



**THE COURT OF APPEAL  
CIVIL**

**Record No.: 2021/192**

**Donnelly J.  
Ní Raifeartaigh J.  
Collins J.**

**Neutral Citation Number [2022] IECA 123**

**BETWEEN/**

**GALINA HEANEY**

**APPELLANT**

**-AND-**

**AN BORD PLEANÁLA**

**-AND-**

**CLARE COUNTY COUNCIL**

**RESPONDENTS**

**-AND-**

**JOHN GALVIN**

**NOTICE PARTY**

**JUDGMENT of Ms. Justice Donnelly delivered (via electronic delivery) on the 31st day of May, 2022.**

**Introduction**

1. The High Court (Barr J.), in a judgment of the 19th March, 2021 ([2021] IEHC 201), dismissed the application for judicial review brought by the applicant (the appellant herein) on the ground that it was brought outside the time allowed by s. 50(6) of the Planning and Development Act, 2000 as amended ("the 2000 Act") for challenging planning decisions. Barr J. also refused to grant the appellant an extension of time because the appellant had not met the test for such an extension contained in s. 50(8) of the 2000 Act.
2. This appeal raises two main issues. The first concerns the point at which the eight-week time limit in which to bring proceedings as set out in s. 50(6) of the 2000 Act both starts and stops running. The second concerns the nature of the two-limbed test, pursuant to s. 50(8) of the 2000 Act, that an applicant must satisfy before the High Court may exercise

its discretion to grant an extension of time in which to bring the judicial review proceedings. The appellant submits that the fact that the substantive grounds of her judicial review challenge are based on EU law was not sufficiently taken into account in the High Court judgment.

3. The decision impugned in the judicial review proceedings is a grant of planning permission by the first respondent (hereinafter "the Board") for the retention of an existing cattle crush and concrete plinths as constructed, together with permission to construct a new extension to an existing livestock slatted house for the purpose of accommodating calf pens for existing livestock, along with associated site works, at the notice party's farm at Moyasta, Kilrush, County Clare. The appellant had appealed to the Board against the decision of the second respondent – against whom proceedings were subsequently discontinued – to grant planning permission.
4. As the judgment of the High Court indicated "*[i]t is common case between the parties that the notice party's farm is within 50 metres of the lower River Shannon special area of conservation (SAC) and within 60 metres of the River Shannon and River Fergus Estuary, special protection area (SPA). It is also accepted that there is a stream running from the notice party's farm into the adjacent Poulfnasherry Bay.*" The substantive point in the judicial review proceedings is the appellant's claim that the Board failed in its statutory duty to apply and implement the screening procedure for appropriate assessment, in circumstances where screening is mandatory (s. 177U of the 2000 Act) by reason of an adjoining Special Area of Conservation (Lower River Shannon Area). The appellant's challenge is that the wrong test was applied because, instead of carrying out an evidence-based mandatory screening, the Board, without any quantitative or objective evidence, made a finding that the appropriate assessment did not "*arise*". As the Board had failed to carry out that function, it had no jurisdiction to lawfully adjudicate on the application for planning consent. Relying on the provisions of s. 177V(3) of the 2000 Act, the appellant submitted that the Board could only give consent after having determined that "*the proposed development shall not adversely affect the integrity of a European site.*" The Board contests the appellant's understanding of the position and submits that, having regard to the entirety of the material before the Inspector, and to his site visit and the substance of his report, it was clear that the Inspector had applied the correct legal test in reaching his conclusion that a stage 2 appropriate assessment was not necessary.
5. As the proceedings were determined on the basis that they were taken out of time, the High Court did not consider the substantive grounds of challenge raised by the appellant to the decision of the Board.

#### **Procedural background**

6. Given that the issues concern time periods, it is helpful to include a relevant chronology of the dealings between the parties.
7. The impugned order of the Board is dated the 27th September, 2018, being the date on which it was signed by the Board member. The letter notifying the appellant is dated the 28th September, 2018.

