APPROVED **[2021] IEHC 21**

THE HIGH COURT

2020 No. 809 J.R.

BETWEEN

JOHN McHUGH

APPLICANT

AND

LAOIS COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 1 February 2021

INTRODUCTION

1. This matter comes before the High Court by way of an application for leave to apply for judicial review. The applicant in the proceedings seeks to challenge a decision of Laois County Council which was made as long ago as January 2006.

2. The application for leave was first moved on an *ex parte* basis before the High Court (Meenan J.) on 9 November 2020. Meenan J. directed that the application should be heard on notice to the planning authority, and the application ultimately came on for hearing before me on 28 January 2021.

3. Having heard submissions from both sides, I delivered an *ex tempore* ruling on that date refusing leave to apply for judicial review on the grounds of delay and the non-joinder of the proper respondents. In circumstances where the applicant, Mr McHugh, is a litigant in person, I indicated that I would prepare a written judgment setting out my

reasons. The judgment was to be sent to Mr McHugh and he would then have a number of weeks to consider same. The proceedings are to be relisted before me on 22 February 2021 to address the issue of costs, and, if necessary, to hear an application for leave to appeal. This is in ease of the applicant, and will allow him to consider whether or not to pursue the matter further by way of appeal (with the attendant risk on costs).

4. In the course of preparing this written judgment, I have identified an additional issue which had not been addressed in my *ex tempore* ruling. The issue concerns the nature of the time-limit which governs the application for judicial review. The fact that the planning authority's decision had been made so long ago has the consequence that these proceedings are subject to the "old" legislative regime, that is, as it stood prior to the commencement of the Planning and Development (Amendment) Act 2006. This issue does not affect the outcome of the application for leave to apply for judicial review. It does, however, have implications for the procedure governing the making of an appeal. I will return to address the time-limit issue at paragraph 16 below.

CHRONOLOGY OF EVENTS

5. The applicant seeks to challenge a decision set out in a letter sent to him by Laois County Council on 3 January 2006. The term "decision" is used guardedly in this judgment, given that the planning authority's position as set out in the letter was not final, and the applicant was expressly invited to make submissions to the planning authority but failed to do so.

6. The letter had been issued in the context of the registration of quarries pursuant to section 261 of the Planning and Development Act 2000. In brief outline, this section imposed an obligation on owners and operators to register certain quarrying activities

with the local planning authority. Thereafter, a planning authority was empowered to impose additional controls upon existing *authorised* quarrying activity.

7. The effect of registration has been described as follows by the High Court (Hedigan J.) in *Frank Harrington Ltd v. An Bord Pleanála* [2010] IEHC 428.

> "[…] The fact the quarry was registered does not amount to a recognition or determination that the quarry had a pre 1964 user. Section 261 of the Planning and Development Act requires planning authorities to register all quarries that either had no planning permission or had planning permission greater than five years. Section 261 (9) sets out the scope of this section and s. 261 (1) imposes the obligation on quarry owners to notify planning authorities and to register. There is no distinction between pre and post 1964 quarries and there is no discretion. Planning authorities must register such a quarry. The aim of the legislation is clearly to try to bring all quarries pre or post 1964 with no planning permission or quarries with planning permissions more than 5 years old into the control net where conditions reflecting modern approaches to quarrying may be imposed in the public interest. Nothing in the legislation provides that such registration changes unauthorized into authorized. Their separate status at best is that they are registered but still unauthorized."

8. Whereas a planning authority had been obliged to register even those quarrying activities which represented unauthorised development, the power to impose conditions or to require a planning application subject to environmental impact assessment had been confined to authorised quarrying activities. Relevantly, a finding, for the purposes of section 261, that quarrying activity was authorised is not conclusive on third parties: *Pierson v. Keegan Quarries Ltd* [2010] IEHC 404.

9. In order to ensure fair procedures, a planning authority was required, under section 261(5), to notify the owner and operator of the quarry of its intentions, and to afford an opportunity to the owner and operator to make submissions.

10. On the facts of the present case, Laois County Council had stated in its letter of 3 January 2006 that it did not intend to impose conditions on the applicant's quarry.

