THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 189 J.R.]

BETWEEN

M.O.S

APPLICANT

AND

THE RESIDENTIAL INSTITUTIONS REDRESS BOARD AND SUPERIOR COURT RULES COMMITTEE AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered the 24th day of April, 2017

1. The Residential Institutions Redress Board (the Board) was established under the provisions of the Residential Institutions Redress Act 2002 (the 2002 Act). The statutory preamble states that the Act is to "provide for the making of financial awards to assist in the recovery of certain persons who as children were resident in certain institutions of the State and who have or have had injuries that are consistent with abuse received while so resident…" The Board was established to make such awards. The abuse which was to be the subject of awards by the Board is defined as:

> "(a) The wilful, reckless or negligent infliction of physical injury on, or failure to prevent such injury to, the child,
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> (b) The use of the child by a person for sexual arousal or sexual gratification of that person or another person,
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> (c) Failure to care for the child which results in serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare, or
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> (d) Any other act or omission towards the child which results in serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare."

2. Under s. 7 of the 2002 Act where a person who makes an application for an award to the Board establishes to its satisfaction:

> "(a) Proof of his or her identity,
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> (b) That he or she was resident in an institution during his or her childhood, and
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> (c) That he or she was injured while so resident and that injury is consistent with any abuse that is alleged to have occurred while so resident.
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> The Board shall make an award to that person…"

3. The time limit for the making of an application to the Board is limited under s. 8(1) of the Act to three years from the establishment day. That period may be extended under s. 8(2) at the Board's discretion "where it considers there are exceptional circumstances" to do so. The Board is obliged under s. 8(3) to extend the three year period where it is satisfied that an applicant was under a legal disability by reason of unsound mind at the time when such application should otherwise have been made and the applicant concerned makes an application to the Board within three years of the cessation of that disability: no legal disability is said to arise in this case.

4. The establishment day of the Act was 16th December, 2002.

5. Under s. 8(4) and (5) of the Residential Institutions Redress (Amendment) Act 2011 (the 2011 Act) it was provided that the Board "shall not consider an application under s. 8 that is made on or after 17th September, 2011. To that end the Board was obliged to publish not later than six weeks before that date a notice to the effect that no application would be considered by the Board on or after that date in Iris Oifigiúil, two daily newspapers circulating in the State and two daily newspapers circulating in the United Kingdom.

6. On 21st January, 2008, the applicant with the assistance of his former solicitor submitted an application form for redress to the respondent pursuant to the provisions of the 2002 Act. In his statement grounding the application, the applicant outlined how he had been committed to St. Joseph's Industrial School Clonmel, Co. Tipperary for two years at the age of twelve. He described a history of physical beatings and sexual abuse while detained there. The application was also accompanied by a report from his general practitioner. It was received by the Board on 23rd January, 2008. The period for the making of his application had in fact expired on 15th December, 2005 pursuant to the provisions of s. 8(1) of the 2002 Act.

7. The applicant sought an extension of the period for the making of his application under s. 8(2). The medical report submitted refers to this delay and stated that he had suffered severe beatings and sexual abuse to such an extent that he suppressed all his feelings and emotions at that time. He had never spoken to anybody about that period in his life and had only lately informed his wife in the context of his wife's uncle having similar experiences. He was afraid that his relationship with his wife would suffer if she were aware of his past. No case was made that the applicant was under any legal disability under s. 8(3). Therefore, the extension of time fell to be considered under s. 8(2) which permitted the Board in its discretion and where it considered there were exceptional circumstances to extend the period for the making of the application.

8. On 28th May, 2008 the Board refused the application for an extension of time for the reasons set out in a letter of that date. It did not consider that any exceptional circumstances had been established in the applicant's case. In reaching that decision the Board took into account an affidavit submitted on behalf of the applicant sworn on 12th February, 2008. The applicant deposed in that affidavit that he first consulted or attended his solicitor in relation to his application for redress in or about December, 2007 following the death of his wife's uncle who had also suffered abuse. He had never been able to grapple with issues relating to the abuse which

he suffered while resident in St. Joseph's Industrial School. He explained the shame and embarrassment relating to what had occurred while he had been resident there which prevented him from disclosing or dealing with those issues.

9. The Board, in refusing the application, stated that advertisements had been placed in all national broadsheet and tabloid newspapers as well as the main provincial papers and on various television networks in respect of the closing date for the receipt of applications prior to 15th December, 2005. Advertisements were also placed in all Irish daily newspapers highlighting each ministerial order which added to the institutions listed in the schedule and placed similar advertisements in Irish newspapers advising applicants of the closing date for the receipt of applications. It set up a website which was a conduit for newsletters, statements and media releases and contained all relevant information concerning the Board. Furthermore, the Board did not accept that there were exceptional circumstances in the applicant's case. It stated:

> "Despite the fact that the redress board had widely advertised the closing date for applications a number of potential applicants were, due to inability to grapple with issues related to what had occurred while they were resident in institutions scheduled in the Act, and also due to shame and embarrassment, unable to lodge applications prior to the 15th December, 2005. Your client's circumstance in this regard is not, therefore, exceptional."

10. The Board therefore formally determined that the application was not validly received within the statutory period provided in the Act and would not be further considered.

11. By letter dated 3rd November, 2010 the applicant's new solicitors requested the Board to permit their client's application to be reopened in respect of the extension of time which had been refused on 28th May, 2008. It was indicated that there were additional factors involved which should have been addressed but had not been submitted to the Board for its consideration in the initial application. Further documentation was submitted. The Board considered a general practitioner's report of 16th October, 2007, the statement of the applicant, the affidavit of the applicant sworn 12th February, 2008, a report and letter of a consultant psychiatrist dated 10th June, 2010 and 12th August, 2011 and the records relating to the applicant's period of residence in St. Joseph's Industrial School. An oral hearing was subsequently held at the Board's premises at which the applicant was represented by solicitor and counsel on 21st November, 2011. The applicant, his wife and his psychiatrist gave evidence. The Board delivered its determination refusing an extension of time on 9th January, 2012 of which the applicant was formally notified on the 11th January.

12. In the course of its determination the Board considered the issue of "exceptional circumstances" and noted as follows:

> "There is no definition of 'exceptional circumstances' included in the 2002 Act. However, some guidance is to be found in the Oxford English Dictionary's definition of 'exceptional circumstances' as being 'of the nature of or forming an exception; out of the ordinary course, unusual, special.' The same dictionary defines an 'exceptional case' as one which is 'excepted a particular case which comes within the terms of a rule, and to which the rule is not applicable; a person or a thing that does not conform to the general rule affecting any other individuals of the same class.' In essence the Board considers that 'exceptional' means something out of the ordinary. The circumstances must be unusual, probably quite unusual, but not necessarily highly unusual. The definitions outlined provide a useful framework from which it is clear that it would be inappropriate for the Board to apply a test of uniqueness in these cases.
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> Accordingly, therefore, when considering applications for an extension of time under s. 8(2) of the 2002 Act, the Board will determine each application according to its individual merits and particular circumstances. In this respect, the Board does not consider that it is possible to define in advance what circumstances might be considered exceptional.
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> However, such an approach does not prevent the Board from envisaging or surmising what sort of individual circumstances in a particular case might be considered exceptional, for example the effect or impact of mental or physical health problems or conditions on a particular individual; personal family circumstances, whether in the applicant's own life or in the lives of others for whom he or she cares; communication problems; or difficulties with legal advice. Any of these types of circumstances, prevailing at a relevant time, could have the effect of preventing or inhibiting an applicant from making an application within the prescribed period and could be considered exceptional…"