8. On the 22nd November, 2018 (a Thursday), the appellant, acting in person, filed a statement of grounds and affidavit (sworn on the 22nd November, 2018) in the Central Office of the High Court. The application for leave to apply for judicial review was moved before the High Court on the 26th November, 2018 (a Monday) when an *ex parte* application was made to that Court.
9. The High Court (Noonan J.) on the 26th November, 2018, ordered the appellant to file an amended statement of grounds to include the notice party in the proceedings. In addition, the appellant was directed to put the Board on notice of the application.
10. On the 23rd April, 2019, the appellant, by now legally represented, filed a motion seeking an extension of time to bring the application for judicial review grounded upon an affidavit of the appellant sworn on the 23rd April, 2019.
11. A contested application for leave to apply for judicial review was heard before the High Court (Noonan J.) on the 15th July, 2019. On the 16th July, 2019, the High Court granted leave to the appellant to apply for judicial review on the grounds set out at paragraph E of the statement of grounds. The question of compliance with the statutory time limit and the application for an extension of time was expressly left over to the substantive proceedings for determination. At the hearing of the judicial review all matters were heard (including the substantive issue) and judgment was reserved. In due course Barr J. determined that the application for leave to apply for judicial review had been brought out of time and that the appellant was not entitled to an extension of time.

**Time limit contained in section 50(6) of the 2000 Act as amended**

12. Section 50(6) of the 2000 Act requires that an application for judicial review be made *"within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate."*
13. The importance of the relevant dates in this case is that if the period of eight weeks began on the date of the decision (the 27th September, 2018), the eight-week period expired on the 21st November, 2018. The appellant would therefore need an extension of time because even on her own case the first action she took to challenge the decision was on the 22nd November, 2018, when she filed papers in the Central Office.
14. In the High Court the appellant made two submissions as to the calculation of time. The first was that time only began to run from the date that she received the notification. The Board submits that it is settled law that time runs from the date of the decision and not the date of notification. The second submission was to the effect that a litigant was within the time period as the motion papers *were lodged in the Central Office* prior to the expiry of the eight-week time limit. The Board submits however that time did not stop running against the appellant on the 22nd November, 2018, but continued up to the 26th November, 2018 when she moved her *ex parte* application before the High Court.

15. At the heart of the appellant's submissions lies her contention that all the issues must be determined having regard to the fact that it is EU law that is at issue in the proceedings. She submits that this was not taken into account by the High Court judge.

### **The High Court judgment**

16. Barr J., having set out the nature of the case, the chronology and the relevant time limits under s. 50 of the 2000 Act, referred to the decision of *Irish Skydiving Club v. An Bord Pleanála* [2016] IEHC 448 which had identified the rationale for the strict time limit. Referring to the same case, Barr J. held that it was clear that time starts to run on the date on which the decision is made, not on the date when the person who wishes to challenge it first learns of it.
17. In relation to when time stops running, Barr J. noted that there appeared to be some divergence in earlier decisions of the High Court as to when exactly time stops running in relation to the bringing of a judicial review application. He discussed the decision of Humphreys J. in *McCreesh v. An Bord Pleanála* [2016] IEHC 394 and the decision of Haughton J. in *McDonnell v. An Bord Pleanála and Anor* [2017] IEHC 366. He said that he was greatly assisted in reaching his decision by the Supreme Court authority of *Reilly v. Director of Public Prosecutions* [2016] IESC 59 being brought to his attention. On the basis of *Reilly*, and referring to the decision of *KSK Enterprises Ltd v. An Bord Pleanála* [1994] 2 IR 128 ("KSK"), he held that time only stopped running when an *ex parte* application was moved before the High Court *i.e.* not when papers were lodged in the Central Office.
18. In relation to the application for an extension of time, Barr J. referred approvingly to the decision of Clarke J. in *Kelly v. Leitrim County Council* [2005] IEHC 11 in which he set out a non-exhaustive list of the factors to which a court can have regard when exercising its discretion in favour of granting an extension of time. At para. 29, Barr J. held there was an onus on an applicant to show that there was good and sufficient reason to extend the time and said that this of necessity required the applicant to establish a good reason why he or she did not move their application within the stipulated eight-week time period. Any further delay also had to be explained and the circumstances that resulted in the failure to make the application for leave had to be outside the control of the applicant.
19. The fact that the extension of time sought was only short, here in the order of five days, was not determinative of the issue. Barr J. referred to the factual situation in *Kelly v. Leitrim County Council* and in *Irish Skydiving Club v. An Bord Pleanála*.
20. In his conclusion, Barr J. referred to those paragraphs of the appellant's affidavit in which she said that she found it hard to accept that the Board should be entitled to defeat her application in respect of a decision which was made on a Thursday but not posted until Friday and only received by her on the following Monday. In that affidavit the appellant went on to say that if she was out of time, then she asked for an extension of time. The appellant stated "*I have been advised that being unaware that the Thursday was too late is not a reason, although that is the case.*" She then averred that the circumstances "*outside of the control of your deponent is the failure of the Board to notify your deponent of its decision for a period of four days (until Monday) and with regard to good and sufficient*

