THE HIGH COURT

JUDICIAL REVIEW

[2018/330JR]

BETWEEN

AJK

APPLICANT

AND

THE MINISTER FOR DEFENCE

RESPONDENT

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 19th day of March, 2019

Issues

1. The applicant's claim is brought by way of statement of grounds of the 30th April, 2018 following leave secured on that date. The applicant seeks an order of *certiorari* quashing the decision of the respondent of the 31st January, 2018 together with an order directing the respondent to reconsider its decision of the 4th May, 2017. In addition, a declaration that the applicant as holder of a declaration of subsidiary protection is eligible to enlist with the defence forces is sought. Additional relief was also sought, however, this additional relief is not being pursued save for the relief of, if necessary an order extending the time to seek *certiorari* of the decision of the 4th May, 2017. It is noteworthy that there is no actually relief of an order quashing the decision of the 4th May, 2017 contained within the statement of grounds.

It is asserted by the applicant that there is no regulatory provision precluding the applicant from being inducted into the defence forces and therefore the respondent erred in law in refusing to enlist him. In addition, it is asserted that the decision was made on the basis of an unpublished un-promulgated or publicly unavailable document. It is claimed that by introducing a temporal permission to remain condition as a prerequisite, which the applicant cannot meet, is *ultra vires* the applicant's right to work under the Constitution and as provided for by s.53 of the International Protection Act 2015. It is stated that the decision of the respondent is unreasonable and/or irrational given that there is no temporal restriction contained in s.53 of the Defence Act 1954. All of the foregoing it is alleged constitutes a breach of natural and constitutional justice and fair procedure and the respondent acted *ultra vires*.

The respondent takes issue with the assertion that there is no temporal restriction contained in s.53 (1) of the Defence Act 1954; with the assertion that the Minister in fact made a decision of the 31st January, 2018 or indeed that the Minister could review the prior decision of the 4th May, 2017 and further states that in extending time in respect of seeking an order for *certiorari* of the decision of the 4th May, 2017 this would be futile as there is no application for *certiorari* of that decision within the statement of grounds and in any event the applicant had not complied with o.84 of the Rules of the Superior Courts insofar as establishing eligibility for an extension of time is concerned.

Background

2. The applicant is a Pakistani national born on the 20th June, 1995. He came to Ireland as an unaccompanied minor in 2012 and secured subsidiary protection status on the 21st October, 2014. At that time he was granted permission to remain in the state for a three year period and thereafter on the 20th June, 2017 he secured an extension of that three year period with his current permission valid until the 20th June, 2020.

In April, 2016 the applicant applied to join the Defence Forces and in May, 2016 he applied to join the Naval Service. He was enlisted in the Naval Service on the 19th December, 2016 and commenced training on the 3rd of January, 2017 however subsequently voluntarily left the Naval Service on the 19th January, 2017 as he was confident he would secure a place with the army which was his preference. The applicant was selected for enlistment into the Defence Forces and was invited to the Curragh Camp to take part in an enlistment procedure on the 24th April, 2017 whereupon he was told for the first time that he was not eligible to enlist on the basis that he required a minimum of twelve-years permission to reside in the state or open-ended. Although not mentioned in the documents of the applicant before the court, it appears that he received an email on the 25th April, 2017 confirming the oral advice of ineligibility given to him on the 24th April, 2017. The applicant also received a letter bearing date the 4th May, 2017 which reiterated the content of the email of the 25th April, 2017 in that it set out the "current legal position" *inter alia* requiring residency to be open-ended or at a minimum must cover the period of engagement including any reserve commitment and as the period of engagement for enlistment was twelve years the required residency must be open-ended or as a minimum must cover the stated twelve-year period. In both the email of the 25th April, 2017 and the letter of the 4th May, 2017 reference is made to the "current legal position" being set out clearly in para. 127 of administration instruction A10.

On the 12th July, 2017 the applicant's solicitors wrote to both the officer in charge of recruitment in the Defence Forces and the Minister for Defence in which reference is made to the application being refused on the basis of an unpublished policy and requested user of discretion to dis-apply that policy. It is asserted that prior to the 24th April, 2017 the applicant was unaware of this policy and that the applicant was currently applying for naturalisation (although in the two affidavits sworn before this Court the applicant states that he is not eligible to make an application for naturalisation until late 2019). The letter went on to accept that the Defence Forces are fully entitled to put in place policies relating to the residency status of applicants, however, asserted such a policy must have the possibility of exceptions for special cases as otherwise it would fall into illegality because of its inflexibility and rigidness.