13. Later in the determination it was stated:

> "The Board takes the view that repression constitutes an unconscious defence mechanism whereby somebody is unable to recall important personal information, usually of a traumatic or stressful nature, and by reason of the unconscious nature of this mechanism the person involved has no control over whether the relevant memories are or are not available to him, for the purposes of acting in a particular way such as in this case the bringing of an application for redress.
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> Having carefully considered all evidence given in this matter the Board is of the view that what is involved in [the applicant's] case is not unconscious repression of memories of the abuse suffered by him in the institution which rendered him unable to bring his application in time, but voluntary suppression of these memories which were both painful and distressing to him. The Board has, since April of 2003, conducted very many oral hearings in the course of administering the Redress Scheme and takes the view that all applicants have painful and distressing memories of the abuse suffered by them in residential care, and in this regard the applicant's circumstances are not exceptional.
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> While [the applicant] may have developed sexual dysfunction as a result of the sexual abuse suffered by him in the institution which has caused him to doubt his paternity of his sons, Dr. O'D has given evidence that this is not the primary reason why he did not bring his application in time, the main reason for his failure to do so being, in his opinion, repression and avoidance of the abuse suffered by him. However, as already stated the Board takes the view that [the applicant] had taken the voluntary and conscious decision not to deal with the abuse suffered by him in the institution because of the painful and distressing memories involved, and that he was not in the same situation as many others in this regard who had developed psychiatric conditions as a result of the abuse, and accordingly his circumstances are not exceptional. The Board also takes the view that the applicant was not, during the relevant periods, suffering from any psychiatric or medical condition which would have rendered him unable to bring his application prior to 15th December, 2005."

14. Nothing further occurred until by letter dated 26th June, 2014 to the Chairperson of the Board, the applicant's solicitor sought a reconsideration of that decision. No further evidence was adduced at that stage. By letter dated 28th July, 2014 the solicitor to the Board responded indicating that the Chairman of the Board was satisfied that the Board had exhausted all of its statutory functions in respect of the late application made on the applicant's behalf and was not in a position to take any further action in respect thereof.

15. By letter dated 24th November, 2015 the applicant's solicitor wrote to the Board. He expressed awareness that the Board had

almost completed its work but asked the Board in the light of the Supreme Court decision in "*O.G. v. Residential Institutions Redress Board*" to review the applicant's application. It noted that the Supreme Court had stated that the legislation underpinning the Board's work was to be treated as a "remedial statute". The Board was requested to exercise its discretion and allow the application to proceed. By reply dated 27th November, 2015 the writer was referred to the reply of 28th July, 2014 which set out the Board's position which remained unchanged. No further consideration was given to the matter by the Board.

"Exceptional Circumstances"

16. At the time of the refusal of the initial application for an extension of the period on 9th January, 2012, the High Court had delivered two judgments concerning the test to be applied by the Board when determining whether "exceptional circumstances" existed which entitled it to exercise its discretion to extend the time. In *J. O'B. v. The Residential Institutions Redress Board* [2009] IEHC 284 O'Keefe J. upheld a decision by the Board to refuse an extension of the period to an elderly gentleman who sought to initiate a late application under the scheme in January 2006 approximately one month after the closing date. The Board concluded that he had been aware of his right to apply at the latest by November 2005 and had sufficient time to apply. The learned judge held that the Board was entitled to refuse the application, a decision which could not be disturbed on its facts in a judicial review. There were no particular circumstances advanced that would have justified an extension of time. The court noted that the Board was entitled "to conclude that ignorance of the scheme and/or closing date did not constitute exceptional circumstances."

17. This decision was followed by Kearns P. in *M.G. v. The Residential Institutions Redress Board* [2011] IEHC 332 in which the applicant who had intellectual difficulties, failed to make an application until several years following the closing date. Notwithstanding the extensive advertisement campaign, the applicant only learned about the existence of the scheme following a casual encounter with another person who had been in the same institution at the same time. The Board held that there were no exceptional circumstances such as would warrant an extension of time. Kearns P., applying the same test as that applied in J.O'B. found that the applicant's intellectual difficulties were not as severe as those contended for and did not in themselves take her case into the category of exceptional circumstances. He acknowledged that "exceptional circumstances" might arise if an applicant had been living "in a faraway jurisdiction or for some other reason had been cut off from all sources of communication, so that the existence of the scheme could only have come to that applicant's knowledge after the time limit had expired." Kearns P. added:-

> "However I am satisfied in this case that even on an interpretation of "exceptional circumstances" which includes extending the time where an applicant could not reasonably have known of the existence of the Board or the compensation scheme, the outcome must be the same in this particular case for the reasons to which I will now turn.
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> … there were ample means of acquiring knowledge available to this applicant, and indeed any other applicant living in this jurisdiction over the relevant period of time. Not only was there a national furore taking place on an almost daily basis in the print, radio and television media, there were also extensive advertisements placed by the respondent body on a nationwide basis."

18. Subsequently in *A.G. v. Residential Institutions Redress Board* [2012] IEHC 492 Hogan J. delivering the judgment of the High Court on the same point and in respect of circumstances which were similar to those in *M.G.*, reluctantly followed the decisions of *J. O'B* and *M. G.* on the basis that he was bound by authority to do so (*Kadri v. Governor of Cloverhill Prisons* [2012] IESC 27 and *Re Worldport Ltd*. [2005] IEHC 189) because of the application of the principle of *stare decisis*. Nevertheless, Hogan J. outlined why as a matter of principle he did not find the reasoning of the Board to be convincing. He disagreed with the Board's proposition that if the Oireachtas had intended that applicants who were unaware of the existence of the scheme during the currency of its operation should have their late applications accepted, it would have employed a state of knowledge test in s. 8(2). He stated:-

> "26. In my judgment, this conclusion does not follow from its premise. The Oireachtas was not to know in advance that substantial numbers of otherwise potentially eligible applicants would not apply in time by reason of lack of knowledge regarding the existence of the scheme. Yet the Board apparently relied on the fact that so many potential applicants applied late in order to demonstrate that ignorance of the scheme was not in itself an exceptional circumstance, precisely because in the event this transpired to be so common.
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> 27. Nor does it follow at all that had the Oireachtas considered that absence of knowledge should be dispositive in all such late application cases it would necessarily have employed a state of knowledge test in s. 8(2). Rather, by using the broad generic term "exceptional circumstances", the Oireachtas simply intended to leave the Board with the greatest possible flexibility to deal with the wide variety of possible circumstances in which late applications might be made. The failure of a potential applicant to learn of an entitlement to apply for redress during the three year period was simply one possible category of exceptional circumstances, but there were doubtless many others. One may assume that some applicants may, for example, have applied late due to a bona fide mistake or misunderstanding. This might well be capable of amounting in given cases to exceptional circumstances, but one might as well contend that had the Oireachtas intended that bona fide mistake should be accepted as a ground of excuse for late applications it could have said so expressly in s. 8(2) instead of employing the test of exceptional circumstances. The very fact that the Board engaged in what, with respect, was entirely circular reasoning in its own way demonstrates its inadvertent failure to come to terms with the amplitude of its power to extend time by reason of exceptional circumstances.
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> 28. Accordingly, if the matter were res integra, I would have interpreted the words "exceptional circumstances" as they appear in this special statutory context in a different manner from that of the Board. In the context of a remedial statute such as the 2002 Act, the argument that the concept of exceptional circumstances should be measured by reference to the anticipated likely conduct of the population as a whole – as distinct from the Board's actual empirical experience with potential applicants under the present scheme – is an attractive one."
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> 29. If that were indeed the test, then the failure of (an otherwise literate) potential applicant who was residing in Ireland during the period between 2002-2005 could well be regarded as amounting to "exceptional circumstances" in this statutory sense. Judged by the ordinary standards of the general population it seems extraordinary that Ms. G. did not become aware of the scheme during that period, yet the Board expressly found that this was so. It is in that particular sense that it might be said that her circumstances were exceptional."