*reason for doing so, I have been advised and believe, this is closely allied with the criteria upon which this honourable court decides whether or not to grant leave, namely whether there are substantial grounds for contending the decision to grant retention permission is invalid, or ought to be quashed."*

21. Barr J. stated at para. 36 that "[w]hile the court has sympathy for the applicant, who was acting as a lay litigant at the relevant time, she has not given any explanation at all why she did not bring her application within the eight-week period; much less has she shown that such explanation arose from circumstances beyond her control." He noted that she only complained that her agent was not notified until the 1st October, which was well within time. He said that the applicant could not plead ignorance of the period within which she could seek judicial review, nor could she plead she was unaware that time would only stop when she first moved her application.
22. Barr J. stated that it was well settled that the fact that she was a lay litigant did not mean she was not bound by the same rules and procedures as other litigants who come before the courts with legal representation. Barr J. referred to five previous authorities for that point. The appellant included in her notice of appeal a claim that the trial judge failed to give adequate weight to the fact that the appellant had initially instituted these proceedings as a lay litigant by reference to Council Directive 85/337/EEC as amended which provided for public participation in respect of matters relating to the environment. This was not pursued in written submissions or at the oral hearing; rather there was a more general reference to the requirements under EU law in respect of the principle of effectiveness which had to include respect for public participation. That issue is dealt with below. In my view however the trial judge made no error in his statement that it is well settled law that merely because a person was a lay litigant did not mean that they were not bound by the same rules and procedures as other litigants.
23. Barr J. concluded that the appellant had not brought herself within the s. 50(8) criteria and he refused the reliefs sought by her in her amended notice of motion.

**Reliance on the EU principle of effectiveness**

24. As reliance on the EU principle that requires any remedy to be effective was central to the argument that the appellant made as to why the High Court judge erred in law, it is appropriate to address these submissions generally at this point in time.
25. Counsel for the appellant submits that the nature of the case was a matter of the utmost importance in considering both the interpretation and the application of the provisions of s. 50 of the 2000 Act. As the case involved an issue of the appropriate test to apply in assessing whether an appropriate assessment on the potential for adverse effects on sites protected under European Directives was required, this was an important factor in considering whether she could be said to have an effective remedy.
26. In support of her submissions, counsel relied upon the Supreme Court decision in *TD (A Minor) v. Minister for Justice, Equality and Law Reform* [2014] IESC 29 ("*TD (A Minor)*") in support of her argument that any Irish provisions which did not provide effective protection

of EU rights would be a violation of the principle of effectiveness. Although the *TD (A Minor)* decision primarily concerned the principle of equivalence, that principle was not relied upon by this appellant.

27. In the appellant's submission, the provisions of s. 50(6) and s. 50(8) had to be interpreted through the lens of the principle of effectiveness. Thus, even in respect of addressing when the time limit begins and when the time limit stops, the Court had to have regard to the blameworthiness of the State or emanations of the State, such as the Board. It was not therefore, in her submission, simply a question of addressing those issues as part of the exercise of the discretion to extend, although if required to be considered it had to form an important part of the calculation.
28. The respondent does not contest that the principles of equivalence and effectiveness are relevant to consideration of a national procedural remedy such as the judicial review proceedings in the present case. The respondent submits however that neither the law nor the facts of this case demonstrate any breach of either principle. The respondent noted that the decision in *TD (A Minor)* concerned a challenge based upon EU law provisions to the 14-day time limit for challenging refusals to grant refugee status or a deportation order under the Illegal Immigrants (Trafficking) Act, 2000 on the basis that it breached the principle of equivalence. The Supreme Court in a 4-1 decision rejected that argument.