Several reminders were sent with the first communication from the respondent dated the 8th November, 2017 which states that the Department was currently engaging with the military authorities in relation to the matter and would revert.

In a subsequent letter of the 22nd November, 2017 from the applicant's solicitors a request was made for a final decision in respect of the applicant and in this letter a threat of litigation was made. The Department responded by a letter of the 5th December 2017 and indicated due to the number of issues raised it would not be feasible to respond within the fourteen-day time limit furnished. Several additional time limits were raised and expired.

By letter of 31st January, 2018 the respondent wrote to the applicant's solicitors indicating that the Department had engaged with the military authorities and it has been established that the attestation into the naval services was administratively incorrect. In

addition it had been established that the applicant's residency permission was insufficient to satisfy the current defence forces induction criteria and thereafter set out that the period of engagement was twelve years and therefore open-ended or as a minimum, twelve-years residency was required. It was indicated that clarification from the immigration services showed permission from the 10th December, 2014 to the 21st October, 2017 and it is asserted that when the applicant applied on the 17th April, 2016 to join the defence forces therefore clearly would have been aware that there was only eighteen months remaining in his residency permission. Although permission was extended on the 20th June, 2017 it is indicated that the applicant would have known that he did not have the lawful entitlement to join the defence forces and commit to the twelve years necessary. It was stated that there were currently no regulatory provisions under s.53(1) of the Defence Act 1954 and the defence force regulation A10 to provide for the applicant's induction into the defence forces. The letter concluded with a statement to the effect that in order to be inducted into the defence forces the applicant requires the appropriate permission. On that basis it is stated that the applicant could not have been inducted into the defence forces.

3. The applicant has sworn two affidavits respectively dated 27th April, 2018 and the 19th November, 2018. There is a comprehensive statement of opposition of the 23rd October, 2018 verified by three separate affidavits on behalf of the respondent. The final affidavit is that of David Kiely of the 14th January, 2019 in response to the applicant's affidavit of the 19th November, 2018.

4. In support of the applicant's position the applicant relies upon the following *jurisprudence*, which is said to be irrelevant by the respondent or otherwise not supportive of the applicant's position:-

(a) *Finnerty v. Western Health Board* [1998] IEHC 143. The applicant relies on this decision as the court determined that the final decision was the 29th of May, 1995 although it is clear from the decision that the applicant knew he was ineligible since July, 1991.

The respondent also relies on this decision on the basis that in that case the C.E.O. had agreed to review an earlier decision and the court refers to the necessity for an application for judicial review being made promptly. The court determined that a decision that is a reiteration of a previous decision is not a new decision. The applicant failed in that matter on the grounds of delay; and

(b) *X(R) v Minister for Justice & Ors* [2010] IEHC 446. This is a judgment of Mr. Justice Hogan in the High Court. The applicant relied on this judgment as the authority for the proposition that unless the relevant scheme provides no power of review there is (in accordance with s.22 (1) of the Interpretation Act 2005) an implicit power of review from time to time.

The respondent counters that the decision was considering the minister's discretion under s.18 (4) (a) of the Refugee Act 1996 which afforded a Minister a defined statutory power. Furthermore, the minister had agreed to undertake a review. The respondent points out that the decision was to the effect that if there is a statutory power there is an implicit power of review.

At para. 26 of the judgment Mr. Justice Hogan states that the real question is whether the existence of an internal review would be inconsistent with the statutory scheme. Ultimately the court decided that it would not.

(c) Sfar v. Revenue Commissioners [2016] IESC 15. The applicant states that the determining factors in that case was the lack of candour on the part of the applicant and in this matter states the applicant acted reasonably at all times and that there was no lack of candour. Furthermore, the applicant argues that the decision was not made on the basis of the first refusal but rather a much later refusal.