19. Ms. G. succeeded in her appeal to the Supreme Court. In *A. O'G. v. The Residential Institutions Redress Board* [2015] IESC 41 Denham C.J. (delivering the judgment of the court) considered the meaning of "exceptional circumstances". The learned Chief Justice stated that the Act of 2002 was a remedial act and should be so interpreted and noted:-

> "34. In their own determination the Board stated that it would 'determine each application according to its individual merits and particular circumstances'.

35. The Board envisaged the sort of circumstances which might be exceptional as:-

'For example, the effect or impact of mental or physical health problems or conditions on a particular individual; personal family circumstances, whether in the applicant's own life or in the lives of others for whom he or she cares; communication problems; or difficulties with legal advice. Any of these types of circumstances, prevailing at a relevant time, could have the effect of preventing or inhibiting an applicant from making an application within the prescribed period and could be considered exceptional.'

36. In this case the appellant did not know of the scheme before the closing date. Thus, the Board had to consider the facts of her case, and decide whether they gave rise to 'exceptional circumstances' so as to enable her application to be admitted.

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39. In light of the general tenor of the Act of 2002, which was remedial in nature, and to the absence of fault in the scheme, the term "exceptional circumstances" has to be interpreted accordingly. In this case the appellant submitted that at the time when she might have been expected to make an application she was suffering from mental health issues and other factors identified by Dr. M.

40. Applying the criteria for "exceptional circumstances" given by the Board itself, to the findings of Dr. M, it is clear that they meet the test of exceptional circumstances. The appellant's personal family situation, her isolation, her psychological distress suffered as a consequence of her childhood in the institutions, her active suppression of memories of her lifetime in the institutions for many years, the fact that she could not cope with the memories until she received counselling, that she could not apply to the Board until she had received counselling, her health difficulties, were all prevailing factors at the relevant time.

41. In addition, irrespective of the criteria given by the Board itself, the decision of the Board was irrational on the evidence before it. On the evidence there was only one conclusion to which the Board could arrive.

…

43. I am satisfied that the Board erred in its exercise of discretion, and that it should have extended time for the appellant's application. I would allow the appeal."

20. The applicant in this case submits that in determining whether to grant him an extension of the period within which to make his application, the Board applied the incorrect test. The applicant placed particular emphasis on those aspects of the decision which focused on the fact that the Redress Board had widely advertised the closing date for applications following which a number of persons were unable "due to shame and embarrassment" to lodge applications prior to the 15th December, 2005. The Board stated that these applicants had also been refused an extension of time. Therefore, it concluded that the circumstances advanced were not exceptional. The Court of Appeal in the later case *of McE v. The Residential Institutions Redress Board* [2016] IECA 17 would explain and apply the principles set out in the G decision when formulating a different test to the narrower test applied in the applicant's case.

21. In addition, the Board took the view that the applicant had taken a voluntary and conscious decision not to deal with the abuse suffered by him because of the painful and distressing memories involved but that he was not in the same position as many others in this regard who had developed psychiatric conditions as a result of the abuse. Therefore, this circumstance was also not deemed to be exceptional. Although there was no countervailing evidence to that given by Dr. O'D, that the main reason for not bringing the application in time was his repression and avoidance of abuse suffered by him, the Board took the view that he had taken the "voluntary and conscious decision" not to deal with the abuse suffered by him.

22. In *McE v. The Residential Institutions Redress Board* [2016] IECA 17, a decision of the Court of Appeal delivered on the 3rd February 2016, Hogan J. (delivering the judgment of the court, Kelly and Edwards JJ concurring) held that the provisions of the 2002 Act including the term "exceptional circumstances" should be construed as "widely and liberally as can fairly be done" because the statute was remedial in nature. The applicant was illiterate and drinking heavily in the years 2002 to 2005. Although he was aware from radio and television of the discussion of issues associated with child sexual abuse, he believed that these related to clerical sexual abuse. He became aware of the possibility that he might have a right to seek redress from the Board when his girlfriend saw an advertisement from a local solicitor in September 2011 just before the expiration of the statutory period within which the Board might receive applications. The Board refused to extend the period for the making of his application beyond the three year period because it was not satisfied that the above matters were "exceptional circumstances" under s. 8(2). The definition of exceptional circumstances set out by the Board in its decision largely reflected the definition given by it in this case. It rejected a "state of knowledge" test and ruled that the words "exceptional circumstances" should be interpreted as meaning circumstances "which might have prevented the existence of the Redress Board from coming to his attention during the relevant period". The Court of Appeal held that the Board applied the incorrect test noting that if the Oireachtas sought to circumscribe the Board's discretion in the manner suggested it could have provided that when seeking an extension an applicant must establish (i) the existence of exceptional circumstances and (ii) that these circumstances were such as to preclude either the existence of the Board or the existence of the Redress Scheme from coming to the applicant's attention within the three year period. Instead the Act simply provided that the Board might extend the time "when it considers there are exceptional circumstances". Hogan J. stated that the Board had:

> "…the widest possible discretion to extend time once it was satisfied that there [were] circumstances such as would make it just and equitable that time should be extended. Contrary to what the Board appears to have required in the present case, there is no necessity to show that the exceptional factors somehow precluded the applicant from making a late application on learning of the existence of the Board or the Redress Scheme."

23. The court then considered how the existence of "exceptional circumstances" was to be measured. It was submitted by the Board that it was entitled to look at the circumstances of the class of potential late applicants and measure the concept of proportionality for the purposes of s. 8 (2) by reference to that narrow class as distinct from the general population as a whole. Hogan J. noted that the fact that the applicant was illiterate was itself an exceptional circumstance judged against the population as a whole "which indirectly hampered his ability to learn of the Redress Scheme…". The court was satisfied that the list of circumstances that might qualify as exceptional was much broader than the "state of knowledge" test: the issue of exceptional circumstances was to be measured by reference to the status of the general population not by reference to the narrow class of potential applicants.

24. The Board accepted that in its experience very many applicants had suffered acute social and educational disadvantage (including alcoholism and illiteracy) which could not be regarded as "exceptional circumstances". However, Hogan J. stated that the 2002 Act was an Act of general application which by definition must be applied and understood by reference to the standard of the general public. It should not be given:

> "… a particular or more limited construction by reason of the actual post-enactment experience of the administrative body in dealing with the limited class of persons".

25. The court was also satisfied that this approach was appropriate having regard to the conclusion stated by the Supreme Court in O'G that the statute was "remedial" and that therefore the phrase "exceptional circumstances" should be given "a wide and liberal" interpretation. The court was satisfied that the section should be considered

> "...as referring to the existence of exceptional circumstances simplicitor and without reference to the necessity, for example, to demonstrate that such circumstances precluded an applicant from either learning of the existence of the Board or from making a timely application to it".

26. The applicant submits that the jurisprudence which emerged subsequent to decisions in J. O'B. and M.G. clearly indicated that the incorrect test for "exceptional circumstances" had been applied by the Board to his application for an extension of time. It would have provided him with grounds for seeking and obtaining an order of certiorari against the respondent quashing its decision refusing to extend the time. In addition, the applicant submits that the Board erred in law failing to give him an opportunity to respond to its intention to disregard the only medical evidence submitted during the course of the oral hearing to the Board in respect of "repressed memory".

