the refusal of her claim for the payment of disability allowance. I will discuss the precise form of order with counsel. I will also discuss whether an ancillary order should be made, pursuant to Order 84, rule 27, remitting the claim to the Minister for Social Protection with a direction to reconsider it and to reach a decision in accordance with the findings of the High Court.

68. Finally, it should be explained that these proceedings have been resolved on relatively narrow grounds. There is nothing in this judgment which necessarily precludes the possibility of the Applicant's claim being lawfully referred to the Criminal Assets Bureau. It is, in principle, open to the Minister to make a referral provided always that the statutory criteria are satisfied.

69. The proceedings will next be listed before me on 31 October 2024 at 10.30 o'clock.

Appearances

Derek Shortall SC and John Temple for the applicant instructed by Staunton Caulfield & Co. Solicitors
Shane Murphy SC and Michael Binchy for the respondents instructed by the Chief State Solicitor

Approved Garrett Simons