The respondent counters that in fact reference was made in that decision to the prior decision of Finlay J. in *De Róiste v Minister for Defence* [2001] 1 IR 190 for the purposes of demonstrating the general necessity for expedition in moving a judicial review applicant. In *De Róiste* it was indicated that a late applicant must explain his delay and show that the delay was justified with a short delay possibly requiring only a slight explanation. In *Sfar* the court was satisfied that the timely pursuit of a remedy is an indispensable requirement when engaging in this type of public law proceeding. At para. 20 Mr. Justice McKechnie indicated that the:-

> "date upon which time commences for seeking such an order will depend on the circumstances of any given case".

Mr. Justice McKechnie quoted with approval the decision of Ms. Justice Carroll in *Finnerty* and was satisfied that the Revenue position remained the same as declared in September, 2007 and Revenue was engaged in a curtesy reply and no more - certainly not a fresh adjudication on a new or different decision. The respondent laid emphasis on para. 39 of the judgment when the court indicated that a court would be justified in treating the very first refusal as being sufficient to trigger the expedition requirement set out in *inter alia* o.84 of the Rules of the Superior Courts.

(d) In *Krupecki v. Minister for Justice and Equality* [2018] IEHC 538, Mr. Justice Humpreys under the heading of "Need to Avoid Drawing on Scarce Judicial Resources", indicated that a pre-action letter in reasons cases is highly desirable and he quoted from Mr. Justice O'Donnell in R*ooney v. Minister for Agriculture and Food* [2016] IESC 1 to the effect:-

> "Litigation is not in itself an intrinsically desirable activity".

The applicant argues that there is public policy requirement of engagement prior to litigation and therefore the correspondence engaged in by the applicant's solicitors in advance of seeking leave on the 30th April, 2018 is effectively the type of correspondence contemplated by Mr. Justice Humphreys in his decision the applicant thereby fulfilled a public policy requirement.

The respondent counters that that particular judgment was a case about reasons which is not the situation in the instant matter and Mr. Justice Humphreys made particular reference to the asylum list.

It is noted that Mr. Justice Humphreys does not suggest an extension of the requirement for prompt action in judicial review applications.

What category does the letter of the 31st January, 2018 fall into
5. In order to determine the impact and effect of the letter of 31st January, 2018 it is necessary to review same in the light of (a) the author thereof; (b) the background; (c) the statutory scheme in respect of recruitment to the army.

(a) Author

This letter was the third of three letters in total written by the Department of Defence to the applicant's solicitors following the initial communication of the applicant's solicitors of the 12th of July, 2017.

In the first letter of the 8th November 2017, acknowledgment of a number of previous letters was given and thereafter it was indicated that the department was then engaging with the military authorities in relation the matter and would revert in due course.

In the second letter of the 5th December, 2017, following two letters respectively dated the 22nd and 23rd of November 2017 from the applicant's solicitor, it was indicated that the issues raised had been brought to the immediate attention of the appropriate military authorities. Thereafter it was indicated that it was not feasible for the department to respond within the fourteen-day time limit imposed in the second solicitor's communication because of the number of issues raised and would have to be investigated. The department indicated that it would endeavour to obtain a response as soon as possible and revert.

The next and final letter received from the Department of Defence in advance of proceedings on the 30th April 2018 was the letter of the 31st January, 2018.

6. In the letter of the 31st January, 2018 it was indicated in the second paragraph that the department has engaged with the military authorities.

7. It is clear from the foregoing that the letter of the 31st January, 2018 emanated from the Department of Defence and not the military authorities.

(b) Background

8. Although the respondent indicates that there was an oral communication followed by an email communication, the respondent does not however take objection to the applicant's suggestion that the decision of the military authorities relevant herein is that dated the 4th May, 2017. It emanates from the Defence Forces Ireland. It is in this letter that the applicant is informed that because of the "current legal position" which apparently is clearly set out in para. 127 of Admin. Instruction A10 (the parties agreeing in these proceedings that such admin instruction is no more than a circular and does not otherwise hold legal authority) the applicant was ineligible to be enlisted into the defence forces.