> "In accordance with Section 261(5), notice is served that the council does not intend to impose conditions on the operation of the current extracted area for the following reasons;
>
> 1. It does not appear that the quarry was in continued operation since pre 1964.
>
> Submissions or observations regarding the proposals may be made by the owner or operator of the quarry to the planning authority by the 27/1/05. These submissions or observations shall be taken into account by the planning authority in performing its functions under subsection (6) or (7) of Section 261 of the Planning and Development Act, 2001."

11. The deadline for submissions refers to a date in January 2005. This is an obvious error—of a type which often occurs at the start of a new year—and should be read as 2006. The planning authority can scarcely have been understood as requesting submissions to be made at a date which had long since passed.

12. The core of the case which the applicant wishes to advance in the judicial review proceedings is that the stated reason, i.e. that it did not appear that the quarry had been in continuous operation since 1964, is *ultra vires*. It is pleaded that the reason "is not a part of the Act, nor is there any phrase or directive in the Act, which is approximate to their given reason".

13. With respect, this ground of challenge is misconceived. The concept of continuous use is well known under the planning legislation. The significance of 1964 is that it is the year during which planning control in its modern form was introduced: development (including quarrying activity) which had commenced prior to 1 October 1964 and had continued in a manner proportionate to that pre-1964 user enjoyed the benefit of certain transitional provisions. (See, generally, *An Taisce v. Ireland* [2010] IEHC 415).

14. The letter of 3 January 2006 correctly observes the legal distinction between authorised and unauthorised development. If and insofar as the applicant had wished to challenge the provisional finding that his quarry had not been in continuous operation, then he

should have made a submission to this effect. The notification from Laois County Council expressly invited submissions from the applicant. No submissions were ever made in response to this invitation.

15. The within judicial review proceedings were instituted on 9 November 2020, that is, almost fifteen years after the date of the impugned decision.

TIME-LIMITS AND PLANNING DECISIONS

16. Under the current version of the planning legislation, any decision made by a planning authority in the performance or purported performance of a function under the Planning and Development Act 2000 ("***the PDA 2000***") is subject to an eight week time-limit.

17. The legal position had been less clear-cut under the original version of the PDA 2000 in that different time-limits were prescribed for various types of decisions under the planning legislation. The eight week time-limit was principally confined to decisions made by a planning authority on an application for planning permission. Other decisions made by a planning authority under the PDA 2000 were subject to the time-limit prescribed under Order 84 of the Rules of the Superior Courts.

18. This anomaly was removed by way of an amendment introduced under the Planning and Development (Amendment) Act 2006. The effect of the amendment was that the eight week time-limit now applies to *all* decisions made by a planning authority pursuant to the PDA 2000. This amendment came into force on 17 October 2006.

19. The decision which the applicant seeks to challenge in these proceedings predates the coming into force of this amendment (the decision is dated 3 January 2006). The decision is of a type which, prior to the amendment, would have been subject to the time-limit under Order 84 rather than the statutory time-limit. The judgment of the High Court (Charleton J.) in *O'Reilly v. Galway City Council* [2010] IEHC 97 confirms that the

amendments introduced to the judicial review procedure by the Planning and Development (Amendment) Act 2006 were not intended to have retrospective effect, i.e. any decision made prior to the commencement date is subject to the "old" legislative regime.

20. Put otherwise, legacy cases, such as the present proceedings, benefit from a form of what is sometimes described as "grandfathering" whereby they are subject to the requirements of the old legislative regime. The practical effect of this is that the relevant time-limit is six months (not eight weeks), and the test for an extension of time is less onerous.

21. Notwithstanding that a decision of the type sought to be impugned in these proceedings would be subject to an eight-week time-limit had it been made on any date after 17 October 2006, the decision in this case continues to benefit from the longer time-limit.

APPLICATION FOR AN EXTENSION OF TIME

22. As explained under the previous heading, the present proceedings represent a legacy case and are subject to the time-limit under Order 84, rule 21 (as it stood prior to its amendment in 2011). The relevant time-limit had been as follows

> "21.(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made."

23. These proceedings should, accordingly, have been instituted by 3 July 2006 at the very latest. In the event, an application for leave was not made until 9 November 2020. The proceedings are thus out of time by a period of in excess of fourteen years.