The Leave Application
27. On the 18th March, 2016 an application was made for leave to apply for judicial review to seek an order of certiorari of the "determination/decision of the Respondent dated the 9th or 11th of January, 2012" refusing the extension of time under s. 8(2). A declaration was also sought against the Superior Court Rules Committee and the Minister for Justice and Equality that O. 84, r. 21(3)(b)(i) and (ii) as amended by S.I. 691 of 2011 of the Rules of the Superior Courts is ultra vires their respective powers because it was "a substantive and impermissible restriction on the right of access to the courts". Alternatively, the applicant sought a declaration that in the circumstances of his case the provision was inapplicable.

28. Leave was granted to seek judicial review on a number of grounds including:

> (1) That the respondent unlawfully fettered its discretion by wrongly limiting its consideration of what may constitute "exceptional circumstances" under s. 8(2) to those circumstances which might have prevented the applicant from submitting his application within the time limit of three years.
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> (2) The respondent unlawfully applied a test based on the applicant's state of knowledge in respect of the Board, its existence and procedures as evidence by its conclusion that the applicant probably knew of the existence of the Board but had blacked it out of his mind prior to 15th December, 2005, as the test for "exceptional circumstances".
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> (3) The respondent ought to have considered all circumstances relevant to the application for the extension of time including the serious injury done to him while in residential care and the extent of the abuse suffered by him and the injury which he would suffer and the injustice which he would suffer if denied the extension.
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> (4) The Board failed to take proper account of the uncontroverted medical evidence that the applicant successfully used "repression" for many years to deal with painful memories of childhood abuse.
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> (5) The Board failed to give notice to the applicant of its intention not to accept the only medical evidence offered in breach of the applicant's right to fair procedures.

29. The main difficulty for the applicant is the lateness of this application for judicial review. Though the court permitted an extension of time within which to bring the application when leave was sought on the 18th March, 2016, this was without prejudice to the respondents' right to raise the issue of delay in its statement of opposition. A statement of opposition was delivered on the 22nd April, 2016 and the notice of motion followed on the 21st May seeking the substantive relief referred to above.

Time
30. The Rules of Court dealing with applications for judicial review are set out in the Rules of the Superior Courts (Judicial Review) 2011 (S.I. No. 691 of 2011).

31. The issue of time is dealt with in O. 84, r. 21 as follows:-

> "(1) 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.
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> (2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.
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> (3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:—
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> (a) there is good and sufficient reason for doing so, and
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> (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
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> (ii) could not reasonably have been anticipated by the applicant for such extension.

(4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.

(5) An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons.

(6) Nothing in sub-rules (1), (3) or (4) shall prevent the Court dismissing the application for judicial review on the ground that the applicant's delay in applying for leave to apply for judicial review (even if otherwise within the period prescribed by sub-rule (1) or within an extended period allowed by an order made in accordance with sub-rule (3)) has caused or is likely to cause prejudice to a respondent or third party.

(7) The preceding sub-rules are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

32. The 2011 Rules amend the Rules of the Superior Courts (S.I. No. 15 of 1986) and in particular O. 84 thereof. Order 84, rule 21 of the 1986 Rules provided that:-

"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.

(2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.

(3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

Thus the 2011 Rules reduces the period within which an application for certiorari must be made from six months to three months and also provides an additional requirement for an extension of time to the "good reason" requirement of the former r. 21, sub-r. (1). The applicant must now establish that there is "good and sufficient reason" for extending the time and that the circumstances that resulted in the failure to make the application for leave within the three month period were outside the control of the applicant or could not reasonably have been anticipated by him/her. In addition, the requirement under r. 21, sub-r. (1) that the application be made "promptly" is not repeated in the new rule.

The Reasons for the Applicant's Delay

33. The reasons for the failure by the applicant to make application for leave to apply for judicial review within the period set out in O. 84, r. 21 are set out at para. 6 of the statement required to ground the application for judicial review. It is stated that following the communication of the respondent's decision to the applicant in January 2012 the applicant considered "what if any further action could be taken to advance his case in circumstances where the 2002 Act did not provide for any statutory appeal". A conclusion was reached at that time that any action taken by way of judicial review would not be successful by reason of the decisions in J. O'B and M.G. These judgments where delivered respectively on the 24th June, 2009 and the 9th August, 2011.

34. Both decisions were reversed following an appeal against the decision of Hogan J. in A.G., delivered on the 6th November, 2012. The Supreme Court allowed the appeal and delivered the judgment in *O.G. v. Residential Institutions Redress Board* on the 15th May, 2015 and this was followed by the decision of the Court of Appeal in McE. on 3rd February 2016. It is claimed that "in light of the uncertainty surrounding the legal position in the High Court, the applicant did not seek leave to bring judicial review proceedings in 2012 within the time permitted by O. 84 of the Rules of the Superior Courts." The applicant claims that he could not have anticipated this change in the law and that it was a circumstance clearly outside his control and that a change in the law constituted "good and sufficient" reason to grant the extension. It is submitted that had the test formulated by the Court of Appeal been followed by the Board the applicant would have been permitted to apply for redress and that it was therefore just and reasonable that an extension of time for bringing these judicial review proceedings should be granted.

35. In *People Over Wind v. An Bord Pleanála* [2015] IEHC 271 the applicant sought to quash a decision by the respondent on the grounds that in carrying out an Environmental Impact Assessment (EIA), it was obliged to have regard to the environmental impacts of a proposed wind farm development and the required grid connection on a cumulative basis. It was submitted that as there was no description of a grid connection in the planning application or the Environmental Impact Statement (EIS) there had been no assessment of its environmental impact even though it was an integral part of the proposed development. Reliance was placed upon the decision of the High Court (Peart J.) in *O'Grianna v. An Bord Pleanála* [2014] IEHC 632 delivered on 12th December 2014, a case said to be based on similar facts. Haughton J. was satisfied that had the issue been fully and properly addressed at the leave stage the applicants would have been in a position to show that the substantive grounds necessary to persuade the court to grant leave existed. The learned judge held that the ground which the applicant sought to advance based on the absence of a grid component and assessment fell outside the grounds upon which leave had been granted on the 31st July 2014. The court was satisfied that the narrower ground based upon the grid objection, had not occurred to the applicant prior to the leave application and emerged only after the decision in O'Grianna on 12th December 2014. Thus the court was satisfied that the applicants did not at the leave stage intend to raise the issue in the pleaded grounds. The court also considered the question of whether an extension of time upon which an application might be made to add an additional ground relating to the grid issue to cover the point might be granted. Haughton J. stated:

"59. Finally, it should be noted that while the court may under O. 84, r. 21 (3) extend the period within which an application for leave to apply for judicial review on any particular ground may be made, no such application was made to this Court either prior to the hearing or at hearing, notwithstanding the importance of the grid connection – cumulative effect complaint. The applicants would of course have had to demonstrate 'good and sufficient reason' for seeking an extension of time and that the failure to seek leave for this particular ground in July 2014 was because of circumstances outside of their control or 'could not reasonably have been anticipated'. They would also have had to show on affidavit the reasons for the failure to make the application at the leave stage. These are onerous requirements and if the only reason that could have been advanced for failing to seek leave on this particular ground in July 2014 was that there was a development in jurisprudence in December 2014, that would not have satisfied the court or give it jurisdiction to extend the eight week period to allow further ground to be pursued."