In excess of two months later by letter of the 12th July, 2017 the applicant's solicitors wrote to the defence forces and copied same to the Minister for Defence. Notwithstanding that there was no request to clarify the current legal framework which deprived the applicant of eligibility within the defence forces the applicant's letter proceeds on the basis that he was ineligible based upon an unpublished policy. It is stated that the purpose of the letter is to "ask you to use your discretion to dis-apply that policy in the instant case and allow our client to enlist, be inducted and complete his basic training". The letter went on to set out the background and indicated that at no stage was the applicant advised of the "above policy". The letter accepted that the defence forces are fully entitled to put in place policies relating to the residency status of applicants but went on to observe that it would be unlawful for such a policy to be operated in a way that it excludes the possibility of exceptions for special cases which statement is then followed by the grounds asserted to comprise compelling reasons why the policy should be dis-applied in the applicant's case. The letter concluded with an assertion that the unpublished policy would fall into illegality because of its inflexibility and rigidness. It will be remembered that no policy was in fact referred to in the letter of the 4th May, 2017. This letter was followed with reminders and an update by letter of the 22nd November, 2017 informing the Minister of the fact that the applicant had secured a further three-year permission to remain in the state *inter alia* on the 20th June 2017. The letter stated:-

> "We hereby take this opportunity to, again, request the Minister of Defence to make a final decision in respect of our client".

The prior request in the letter of the 12th July, 2017 was in fact a request of the minister to exercise an asserted discretion to dis-apply the asserted policy.

The letters from the minister have been detailed above. It is worth noting that following the letter of the 31st January, 2018 the only communications from the applicant's solicitors prior to seeking leave on the 30th April, 2018 were two letters, the first the 29th of March, 2018 and the second 18th April, 2018. Both letters are similar in that they are seeking copies of three potential categories of documents. Significantly there is nothing in those letters to indicate what the applicant understood by the letter of the 31st January, 2018 although such letters did not, as was the case on five occasions prior to the letter of the 31st January, 2018, threaten legal proceedings in the absence of a response.

The foregoing demonstrates therefore that the letter of the 31st January, 2018 emanated from the minister in circumstances where following the military decision of the 4th of May, 2017 the minister was asked, by letter of the 12th July, 2017, to exercise his discretion to dis-apply the policy and was asked by letter of 22nd November 2017 to make a final decision in respect of the applicant for the reasons set out in the letter of the 12th July, 2017. The letter of the 31st January, 2018 therefore issued in circumstances where the vires of the military decision of the 4th May, 2017 was not questioned. The grounds set forth in the letter of the 12th July, 2017 might be classified as humanitarian grounds as opposed to legal grounds save for the contention that the alleged policy would be operated unlawfully if it excluded the possibility of exceptions for special cases and was otherwise a policy which was inflexible and rigid.

(c) Statutory Scheme

9. The respondent argues that the minister did not and legally could not make a decision which would allow for the enlistment of the applicant.

The applicant in his second affidavit of 19th November, 2017 at para. 4 states that:-

> "I asked the respondent to review the decision made by the army and…he agreed to do so."

It is argued on behalf of the applicant the correspondence prior to the letter of the 31st January, 2018 demonstrates that the respondent did agree to review the military decision, that the letter of the 31st January, 2018 was such a review and the minister had residual discretion to do so.

The basis for the applicant suggesting that the letter of the 31st January, 2018 comprised a review by the minister is:-

> (1) The correspondence aforesaid.
>
> (2) The fact that the letter emanated from a different section within the Department of Defence.
>
> and
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> (3) The letter of the 31st January, 2018 relied in part on the assertion that *inter alia* on the 20th June, 2017 when the applicant's permission to remain was renewed he knew that he was ineligible.
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> (4) Reference is made, for the first time, of s. 53 of the Defence Act, 1954.

The applicant states that the statutory basis by which the minister has the discretion contended for is:-

> (a) It is argued that the judgment of Mr. Justice Hogan *R (X) and Ors v the Minister for Justice and Ors* of the 10th of December 2010 is authority for the proposition that once the power is vested in the defence forces to enlist there is a power to review implied unless the statute says otherwise;
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> (b) Section 56 of the Defence Act 1954 affords the minister power in respect of eligibility grounds and he cannot fetter his discretion by regulation.
>
> and
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> (c) Section 1 (x) of the Ministers and Secretaries Act 1924 provides *inter alia* that the Minister for Defence is the head of the military.

The applicant also argues, correctly, that the assertion that the Minister did not have a residual discretion was not raised in the statement of opposition the 23rd of October, 2018.