***When does time start to run?***

29. Somewhat unusually, the issue of when time began to run for the purpose of s. 50(6) was not expressly pursued in the notice of appeal, but it was referred to in the appellant's written submissions. At the oral hearing, this part of the appellant's argument was subsumed into her argument that European law required that neither the period of administrative delay within the Board, nor the unavailability of a Court before which to make the *ex parte* application, should be counted against the appellant. The nature of the submission related to interpretation as to the date on which time stops but also an argument that time limits should not be strictly imposed. It is appropriate however for this Court to address the statutory mandated date on which time begins to run as this informs the determination of the other arguments.
30. The aim of statutory interpretation is to give effect to the words of the statutory provision. It is the words of the provision that indicate the intention of the Oireachtas in enacting the legislation. The first, indeed the obvious point, to note is that s. 50(6) of the 2000 Act is clear in that it does not state that time is to run from the date of notification. This contrasts with s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act, 2000 which expressly provides that the relevant time-period in which to take judicial review proceedings commences "*on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the Order concerned*".
31. The interpretation of the relevant provisions of the 2000 Act must take into account their context within the Act, being an Act setting out the legal provisions for planning and development in this jurisdiction. The relevant provisions are to be found within the section which deals with court challenges to decisions and acts of the planning authorities and the

Board. This Court must also have regard to the considerable legal authority that has now accumulated in the area of time limits in judicial review applications generally but also as regards time limits for challenges to planning decisions. Those authorities indicate that statutory time limits of the type at issue are strict and that the power to extend such time limits must be strictly construed.

32. Barr J., correctly in my view, relied upon the decision of Baker J. in *Irish Skydiving Club v. An Bord Pleanála*, and in particular paras. 9, 10, and 11 of her judgment. In those passages, Baker J. cited with approval the *dicta* of Kearns J. in *Noonan Services Limited & others v. The Labour Court* (Unreported, High Court, 25th February, 2005) when he explained the policy for a strict approach as follows:

*"This approach does no more than reflect a growing awareness of an overriding necessity to provide for some reasonable cut-off point for legal challenges to decisions and orders which have significant consequences for the public, or significant sections thereof."*

33. Baker J. in *Irish Skydiving Club v. An Bord Pleanála* also referred to *dicta* in *KSK*, a decision which I will address further in the context of the issue of when time stops running, concerning the rationale of providing legal certainty with respect to planning decisions. *KSK* concerned the relevant provisions in the Local Government (Planning and Development) Act, 1963 ("the 1963 Act"), as amended dealing with time limits for challenges to planning decisions, which said time limits could not be extended. Finlay C.J. stated:

*"... it is clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the planning authorities and in particular one must assume that it was intended that a person who has obtained a planning permission should, at a very short interval after the date of such decision, in the absence of a judicial review, be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision."*

34. It is difficult to see any basis for reading s. 50(6) of the 2000 Act as anything other than clear on its face that time begins to run on the date of the decision. The Board decision in the present case was made on the 27th September, 2018. The appellant's written submissions do not appear to contest that the decision was taken on that date; rather her argument is that by failing to take into account the delay by the Board in communicating its decision to the appellant (and also by deeming as "delay" the period between filing papers and moving *ex parte*), that the High Court "*permits administrative delay or inertia, to impermissibly foreshorten a statutory time period*". Thus, her argument had been that time began to run from the date of communication.