36. This is precisely the basis upon which the extension of time under O. 84 r. 21 (3) is sought in this application. The court is satisfied that the developing jurisprudence chronicled above could not have satisfied the test upon which the court might exercise its discretion to extend the time on the basis that there was a good and sufficient reason so to do or that the failure to seek relief within three months was because of circumstances outside the applicant's control. The reason for not initiating a leave application at all was clearly influenced by the state of the law. Though the actual results of the G and McE cases lay in the future, it was at all times open to any unsuccessful applicant to initiate a challenge to the decision as in McE.

37. In this case the extension of time sought and the substantive ground to be advanced if time were extended, are both based on the change in the "exceptional circumstances" test arising from developing jurisprudence. The Supreme Court has definitively rejected the retrospective application of decisions for the benefit of applicant who did not or did not in a timely manner seek relief. The issue of the retrospective effect of declarations that particular statutory provisions are unconstitutional was considered by the Supreme Court in *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88. Though that decision was concerned with the retrospective effect of declarations of unconstitutionality, Murray C.J. at paras. 30 to 42 considered the issue of retrospective effect as developed at common law. The learned Chief Justice stated:

> "33. Thus, the conventional manner in which the law has been applied in a particular area for many decades may be greatly altered even turned on its head as a result of a particular issue being raised in a particular case at a particular point in time leading to an extension of the law by reference to general principles, the overriding of precedent or the specific interpretation of a provision of a statute which gives it a meaning different from that which had been commonly held. The decision of this court which decided that failure to wear a seatbelt could constitute contributory negligence did not entitle already decided cases to be reopened… The second example is *Byrne v. Ireland* [1972] I.R. 241 which determined, for the first time, that the State… was vicariously liable for the negligent or tortious acts of public servants and did not benefit from any so-called prerogative of immunity from suit claimed to be attached to the State in its sovereign status. That was the meaning given to the Constitution and a fortiori since its enactment in 1937. The plaintiff was therefore entitled to recover damages from Ireland for any injuries which she suffered as a result of falling on a footpath which had subsided due to excavation works carried out by the Department of Post and Telegraphs.
>
> 34. It did not mean in law, and no one has or was ever likely to suggest, that any persons who had previously brought a similar unsuccessful case against a Minister or the State or indeed who had confined themselves to suing the only person it was thought they could sue, the actual public servant who committed the tort… could in the light of the ruling, set aside any previously decided cases or reopen them.
>
> 35. The common law has never conceived as consistent with any ordered administration of justice that previously decided and finally determined cases could necessarily be set aside or reopened in the light of a new precedent notwithstanding the historical view of the common law, expressed by Blackstone in his Commentaries, that judges 'discover' the law as it truly is and that overruled precedents were misrepresentations of the law and were never law…
>
> 36. Judicial decisions which set a precedent in law do have retrospective effect. First of all, the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law, such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position.
>
> 37. … No one has ever suggested that every time there is a judicial adjudication clarifying or interpreting the law in a particular manner which could have had some bearing on previous and finally decided cases, civil or criminal, that such cases be reopened or the decisions set aside.
>
> 38. It has not been suggested because no legal system comprehends such an absolute or complete retroactive effect of judicial decisions. To do so would render a legal system uncertain, incoherent and dysfunctional. Such consequences would cause widespread injustices."

38. The rationale for the existence of this rule was stated by Henchy J. in *Murphy v. The Attorney General* [1982] I.R. 241 p. 314 (quoted by Murray C.J.) in considering the effects of a law declared unconstitutional ab initio:

> "Over the centuries the law has come to recognise, in one degree or another that factors such as prescription (negative or positive), waiver, estoppel, laches, a statute of limitation, res judicata, or other matters (most of which may be grouped under the heading of public policy) may debar a person from obtaining redress in the courts for injury, pecuniary or otherwise, which would be justiciable and redressable if such considerations had not intervened. To take but two examples, both from a non-constitutional context, where a judicial decision is overruled by a later one as being bad law, the overruling operates retrospectively, but not so as to affect matters that in the interval between the two decisions became res judicatae in the course of operating the bad law…"

There are public policy considerations which militate against a complete or absolute retroactive effect of judicial decisions. Furthermore, as Murray C.J. also noted:

> "41. It has never been held, and as far as I am aware never been argued the matter might well be considered beyond argument, that the common law rule that judicial decisions do not retrospectively apply to cases already decided is in any way inconsistent with the Constitution."

39. Murray C.J. summarised the general principle applicable in respect of the retroactive effect of declarations of unconstitutionality as follows:

> "125. In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional. That is the general principle.

> 126. I do not exclude, by way of exception to the foregoing general principle, that the grounds upon which a court declares a statute to be unconstitutional, or some extreme feature of an individual case, might require, for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice, that verdicts in particular cases or a particular class of cases be not allowed to stand.
>
> 127. I do not consider that there are any grounds for considering this case to be an exception to the general principle. The applicant, like all persons who pleaded guilty to or were convicted of an offence … had available a full range of remedies under the law. They could have sought to prohibit the prosecution on several grounds including that the section was inconsistent with the Constitution. Not having done so they were tried and either convicted or acquitted under due process of law. Once finality is reached in those circumstances the general principle should apply."

40. The court does not consider that a rule which precludes the retroactive effect of later decisions on a particular point to previously decided cases which have concluded could, as a matter of principle, allow a party who has failed to assert their legal rights or mount a challenge upon the same point in a timely manner to do so. This would place such an applicant in a better position than a person who had asserted their legal rights but whose proceedings had concluded but who had either not raised the particular point in those proceedings or having raised the point, had lost it.

41. In *W.Q. v. Mental Health Commission & Ors* [2007] 3 I.R. 755, the applicant was detained in the Central Mental Hospital under s. 184 of the Mental Treatment Act 1945 then applicable. On the date of expiration of his initial detention, a consultant psychiatrist made a renewal order for his detention under s. 15 of the Mental Health Act 2001. The s. 184 order, was never reviewed by a Mental Health Tribunal before it expired as required by statute. The renewal order was, however, reviewed and affirmed by a Mental Health Tribunal at which the applicant was represented. The order was thereafter further renewed and reviewed by another Mental Health Tribunal which rejected a submission that the subsequent renewal orders were invalid. The second renewal order was consequently affirmed. An Article 40 application was brought challenging the lawfulness of the applicant's detention because, inter alia, it was not preceded by a valid renewal order. In reply, the respondent submitted that it was not possible for an applicant to rely on defects in renewal orders that were not brought to the attention of a Mental Health Tribunal or, where appropriate, the High Court in a timely manner, to challenge the validity of the late renewal orders.

42. O'Neill J. found that the earlier orders were invalid. However, the learned judge also concluded that it was not possible to rely upon defects in earlier orders or to challenge the validity of a renewal order which was valid where the defects could have been, but were not, complained of to a Mental Health Tribunal or brought to the attention of the court under an Article 40.4 inquiry. The court considered that it was wholly undesirable that a renewal order which was of itself valid should be found invalid because of a defect in a previous order. A person who required long term treatment would probably have been the subject of a number of renewal orders over time and it was not in the best interests of persons suffering from mental disorder that such uncertainty should be created. The learned judge stated:-

> "47. That being so, in my opinion, there cannot be a reliance upon defects, even substantial defects in earlier admission or renewal orders, where these defects could have been complained of in a mental health tribunal or brought to the attention of this court on an Article 40.4 inquiry, but were not, to challenge the validity of a renewal order which in itself is valid.
>
> 48. In this respect I am satisfied that the dictum of Henchy J. in *The State (Byrne) v. Frawley* [1978] I.R. 326 at p. 350 is apposite where he says the following:-
>
> 'What has been lost in the process of events is not the right guaranteed by the Constitution but the prisoner's competence to lay claim to it in the circumstances of this case.'
>
> 49. In this case the defects in the s. 184 order or the defects in the renewal order … are neither cured, excused nor ignored. What has occurred is that, in the process of events, the applicant has lost competence to lay claim to, or place reliance on these defects to challenge the validity of the renewal order …. In this regard, the 'domino effect' much feared by the respondents is avoided.
>
> 50. The principle that a legal or statutory provision which is subsequently found to be invalid may be sheltered from nullification and thus accorded the continuance of legal force and effect, where its invalidity is not asserted at the appropriate time, and where those affected by it and concerned with it, in good faith, have treated it as valid and acted accordingly, is now well established in our jurisprudence following the judgments of the Supreme Court in *A. v. Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 I.R. 88."