Various paragraphs within the statement of opposition make reference to the letter of the 31st January, 2018 as being a decision – at para. 29 it is claimed that the applicant's application was considered and subsequently reconsidered and at para. 8 it is stated that the applicant is not entitled to an order of *certiorari* quashing the reiteration of the 31st January, 2018 affirming his earlier decision of the 4th May, 2017

10. It appears to me that the judgment of Mr. Justice Hogan is particularly significant in the context of determining the power, if any, of the minister. Mr. Justice Hogan was dealing with the question as to whether or not the minister has jurisdiction to review a decision under s.18 (4) of the 1996 Refugee Act. Within s.18 (4) is a discretion to the minister and ultimately Mr. Justice Hogan was satisfied that having regard to s.22 (1) of the Interpretation Act 2005 such a power can be exercised from time to time.

The court considered the previous Supreme Court judgment in *Izevbekhai v. Minister for Justice and Ors* [2010] IESC 44. At para. 19 of his judgment Mr. Justice Hogan stated that:

> "Fennelly J. in the Supreme Court decision made it clear that any arguments based on the existence of some residual ministerial discretion would be inconsistent with the overall structure of the regulations".

Insofar as the ratio of the Supreme Court decision is concerned Mr. Justice Hogan stated:-

> "The Minister's discretion with regard to subsidiary protection is made conditional on the notification which was required to be sent to any person who was the subject of the deportation order and that specific notification only applied to deportation made after the operative date".

At para. 26 Mr. Justice Hogan stated that the real question is whether the existence of an internal review would be inconsistent with the statutory scheme. At p. 6 of his judgment Mr. Justice Hogan also deals with an issue which is raised in the within matter namely the position where a public body conducts an internal review and later argues that it had no jurisdiction to engage in the course of action it had earlier embarked on. The decision of MacKechnie J. in *Re Greendale Building Company Ltd* [1977] IR 256 was quoted to the effect that there can be no estoppel as against a statute and therefore the fact that the department had by its own conduct led the applicants to believe that such a jurisdiction really existed was irrelevant as matter of strict law.

Clearly, therefore the availability of a discretion remaining with the minister would depend upon the overall structure of the regulations rather than dependant on the content of the statement of opposition.

11. Under s.56 of the 1954 Act the minister is enabled to make regulations for the purposes of conferring powers of recruitment and thereafter under s.57 enlistment is to take place in accordance with the recruiting regulations. Under s.298 the statutory instrument of 1941 is incorporated.

The relevant statutory instrument in turn provides at para. 1(1) under the heading of "Recruitment and Enlistment" that Adjutant-General is responsible for organisation and conduct of recruiting for the defence forces. In para. 2 it is provided: -

> "General officers commanding commands are, under the orders of the Adjutant-General, charged with the general administration of recruiting for the defence forces and are responsible for the appointment of attesting officers and for the opening of recruiting stations at such places and times as they may consider necessary. They may, with the approval of the Adjutant-General, issue such recruiting instructions, not inconsistent with regulations, as may be necessary for the guidance of attesting officers and recruiters".

The balance of the regulations does not suggest that the minister has reserved a function of recruiting and indeed the applicant does not suggest they do.

In the circumstances, I am satisfied that the implied power of review mentioned in Mr. Justice Hogan's decision is not vested in the minister but rather in the Adjutant-General or the general officers commanding commands under the orders of the Adjutant-General. In these events it is not within the statutory framework that the minister would have a function or an implied reserved function in recruitment.

As there is no estoppel against a statute it cannot be said that the content of the statement of opposition confers the discretion contended for by the applicant.

(d) General

The following points also arise with regard to the letter of the 31st January 2018:

(a) The subsequent correspondence from the applicant's solicitors of the 29th March 2018 and the 18th April 2018, as aforesaid, request certain documents however the documents appear to arise on foot of content of the decision of the 4th May, 2017 and the admin instruction A10 therein referred to. Accordingly, prior to the application for leave some three months after the issue of the letter of the 31st January 2018 no understanding by the applicant that such letter is a decision let alone a binding decision had been communicated by the applicant;

(b) Insofar as the application asserts that it is clear that there is an ongoing process since the letter of the 12th July 2017 to the letter of the 31st January 2018 it appears to me that if one considers the letters postdating the letter of the 31st January 2018, being those of the 29th March 2018 and the 18th April 2018 these letters would suggest that the process was in fact ongoing. Neither of these two aforementioned letters mention "decision" rather, refer to the letter of the 31st January.