35. The manner in which the argument is made would appear, on its face, not to raise an issue of interpretation. The decision of the Court on interpretation does not "*foreshorten a statutory time period*". Either the High Court was right in its interpretation as to when time began to run, or the High Court was wrong in its interpretation; that is a matter that this

Court must now decide. Merely stating that the High Court (or any Court) is foreshortening the statutory time period because it makes its decision on interpretation in a particular way is a circular argument – and one which does not assist with the proper interpretation of the relevant provisions. In the present case, the Court must apply the rules of interpretation to this piece of legislation, the first of which is to assess the plain meaning of the statute taking into account its context. The context is that this is planning legislation and the provision at issue is contained within a section which provides for very specific time limits which are shorter than the norm for judicial review applications pursuant to Order 84 of the Rules of the Superior Courts (“RSC”). In my view, that context confirms that the plain meaning of the provision is that time begins to run on the date of the decision and the date of the decision plainly means the date on which the decision is made.

36. The appellant’s submission can only be understood however by reference to her submissions on the principle of effectiveness. The appellant has not asked the Court to disapply or set aside the provisions of s. 50(6) of the 2000 Act, as the Supreme Court in *TD (A Minor)* stated could necessarily arise in some cases (see para. 217 of the judgment of Fennelly J.). Instead, it is the interpretation itself of the time limit which must give way to the principle of effectiveness. Contrary to the appellant’s submission and for the reasons set out, I do not find that the principle of effectiveness makes any difference to the interpretation of these time limits.
37. In the first place, as Fennelly J. stated in *TD (A Minor)*, quoting from the Court of Justice of the European Union (“CJEU”) decision in *Grundig Italiana v. Ministero delle Finanze* (Case C-255/00), it is for the domestic legal system to lay down the rules governing actions safeguarding rights which “do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)”. There is no evidence before us that this eight-week time limit renders it virtually impossible or excessively difficult to exercise EU rights. Even addressing the provision at face value, there is no apparent reason why the time limit should render it impossible or excessively difficult to exercise rights nor has any such reason been identified to us. In the present case, if the appellant had moved her application in the High Court a single day before she filed the papers in the Central Office, she would have been in time. There is no evidence before us that in her specific case, or even more generally, compliance with this time limit is virtually impossible or excessively difficult. The fact that large numbers of challenges have been taken in respect of planning decisions since the introduction of this eight-week time limit is also something of which the Court can take judicial notice.
38. I would also point out that there is nothing in the principle of effectiveness that would require s. 50(6) to be interpreted as meaning that time only runs from when the decision was communicated to the person. The principle of effectiveness does not require the interpretation of a statute in a manner that is *contra legem* i.e. an interpretation that goes against the clear statutory provisions. The term “date of the decision” is clear on its face and cannot be interpreted otherwise. Of course, on the authority of the case law of the CJEU and the Supreme Court, if such an interpretation were to violate the principle of effectiveness, then the Court would be bound to disapply the statute. In my view



disapplying the statute simply does not arise here. The provisions of s. 50(6) are clear, time runs from the date the decision is made. There is no evidential basis or rationale for holding that this particular interpretation in itself violates the principle of effectiveness.

39. It is appropriate to address at this point another CJEU decision raised by the appellant. This is the decision of the CJEU in *Flausch & Ors v. Ypourgos Perivallontos kai Energeias & Ors* (Case C-280/18) ("*Flausch*"). That case involved a situation where the local island population had no knowledge of a planned tourist development. In accordance with Greek law, notice had been given in a newspaper, but this newspaper was local to another island and which had no, or negligible, circulation on the island in question. The local island population therefore had no knowledge of the planned development.
40. The CJEU stated that it was compatible with the principle of effectiveness to lay down time limits for bringing proceedings in the interests of legal certainty which protects both the individual and the authorities concerned. The Court went on to state that it did not regard as excessively difficult the imposition of periods for bringing proceedings which start to run only from the date on which the person concerned was aware or at least ought to have been aware of the announcement, but that it would be incompatible with the principle of effectiveness to rely on a period against a person if the conduct of the national authorities in conjunction with the existence of the period had the effect of totally depriving them of the opportunity of enforcing rights *i.e.* if the authorities were responsible for the delay.
41. The facts of that case are entirely different, and I will address them in greater detail below when dealing with the extension of time provisions. Suffice to say that the situation in *Flausch* was particularly egregious, wherein the local inhabitants did not get notice of the launch of the public participation process and could not be deemed to be informed of the final decision granting consent. The CJEU answered the first question it was asked by saying that the EIA Directive must be interpreted as precluding a Member State from carrying out procedures for public participation in decision-making where specific arrangements implemented did not ensure actual compliance with the rights of the public concerned. It was in that context that the Court then answered the second question about a 60-day time limit from an announcement on a specific website for bringing proceedings as follows:

*"Articles 9 and 11 of Directive 2011/92 must be interpreted as precluding legislation, such as that at issue in the main proceedings, which results in a period for bringing proceedings that starts to run from the announcement of consent for a project on the internet being relied on against members of the public concerned where they did not previously have an adequate opportunity to find out about the consent procedure in accordance with Article 6(2) of that directive."*

42. I do not consider that in its *dicta* at paras. 54, 55 or 56 of *Flausch*, the CJEU was setting down a requirement that, in order to comply with the principle of effectiveness, time limits for taking judicial review proceedings could only commence on the date of notification of the planning decision to the person concerned, or the date on which they at least ought to have been aware. Instead, the CJEU was ensuring that the principle of legal certainty, itself

compatible with the principle of effectiveness, could not be relied upon to totally deprive a person of the opportunity to enforce rights. The principle of access to justice had to be pursued by Member States. It is also noteworthy that the position of the appellant in these proceedings was entirely different; she was an active participant in the decision-making process having made the appeal to the Board in the first place. She knew all about the process.

43. In the present context, the time limit cannot be read as totally excluding this appellant from the judicial review process. I am satisfied that *Flausch* does not compel the courts to interpret the provisions of s. 50(6) as meaning that the time only begins to run from the date the decision was notified to the appellant (or her agent). Furthermore, although the CJEU in *Flausch* made reference to the planning authorities' delay, the decision is not authority for the proposition that where authorities delay a person affected cannot be held to time limits. The blameworthiness of the authorities may be relevant when taking into account the overall circumstances of the case and considering whether to extend time. I am not satisfied that it compels a different interpretation contrary to the plain meaning of the statutory provision. I am satisfied therefore that time begins to run from the date the decision was made.

***When does time stop running?***

44. At issue here is whether time stops running when the *ex parte* motion papers are lodged in the Central Office as the appellant contends, or when the application is moved in open court as the respondent contends. The appellant submits that this is governed by the decision of the Supreme Court in *KSK*. She submits that the trial judge wrongly relied on the decision of Haughton J. in the High Court in *McDonnell v. An Bord Pleanála* in which he applied the Supreme Court decision in *Reilly v. Director of Public Prosecutions*. The appellant submits that in adopting the ratio in *Reilly v. Director of Public Prosecutions*, the High Court failed to have regard to the factual matrix in *KSK* and failed to differentiate between the factors at play in a criminal and in a civil matter. The Board, on the other hand, submits that the appellant is incorrect in trying to draw a distinction between the Supreme Court decisions in *KSK* and *Reilly v. Director of Public Prosecutions* or between the decision of the High Court in this case and in *KSK*.
45. It is necessary to look at these decisions. Prior to doing so it is appropriate to note that Haughton J. in the High Court in *McDonnell v. An Bord Pleanála* reached a different conclusion to that of Humphreys J. in *McCreesh v. An Bord Pleanála* as to when time stopped running. In *McDonnell v. An Bord Pleanála*, Haughton J. gave *McCreesh v. An Bord Pleanála* careful consideration before respectfully departing from the finding of his High Court colleague. Barr J. noted that the decision of the Supreme Court in *Reilly v. Director of Public Prosecutions* did not appear to have been considered or even opened to Humphreys J. in *McCreesh v. An Bord Pleanála*.
46. Although this appellant was in any event strictly speaking out of time on the Thursday when she filed her papers in the office, given the extent of the argument on this issue I believe it is appropriate to address the matter. Although the length of the delay of itself is not determinative as to whether an extension of time ought to be given, the issue of when time

stopped running would increase the delay in the present case from a delay of one day into a delay of five days.