43. I am satisfied that the applicant has not demonstrated a "good and sufficient reason" for the extension of time for the bringing of this application. The fact that the test for "exceptional circumstances" was the subject of subsequent litigation by other applicants seeking an extension of time culminating in the decisions in *G.* and *McE.* some four years and two months after the decision in the applicant's case, is not a reason to extend the time for the bringing of an application for judicial review. It is clear that those who have concluded their cases on the same point in *J. O'B.* and *M.G.*, could not now gain the benefit of the retroactive application of the decisions in *G.* and *McE*. The applicant on the basis of legal advice given to him at the time made an informed choice not to pursue a judicial review on the point. I am not satisfied that he is entitled to advance the decisions of the Supreme Court and the Court of Appeal as a basis upon which to extend the time for the making of this application or indeed that he would be entitled if time were to be extended, to succeed on the substantive point, on the basis of the authorities cited above.

44. The court is satisfied that the decision of the respondent may only be challenged and invalidated "…if the right remedy is sought by the right person in the right proceedings in the circumstances and, it might be added, at the right time" (per O'Donnell J. in *Cullen v. Wicklow County Manager* [2011] 1 I.R. 152. at p. 161). The applicant in this case has not initiated this application at the right time and has chosen now to do so without what the court regards as a "good and sufficient reason". The court is also satisfied that the circumstances surrounding the failure to initiate the judicial review proceedings could not be regarded as outside the control of the applicant: the evidence is that it was an informed and reasoned choice. Another litigant might have and in the case of *G* and *Mc E* made a different choice when faced with a similar issue. The point in respect of the Board's treatment and assessment of the medical evidence was available from the date of the decision and could have been relied upon within the three month period as a stand-alone point.

45. The delay in seeking leave in this case is well outside the time permitted and is undoubtedly inordinate. The Board does not plead or assert any specific prejudice to its capacity to defend a challenge on the substantive grounds of the application. The court is satisfied that the respondent does not have to establish prejudice nor does the absence of prejudice, of itself constitute a good

reason for granting an extension of time; but its absence will usually be relevant to the issue of the exercise of the court's discretion (*Dekra Eireann Teoranta v. Minister for the Environment* [2003] 2 I.R. 270). However, the Board also claims a more general form of prejudice in that the uncertainty created by an extension of time will affect the completion of its works in this case and perhaps many other cases if the test adumbrated in *McE* is sought to be applied retrospectively by other unsuccessful applicants.

46. The scheme provided under the 2002 Act initially set a time limit for applications. It is directed to a defined group of potential applicants. It was the subject of repeated media campaigns giving notice of the redress available to eligible applicants. No new applications under s. 8 of the 2002 Act were permissible if received on or after 17th September 2011 under the 2011 Act. It is submitted that an extension of time in this case militates against the timely and efficient conclusion of the Board's work as clearly intended by the Oireachtas and is contrary to public policy. It would lead potentially to many new applications by those who have been unsuccessful in the past. Though the court is not persuaded that it should not grant an extension if that is appropriate in this particular case on the basis that others might benefit from such a ruling, it is persuaded that to do so would undermine what was described by Keane C.J. in In Re Illegal Immigrants(Trafficking) Bill 1999 at p 392, as the " well established public policy objective that administrative decisions[...] should be capable of being applied or implemented with certainty at as early a date as possible and that any issue as to their validity should accordingly be determined as soon as possible." I am satisfied that the Board's submission in this respect is correct and is consistent with the reasons underpinning the jurisprudence of the Supreme Court in respect of the non-retroactive effect of declarations of constitutional invalidity and other common law decisions already discussed.

47. The court is therefore satisfied for the reasons set out above that an extension of time under O.84,r.21(3) should not be granted because the applicant has failed to establish "good and sufficient reason" to do so. It follows that even if the applicant were to succeed on the ultra vires challenge to sub-rule(3)(b)(i) and (ii) it will not avail him as the application must be refused. If however, the court is incorrect on this point it would become necessary to consider the ultra vires argument advanced.

Order 84 rule 21

48. The applicant submits that if he is not entitled to an extension of time under O.84,r.21(3) he should be granted a declaration that O.84,r.21.(3)(b) (i) and (ii) are ultra vires the Superior Courts Rules Committee on the ground that:-

> "6X. Order 84, Rule 21(3)(b)(i) and (ii)(as amended by S.I. 691 of 2011) of the Rules of the Superior Courts to the extent it provides for a more strict discretion in respect of an extension of time amounts to an impermissible restriction on the right of access to the courts in the circumstances of the case."

49. Order 84, r. 21(3) vests a discretion in the court to extend the time in which an application for leave to apply for judicial review may be made. It also provides that the court "shall only extend such period if it is satisfied…" under sub rule (a) that there is good and sufficient reason for doing so and under sub-rule (b) that the circumstances resulting in the failure to make the application were either (i) outside the control of the applicant or (ii) could not reasonably had been anticipated by him.

50. The rules were made by the Superior Court Rules Committee(the second named respondent) constituted pursuant to the provisions of s. 67 of the Courts of Justice Act 1936 and the powers conferred upon it by s. 36 of the Courts of Justice Act 1924 and s. 14 of the Courts (Supplemental Provisions) Act 1961. The second named respondent made the rules on the 28th November 2011. The Minister for Justice and Equality concurred in the making of the rules on the 20th December. Notice of the Statutory Instrument was published in Iris Oifigiúil on the 30th December 2011.

51. Section 36 of the Courts of Justice Act 1924 provided that the Minister for Home Affairs could at any time make rules of court and in particular:-

> "…rules may be made for all or any of the following matters:-
>
> (i) pleading, practice and procedure generally (including the entering up of judgment and the granting of summary judgment in appropriate cases) in all civil cases, including revenue cases and proceedings as to the validity of any law having regard to the provisions of the Constitution and proceedings in the nature of petition of right;"

Judicial review proceedings are clearly civil proceedings the pleadings and procedure of which may be regulated by rules of court. This applies to the setting of times within which steps must be taken in the proceedings including time limits for seeking leave to apply for judicial review and an extension of such time limits.

52. Section 68(1) of the Courts of Justice Act 1936 removed the power for the making annulment or alteration of rules of courts and making new rules from the Minister of Justice and conferred that power on the second named respondent "with the concurrence of the Minister for Justice".

53. Article 36 of the Constitution provides inter alia that:-

> "Subject to the foregoing provisions of this Constitution relating to the Courts, the following matters shall be regulated in accordance with law, that is to say:-
>
> (iii) the Constitution and organisation of the said courts, … and all matters of procedure."

54. Keane C.J. in delivering the judgment of the court in The Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 1.R. 360 at p. 387 stated:-

> "It is within the competence of the Oireachtas to regulate by law, by primary legislation or, in the due exercise of its powers, by way of secondary legislation, such as Statutory Instruments, procedural matters, including procedural remedies before the courts provided constitutional rights and other provisions of the Constitution relating to the courts are not infringed."