(c) In McKechnie J's judgment aforesaid the court referred to a number of decisions which the applicant clearly interpreting the decision as a refusal – see for example p. 29 of the judgment.

(d) The letter of the 31st January 2018 does not use terminology such as 'review', 'uphold', 'confirm', 'consideration' to support the contention that it is a decision

(e) The letter does not mention at all either the decision of the 4th May 2017 or indeed the applicant's letter of 12th July 2017.

(f) The grounds set forth in the applicant's letter of the 12th July 2017 and somewhat supplemented in the letter of the 22nd November 2017 are not referred to.

(g) The letter does refer to s.53 (1) of the 1954 Act however it appears to me impossible that such a reference on a standalone basis could be considered a review decision.

(h) Although the letter does refer to the fact that the applicant would have known that he did not have a lawful entitlement, this refers to a period on or about the 20th June 2017 therefore postdates the decision of the 4th May, 2017, and therefore is a correct statement of fact.

(i) Reference in the letter to placement in the naval service is not material.

(e) Finding

12. For all of the reasons above I am satisfied that: -

(1) The minister did not retain authority to review the decision of the military insofar as enlistment is concerned.

(2) The letter of the 31st January 2018 is not a decision and even if it was it was from the minister without legal standing.

Section 53 of the Defence Act 1954

13. In my view, the understanding by the military of the content of s.53 (1) of the Defence Forces Act 1954 coupled with the regulations made thereunder (of 1941 but incorporated as above into the 1954 scheme) comprises a misunderstanding and is not sustainable.

The period of twelve years mentioned in para. 53 (1) (a) is noted in the margin of the act as being a fixed term period.

It is argued by the respondent that such a fixed term period therefore requires a guarantee by an applicant. There is no mention of the word "guarantee" in s.53 or indeed the balance of the 1954 Act nor is there such a reference in the regulations.

14. In regulations 7 & 12 eligibility requirements are set forth. It is common-case that the applicant is not ineligible because of any one or other of the matters referred in either such regulation.

15. Significantly in my view one of the reasons why an enlisted person might be discharged is if that person became an MP (see s.74) – this by definition would be a voluntary course of action adopted by the enlisted party. If as the respondent suggests, S.53 (1) requires a guarantee of availability for the full twelve-year period, so as to exclude the applicant because the Department of Justice affords three year rolling permissions, then surely there would be a requirement for a guarantee that an enlisted person would not voluntarily become an MP during the fixed term period however this is not the case. The possibility of discharge because an enlisted person becomes an MP does not in my view support the respondents understanding of s.53(1). Fixed term contracts are not unusual in employment or indeed public procurement situations. It is a statement of the intended duration.

16. The respondent laid considerable stress on the user of the term "liable to serve at all time" for example in ss. 85 and 89 of the

1954 Act however both sections also refer to "while so employed" and therefore in my view cannot support the asserted understanding of s.53.

17. I am satisfied that the normal and ordinary use of the words employed in s. 53 is to provide for a fixed term contract, with a lesser period in certain circumstances not now arising, and the act as a whole and the regulations thereunder do not support a guarantee being required, which, in accordance with the submissions made, is central to the respondent's asserted understanding of the legislation.

Further, as was pointed out by the applicant not only would a party be discharged if he became an MP (s. 74) a party can also buy out the balance of the term as provided in s.75.

Although it may not be convenient for the military from a cost or other point of view not to secure guarantees from enlisted persons this of itself does not guide the meaning of s.53 of the regulations under the 1954 Act.

In my view, there is no necessity to call in aid of the interpretation of s. 53 the balance of the act however in circumstances where the balance of the act and the regulations would be looked at to determine the intention of the legislature in understanding the provisions of s.53 I am not satisfied that such an overview yields the understanding contended for by the respondent but rather supports the view that a guarantee as such is not incorporated in s.53.

Extension of time

18. SI No. 691 of 2011 deals with the Superior Court rules in respect of judicial review. Order 84, sr. 21 provides that an application to apply for judicial review shall be made within three months from the date when grounds for the application first arose. Sub-rule 3 goes on to provide that the court may extend this period "but the court shall only extend such period if it is satisfied that: -

> (a) There is good and sufficient reasons for doing so, and
>
> (b) The circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either: -
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> (i) were outside the control of, or
>
> (ii) could not reasonably have been anticipated by
>
> the applicant for such extension".