24. The applicant has indicated that he seeks an extension of time within which to bring these proceedings. No proper explanation has been provided on affidavit, however, for the

inordinate delay in this case. The only affidavit filed in these proceedings is a *pro forma* affidavit which verifies the statement of grounds.

25. The statement of grounds addresses the delay in brief terms, and suggests that there is "good cause" to extend time because the case was "in the hands of solicitors" from January 2006 until the end of 2019. This appears to be a reference to an initial consultation with the applicant's own solicitor in January 2006, and to a prolonged attempt by the applicant to obtain a legal aid certificate during the period 2016 to 2019.

26. Separately, it is suggested that the applicant himself had been dealing directly with the planning authority during the period 2013 to 2014.

27. The test for granting an extension of time under Order 84 (prior to its amendment in 2011) is whether there is good reason for extending the period within which the application shall be made.

28. The principles governing the discretion to allow an extension of time have been recently stated by the Supreme Court in *M. O'S v. Residential Institutions Redress Board* [2018] IESC 61; [2019] 1 I.L.R.M. 149. This judgment had been delivered by reference to the current version of Order 84, which includes the additional requirement that the delay have been due to circumstances outside the control of an applicant. The judgment is nevertheless of relevance to a legacy case, such as the present proceedings, in that it summarises the effect of the case law on the unamended Order 84. That summary is set out as follows at paragraph 60 of Finlay Geoghegan J.'s judgment.

> "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.'"

FINDINGS OF THE COURT

29. I have concluded that there is no "good reason" to extend time in the present case. First and foremost, the delay in this case is inordinate. The applicant is seeking to challenge a decision some fourteen years after the event. This is so notwithstanding that the applicant had been on notice of the making of the decision at the relevant time. This is not a case where, as sometimes occurs, an individual does not become aware of a decision or the facts underlying the decision for a significant period of time. Rather, the decision here had been delivered to the applicant by way of registered post.

30. This delay of fourteen years has to be seen in the context of a time-limit of six months. The delay is a multiple of this. As explained by Fennelly J. in *De Roiste v. Minister for*

Defence [2001] IESC 4; [2001] 1 I.R. 190, an extremely long delay, without cogent explanation and justification, may in itself constitute a good ground for refusing relief.

31. Secondly, there is a public interest in ensuring that there is finality in planning matters. Members of the public, landowners and planning authorities are all entitled to order their affairs on the assumption that a planning decision which has not been challenged within time is valid. It would undermine legal certainty, and potentially have an adverse effect on property rights, if a decision of a planning authority could be set aside more than a decade after it had first been made.

32. Thirdly, the applicant has not put forward any proper or adequate explanation for the delay. It is evident that the applicant was aware of the making of the decision at the relevant time. It appears that he took legal advice at that time, and made an informed choice not to challenge the decision. Even when, two years later, in 2008 the impugned decision is alleged to have had an adverse effect on the ability of the applicant to secure a contract, he chose not to institute proceedings. It would be unjust to allow him to do so now more than a decade after these events.

33. Fourthly, the applicant is not entitled to rely on his dealings with the Legal Aid Board as providing a good reason for an extension of time. The applicant does not seem to have engaged in earnest with the Legal Aid Board until 2016. There is a reference to the applicant having approached the Legal Aid Board initially in 2011, but no explanation has been provided as to what the outcome of that approach was. At all events, irrespective of whether one takes the date as 2011 or 2016, an application for judicial review to challenge a decision from January 2006 was already hopelessly out of time by that stage. More generally, an applicant is not entitled to rely on (alleged) difficulties in obtaining legal representation as a reason not to comply with the time-limit for judicial review proceedings.

34. Fifthly, there have been very significant changes to the law regulating quarrying activity since the date of the impugned decision. In particular, as a result of amendments introduced under the Planning and Development (Amendment) Act 2010, planning authorities had been required to examine every quarry in their administrative area to determine whether there had been compliance with the requirements of EU environmental legislation. Further amendments have been made in respect of enforcement action against unauthorised quarries. Given the legislative changes in the interim, no decision made by a planning authority in the context of section 261 can be said to be determinative of the planning status of a quarry.