55. In that case it was submitted (inter alia) that though s. 5(2)(a) of the Bill contained an express provision whereby the court might extend the time for bringing judicial review beyond the fourteen day period provided where there was "good and sufficient" reason for doing so, the period was so short that it would inevitably trigger applications to extend the time so often that it was clearly a flawed and fundamentally unjust provision. Keane C.J. stated:-

> "Whether a large number or even a majority of persons seeking leave to apply for judicial review will find it necessary also to apply for an extension of time is a matter for speculation. In any event, such a mathematical approach is not a basis

on which to assess the validity or efficacy of such a provision. The courts are regularly requested to extend the time for the taking of certain steps and proceedings, for an appeal from one court to another and indeed for the bringing of judicial review itself. The extension of time for the filing of the pleadings, by agreement or by leave of the court, may, under a relevant rule, occur in a very large number of cases but this had never been regarded as undermining the constitutional validity of the rule in question. More fundamental, however, is the fact that a person seeking judicial review pursuant to s. 5 must in the first instance apply to the High Court for leave to apply for judicial review irrespective of any time limit for doing so. If such a person has also to apply for an extension of the time within which to make the application on the grounds that there is good and sufficient reason for such an extension, that cannot be said to undermine access to the courts. Indeed by giving that very discretion to the court to extend the time, access to the court is enhanced."

56. The Superior Court Rules Committee is vested with power to make rules of court for "all or any… pleading, practice and procedure generally… in all civil cases..". The court is satisfied that this includes the power to make rules as to the time within which an application for leave to apply for judicial review must be brought and the circumstances in which an extension of that period may be granted.

57. In *The State (O'Flaherty) v. O'Floinn* [1954] 1 I.R. 295 Kingsmill Moore J. explained the scope of "practice and procedure" as "the manner in which, or the machinery whereby, effect is given to a substantive power which is either conferred on a Court by statute or inherent in its jurisdiction". A power to make rules must not be exercised "to extend enormously a substantive power which the Legislature was careful to confer on a restricted form". The court is satisfied that the sub-rule impugned in this case does not extend or reduce the nature and scope of the Court's substantive power in respect of judicial review and that it is limited to what is a matter of procedure and practice.

58. In this case the applicant acknowledges that a test providing the basis for an extension of time of "good and sufficient reason" is not in itself objectionable. However, it is submitted that Ord. 84, r. 21(3) constitutes the denial of the right of access to the courts because sub-rules (b)(i) and (ii) reduces the discretion of the High Court to a consideration of these two factors alone, more especially where it is said that there is "good and sufficient reason" to extend the time in this case (a proposition which the court does not accept). The court is satisfied that O.84.r.21(3) is part of the statutory scheme whereby access is not only afforded to those seeking relief but is "enhanced" for those who have been dilatory in seeking relief in a reasonable and proportionate way.

59. In *Shell E.P.Ireland Limited v. McGrath* [2013] 1 I.R. 247 the Supreme Court held that the time limit for making an application for judicial review provided for in O. 84, r. 21 applied by analogy to claims which had as their substance the seeking of reliefs ordinarily obtained by judicial review even though framed in another way such as declaratory proceedings. The court held that it would make a nonsense of the system of judicial review if a party could bypass any obligation arising in that system, such as time limits and the need to seek leave of the court by issuing plenary proceedings which in substance sought the same relief. Clarke J. in delivering the judgment of the court (Denham C.J. and Fennelly J. concurring) considered the status of the rules of court applicable in judicial review cases:-

> "57. The rules of court are, of course, a form of secondary legislation. They are made with the authority of the Oireachtas in the form of the enabling provisions of the Courts of Justice Acts 1924 to 1936 and the Courts (Supplemental Provisions) Act 1961. That does not, of course, give the rules making authority carte blanche. It is possible that an argument might be made that measures adopted in the rules go beyond the legitimate delegated powers of rules making authorities. It might also be, as the trial judge correctly pointed out, that limitations, whether to be found in legislation or in the rules, which affect the ability of a party to maintain or defend proceedings in a reasonable way, might amount to a breach of the rights of such party either to access to the court or to the fair conduct of proceedings (as to the distinction between which see *Farrell v. Bank of Ireland* [2012] IESC 42).
>
> 58. However, the Oireachtas has conferred on the rule making authority power to make rules of court. Those rules have, unless declared invalid, the force of law. If it is suggested that a time limit for bringing judicial review proceedings which is to be found only in rules of court is of a different status to a time limit to be found in legislation then such an argument really could only have validity if it were to bring into question the power of the rule making authorities to introduce those time limits in the first place. If the introduction of time limits for bringing judicial review is intra vires the rule making authority then it is a legitimate exercise of secondary legislation and amounts to a legal barrier to the bringing of such proceedings outside such time limits subject, of course, to the power contained in the rules themselves to extend time. The fact that such a legal power is to be found in secondary as opposed to primary legislation does not seem to me to affect its status. If it is said that the rule making authorities do not have the power to impose such time limits then it is hard to see how that point would not apply to all judicial review cases save those where there is an express time limit to be found in primary legislation. There was, of course, no challenge to the validity of the rules of court, which provide for time limits in respect of judicial review proceedings, before this court. The court must proceed, therefore, on the basis that the rules in relation to judicial review time limits are a valid exercise of the power delegated to the rule making authorities by the Oireachtas.
>
> 59. On that basis the rules have the force of law and have the same status as time limits to be found in primary legislation except, of course, that the rule making authorities do not have the power to depart from those time limits which are specified in primary legislation. It is, of course, the case that the type of legislation which has been adopted in recent times in the planning and immigration fields, for example, not only imposes a statutory time limit for the commencement of proceedings but also prevents any question as to the validity of relevant measures being raised save by judicial review. There is no similar provision in respect of challenges outside those fields which have been the subject of specific legislation. No such restriction applies to a challenge in respect of measures such as the compulsory acquisition orders and the consent which are at the heart of these proceedings. However, it remains the case that a judicial review challenge to those measures would be required, as a matter of law, to be taken within the time limits specified in the rules of court or in such extended time as the court might provide. It seems to me to necessarily follow that permitting such a challenge to be brought in a manner which would entirely circumvent those rules would amount to permitting rules which have the force of law as secondary legislation to be circumvented in an inappropriate way. It seems to me to follow that a valid exercise by the rule making authority of its power to impose, by rule of court, time limits for the bringing of judicial review applications necessarily implies, by analogy, that those rules are applicable to such challenges in whatever way, as a matter of procedure, the challenge concerned may be brought."

The case concerned the 1986 rules.

60. As Fennelly J. stated in *De Roíste v. Minister for Defence* [2001] 1 1.R. 190 at p. 221 in respect of time limits set concerning the initiation of judicial review applications under the 1986 rules, the time limit was not a limitation period but a period within which prima

facie an applicant must apply for relief and outside of which they must seek an extension of time based upon an explanation of the delay and demonstration that it was justifiable. The learned judge noted that explicable delays would normally be a matter of months and very rarely a matter of years; "A long delay would require a more cogent explanation".

61. As already noted the applicant accepts that a requirement of "good and sufficient reason" for extending the time under the 2011 rules is reasonable. The substantive challenge focuses upon sub-rules (b)(i) and (ii) and not on sub rules (a). The court finds it incongruous that a claim is made that the second named respondent acted ultra vires in respect of the latter two sub-rules but not in respect of the making of rules concerning the time within which a judicial review may be initiated or the extension of time on the basis of "good and sufficient reason" under rule 21(3)(a) might be granted. Either the power exists to make rules concerning the timeliness of applications or it does not. I am satisfied that it does. Furthermore, the court is satisfied that since "good and sufficient " reason has not been established, the court could not have granted an extension of time even if the sub-rule was deemed ultra vires the Committee.