In sub-rule 5 it is provided that an application for an extension referred to in sub-rule 3 shall be grounded upon the affidavit sworn by or on behalf of the applicant and shall set out the reasons for the applicant's failure to make the application for leave within the prescribed period and shall verify the facts relied on in support of those reasons.

18. The difficulty with an application to extend time in the instant matter is as follows:

> (1) The grounding affidavit of the applicant does not address at all the issue of an extension of time;
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> (2) paragraph 2 of the statement of opposition of the 23rd October 2018 clearly sets out that objection was taken to any challenge to the decision of the 4th May 2017 on the basis of o. 84 r, 21 where no reasons were provided;
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> (3) Following from the statement of opposition the applicant swore a second affidavit bearing the 19th November 2018 and paras. 4 & 5 thereof are relevant in the instant circumstances. At para. 4 the applicant addresses para. 2 of the statement of opposition and states:-"I say and am advised that it should not become necessary for me to challenge that decision in circumstances where I asked the respondent to review the decision made by the army and where he agreed to do so". In para. 5 the applicant states: -"I wished to challenge that decision but I instructed my solicitors to ask the respondent to review the army's decision to refuse to allow me to enlist in its general service…further reminders were sent by my solicitors culminating in the respondent's decision of the 31st January, 2018 which is the decision challenged in these proceedings."
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> (4) Later in his affidavit of para. 7 the applicant expresses surprise that he is being criticised for not issuing proceedings immediately after the decision of the 4th May, 2017 without giving the department a chance to clarify that communication and perhaps to overrule it. In para. 8 the applicant refers to a communication by his solicitor to the respondent expressing dissatisfaction with the decision of the 4th May, 2017. He then goes on to suggest that the applicant was seeking to avoid issuing proceedings and taking up the resources of the court, as being good and sufficient reason to extend time to challenge the respondent's decision "should same be necessary".
>
> The 12th July 2017 letter did not seek any clarification in respect of the communication of the 4th May, 2017. Nor was there an expression of dissatisfaction in the letter of the 12th July 2017. The letter requested the respondent to exercise a discretion on grounds therein set out to avoid the import of the decision of the 4th May 2017 – no suggestion was made that the content of the decision of the 4th May 2017 was *ultra vires*.
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> (5) Having reviewed the correspondence from the department prior to the letter of the 31st January 2018 I am not satisfied that there was any agreement to review the decision.
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> (6) Para. 5 of the applicant's affidavit of the 09/11/18 suggests that the applicant made a conscious decision rather than to challenge the decision of the 4th May, 2017 to proceed to seek a review instead.
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> (7) The good and sufficient reason proffered on behalf of the applicant, included in submissions, is the assertion that the applicant was affording the department a chance to clarify its communication and perhaps overrule it. However, the communications from the applicant's solicitor does not support such a characterisation of the events and even if it did it certainly would not amount to good and sufficient reason beyond the letter of the 31st January 2018.
>
> (8) In para. 5 of the affidavit of the 19th November 2018 the applicant refers to the asserted decision of the 31st January 2018 as being the decision challenged in the within proceedings and indeed the statement of grounds does not

contain any standalone relief seeking to quash the decision of the 4th May, 2017 rather the only relief in this regard is: -

> "g. if necessary an order extending the time to seek *certiorari* of the decision of the 4th of May 2017".

(9) Order 84, r. 20 (1) (a) (ii) requires a statement of each relief sought and of the particular grounds upon which each relief is sought.

(10) There are no grounds directed at the extension of time.

(11) The grounds in para. 6, given the late amendments to the statement of grounds are underlined, appear to me to be directed at seeking to quash the asserted decision of the 31st January 2018 rather than the decision of the 4th May 2017.

In the circumstances, therefore I am satisfied the necessary prerequisite to the court exercising a discretion to extend time namely that good and sufficient reasons would be afforded being reasons which explained and objectively excused the delay are not available.

By reason of the foregoing sufficient evidence is not before the court to enable the court to extend time to challenge the decision of the 4th May 2017.

It would only be in circumstances of good and sufficient reason for the delay being afforded that the merits of the case, as aforesaid, would be taken into account in or about the exercise of the discretion.

Conclusion
For the reasons above the applicant's application is refused.