35. Finally, in the exercise of its discretion on an application for an extension of time, the court is entitled to have some regard to the underlying merits of the intended judicial review proceedings. This is because what is required under Order 84 is that there be good reason for granting an extension of time, not merely that there be a good reason for the delay. There is no reason to grant an extension of time in the case of judicial review proceedings which have no underlying merits. Leaving aside entirely the issue of delay, these proceedings could not have succeeded in circumstances where the applicant failed to avail of the invitation by Laois County Council to make submissions to it. The planning legislation is a self-contained administrative code, and, save in exceptional circumstances, parties are expected to exhaust their procedural rights under the legislation before having recourse to the courts.

36. More generally, the core complaint in the judicial review proceedings appears to be based on a misconception of the legal significance of continuous user.

VALIDITY OF THE SIX MONTH TIME-LIMIT

37. It is alleged in the statement of grounds that the time-limit under Order 84 of the Rules of the Superior Courts is invalid. More specifically, it is alleged that the Superior Courts Rules Committee derives its power from a series of Acts which are said to be unconstitutional "due to the fact that they purport to give rights to" the Committee which may impede the applicant's constitutional right of access to the courts.

38. Any challenge to the parent legislation may only be advanced in proceedings which have been taken against Ireland and the Attorney General. Similarly, any challenge to the validity of the Rules of the Superior Courts would have to be taken against the Superior Courts Rules Committee and the Minister for Justice.

39. Laois County Council is the only respondent to these proceedings, and is not the *legitimus contradictor* to a constitutional challenge. The proceedings are thus irregular and leave to apply for judicial review on these grounds is refused accordingly.

ACTIONS OF LEGAL AID BOARD

40. Any claim for relief against the Legal Aid Board is inadmissible in circumstances where, first, it has not been joined to the proceedings; and, secondly, no attempt has been made to identify the specific decision which it is sought to impugn.

IS LEAVE TO APPEAL REQUIRED?

41. The fact that this is a legacy case which seeks to challenge a decision from as long ago as January 2006 appears to have the legal consequence that any judicial review proceedings are subject to the legislative regime as it stood prior to the Planning and Development (Amendment) Act 2006. On this analysis, a challenge to a decision made pursuant to section 261 of the PDA 2000 was not caught by the statutory judicial review

procedure then prescribed under the unamended version of section 50 of the PDA 2000 (*O'Reilly v. Galway City Council* [2010] IEHC 97). Rather, any challenge was subject to conventional judicial review under Order 84 of the Rules of the Superior Courts.

42. On this analysis, not only does the applicant have the benefit of the more generous time-limit under Order 84, he may also be exempt from the requirement to obtain leave to appeal to the Court of Appeal. To elaborate: the position under the current version of the planning legislation is that the decision of the High Court on an application for leave to apply for judicial review in a planning matter may only be appealed to the Court of Appeal if the High Court grants leave to appeal. An application for leave to appeal falls to be determined by reference to the statutory criteria prescribed under section 50A of the PDA 2000.

43. If, as appears to be the position, a challenge to the decision of 3 January 2006 is properly brought by way of conventional judicial review proceedings, then there is no requirement for leave to appeal to the Court of Appeal.

44. The parties will be invited, on the adjourned date of 22 February 2021, to address the court on the question of whether leave to appeal is required. If not required, then the only issue which remains outstanding in these proceedings is the allocation of legal costs.

CONCLUSION AND FORM OF ORDER

45. The application for leave to apply for judicial review is dismissed as against Laois County Council by reason of delay. The applicant is not entitled to an extension of time under the pre-2011 version of Order 84, rule 21 of the Rules of the Superior Courts in circumstances where there is no "good reason" for extending the period within which the application for judicial review shall be made.

46. The challenges to the validity of the time-limit under Order 84, rule 21 and to the actions of the Legal Aid Board are both inadmissible for the reasons outlined earlier.

47. These proceedings will be listed before me on 22 February 2021 at 10.30 a.m. to address the issue of costs, and, if necessary, any application for leave to appeal to the Court of Appeal.

Approved