62. It is submitted on behalf of the applicant that the two additional conditions that must now be established in addition to "good and sufficient reason" namely that the circumstances that resulted in failure to make the application for leave within the period were outside his control or could not reasonably have been anticipated, reduces the discretion under O.84.r.21(3) to two factors alone. In doing so, it is claimed that the Committee has imposed an impermissible and disproportionate burden on the right of access to the courts and brought about a substantive restriction on the scope of the remedy of judicial review.

63. The applicant relies upon *Blenhein v. Minister for Health* [2004] 3 I.R. 610 in which a challenge was made to the constitutionality of s.260 of the Mental treatment Act,1945 which restricted the initiation of proceedings in respect of an act said to have been done under the 1945 Act, without the leave of the High Court: this could only be granted if it were satisfied that there were "substantial grounds for contending that the person against whom the proceedings are to be brought acted in bad faith or without reasonable care". The limitation of the cause of action to two specific grounds was deemed to be an impermissible interference by the legislature in the judicial domain contrary to Articles 6 and 34 of the Constitution providing for the separation of powers and administration of justice respectively. Carroll J. in upholding the challenge accepted that the legislature was entitled to provide that whatever grounds are deemed worthy of consideration in deciding whether to grant leave to apply to court should be substantial, but was not entitled to limit access to the High Court on specific grounds as set out in s.260. On appeal the Supreme Court upheld the High Court decision [2009] 1 I.R. 275. Denham C.J. (delivering the judgment of the court) stated that the impugned section had a legitimate purpose namely, to give a limited form of protection to persons acting under the legislation. She added:

> "15. ...But the section is a restriction of a constitutional right (access to the courts), in the context where the fundamental constitutional right of liberty has itself been restricted. Thus it is a matter of seeking a reasonable and proportionate process.
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> 16. The fact that access to the court is restricted is not of itself unconstitutional: The Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 I.R. 360 at p. 395. This court has itself restricted access in ordinary litigation: *Wunder v. Hospitals Trust* (1940) Ltd. (unreported Supreme Court, 24th January 1967 and 22nd February,1972).
>
> 17. The limitation of access to the court in this case, was not just one of "substantial grounds", it was to situations where the High Court was satisfied that there were substantial grounds for contending that the person against whom the proceedings were to be brought acted in bad faith or without reasonable care. It was a restriction on the administration of justice where several features of the section are important. It placed a burden on a plaintiff, it related to two specified grounds only, it limited access to the courts, it curtailed the discretion of the court in a situation where a balance of constitutional rights is required to be protected..."

64. The Supreme Court then considered whether notwithstanding that the aim of the section was legitimate, the limitation on the plaintiff's right was overbroad, proportionate and necessary to secure that aim (applying the principle set out by Costello P. in *Heaney v. Ireland* [1994] 3 I.R. 593). It held that though the objective of the section was important, it was not of sufficient importance to override the constitutional rights of liberty and access to the court. It did not pass the proportionality test "for while being rationally connected to the objective, it is arbitrary (in referring to only two possible grounds of application) and hence unfair." Therefore, it did not impair the rights involved as little as possible and was disproportionate.

65. The court notes the applicant does not seek a declaration that the impugned sub-rule is invalid having regard to the provisions of the Constitution. The court is satisfied that the Blehein decision concerned a statutory restriction of the substantive remedy available to the plaintiff in that case: it may be distinguished from this case for that reason. The sub-rule impugned in these proceedings does not alter the nature or scope of the remedies available by way of judicial review in any substantive way. O.84., r.21(3)(b) is an important provision which regulates the procedure and time for the bringing of an application which has been appropriately regulated by rules of court for many years. It does not restrict the grounds upon which an application may be brought or the nature of the relief which may be sought.

66. The court is satisfied that the impugned sub-rule is entirely consistent with the developing jurisprudence of the Supreme Court in respect of the extension of time in judicial review cases. Before the 2011 rules were introduced the applicant faced a time-limit and was obliged to apply promptly; time could be extended for "good reason". Denham J.(as she then was) stated in *De Roiste v. The Minister for Defence & Others* [2001] 1 I.R. 190, at p.208, that in analysing whether there was "good reason" to extend time the court could take the following matters into consideration:

> "(i) the nature of the order or actions the subject of the application;
>
> (ii) the conduct of the applicant;
>
> (iii) the conduct of the respondents;
>
> (iv) the effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed;
>
> (v) any effect which may have taken place on third parties by the order to be reviewed;
>
> (vi) public policy that proceedings relating to the public law domain take place promptly except where good reason is furnished.

Such list is not exclusive. It is clear from precedent that the discretion of the court has ever been to protect justice."

66. Denham J. also noted that there are no statutory periods of limitation in judicial review and that the court may exercise its full discretion which "is rooted in the writs and common law". It is accepted that the requirement of "good reason" and "good and sufficient reason" are the same. I do not consider that the two additional elements included in the challenged sub-rule inaugurate an additional onerous or unduly restrictive feature to the exercise of the discretion. There is no restriction on what may be advanced in support of a claim of good and sufficient reason. There is an additional requirement to establish the circumstances set out in either (i) or (ii). The two additional points are alternative not cumulative. Thus an applicant must establish that the circumstance relied upon was outside his/her control. This may take a number of forms as has already been recognised in the case law. Alternatively, the circumstance must be one that could not reasonably have been anticipated. Thus in In Re Illegal Immigrants (Trafficking) Bill 1999, the Supreme Court in dealing with a fourteen day period within which an application for leave to apply for judicial review must be made, considered that the period did not interfere with the right of access to the court where there was a wide and ample enough jurisdiction to extend the time. In particular, the Court noted that where applicants "through no fault of their own" are unable to apply within the time provided, this could be advanced as a ground to seek an extension of time (see also *Brady v. Donegal County Council* [1989] I.L.R.M. 282). On the other hand under the old rules an applicant who was unable to furnish good reason for failure to initiate proceedings for judicial review within time was regarded as an applicant " who will not normally be able to show good reason for an extension of time" (per Fennelly J. in Dekra cited above at p.304).

67. The court is satisfied that sub-rules (3) (b) (i) and (ii) reflect and are consistent with the references in the case law to similar considerations in which an applicant's fault in delaying the initiation of a leave application determined whether an extension of time might properly be granted. The circumstances addressed in the sub-rules in any particular case will likely be very closely connected to facts which are also said to underpin any "good and sufficient reason" advanced. If circumstances are within the control of the applicant it is difficult to understand why a timely application would not be made. If circumstances could have been reasonably anticipated it is equally difficult to comprehend why a timely application would not follow. These are rational and logical considerations and do not constitute overbroad, disproportionate or impermissibly restrictive grounds for seeking an extension of time.

68. The court is satisfied that the terms of O.84., r.21(3)(a) and(b)(i) and (ii) are not ultra vires the powers of the second named respondent and ensure that an applicant who has delayed and fallen outside the time-limits for the initiation of the leave application may have time extended on the exercise of judicial discretion taking into account all relevant factors including any fault on the part of the applicant in delaying the application. The rule provides a means of enhanced access to court and a remedy. The conditions in the rule are entirely consistent with fairness of procedure and a right of access to the courts for litigants who in justice ought to be granted an extension of time but disfavour those who sit on their rights, are dilatory and through their own fault fail to act when circumstances are within their own control or could reasonably have been foreseen by them. The court is satisfied that it is a proportionate, rational and fair provision.

Conclusion

69. For the reasons set out above, the application is refused.