47. I will commence consideration of this issue by looking at the Supreme Court decisions in *KSK* and in *Reilly v. Director of Public Prosecutions*. The statutory and rule provisions were not identical to the statutory provisions in the present case but nonetheless the manner in which the judgments addressed the difference between *ex parte* applications and motions on notice is important.

48. The *KSK* case concerned the provisions of s. 82 of the 1963 Act, and in particular subsections 3A and 3B thereof. Under sub-s. 3A a party could not challenge a decision of the Board other than by way of Order 84 RSC (which provides for matters of procedure and practice in applications for judicial review). However, pursuant to sub-s. 3B such a *judicial review* had to:

“(i) be made within the period of two months commencing on the date on which the decision is given, and,

(ii) be made by motion on notice (grounded in the manner specified in the Order in respect of an *ex parte* motion for leave) to –

(a) *if the application relates to a decision under (3A) (b) of this section, the Board and each party or each other party, as the case may be, to the appeal.*

(b) *any other person specified for that purpose by order of the High Court.”*

Order 52, rule 2 RSC provides “[s]ave as otherwise provided by these Rules, all such applications other than such as under the existing practice are made *ex parte* or are authorised by these Rules to be so made, shall be made by motion on notice to the parties concerned...”.

49. In *KSK*, the applicant contended that either filing a notice of motion in the Central Office or service on one of the respondents amounted to the making of an application. The Board made the argument that moving the application in court, even if only for the purpose of asking that the application be heard on another day, was the making of an application for leave to apply for judicial review. In that case, the notice of motion and grounding affidavit were filed on behalf of the applicant within the two-month period and were served on the first respondent within that period, but the motion was returnable for a date outside the two-month time limit. The High Court dismissed the application on a preliminary point that the application was time barred. The Supreme Court dismissed the appeal on the basis that since the applicant had only served the first respondent but not the other respondents within the two-month period, the application was time barred and could not be maintained. The basis for that decision lies in the wording of the section at issue in those proceedings.

50. Finlay C.J. commenced by saying that the issue before the Court was a matter of statutory interpretation. He noted that “*application*” was not defined and that if it could be considered ambiguous, the Court would be obliged to look at the particular subsection in which the

word was used and the apparent legislative objectives and provisions which are part of the context of the subsection. He noted that the general scheme of the subsection was to very firmly and strictly confine the possibility of judicial review in challenging or impugning planning decisions. The relevant provisions did not provide for an extension of time. It was clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by planning authorities.

51. Finlay C.J. then said that having regard to those general considerations and to his view of the importance of the notification to the developer in particular, he "*must reject the contention that the application made within the month could be constituted by the mere filing of a Notice of Motion in the Court offices.*" He then referred to Order 52, rules 1 and 2 RSC and said that he was "*satisfied that in ordinary terms these two rules indicate that there are known to the Courts applications which are made by motion and that both those that are made ex parte and those that are made on notice to parties concerned come within that general classification of applications to the Court made by motion.*" Finlay C.J. then referred to the procedure under Order 84 where an application for leave to apply for judicial review is to be made by motion *ex parte*. The provision for a motion on notice is inserted by the Local Government (Planning and Development) Act, 1992 with regard to planning decisions. Finlay C.J., in a passage of significance to these proceedings went on to state:

*"There can be no doubt in my mind that an application to the Court made by motion ex parte cannot be said to be made until it is actually moved in Court. In the case of a Motion on Notice which is what is provided for in this subsection, I am quite satisfied that it could not be said to have been made under any circumstances until notice of it had been given to the parties concerned."*

52. Contrary to the appellant's submissions that *KSK* assists her argument that time stops where papers are lodged for the purpose of making an application by *ex parte* motion, the decision supports the opposite contention. The wording of the relevant provisions of the 1963 Act referred to an "*application made by motion on notice*". Finlay C.J. said that this was a phrase consistent with the plain objects of the subsection and that the vital and important thing was that there was a very sharply limited time scale for the parties concerned and that it required the developer to be made aware of the challenge. His judgment in *KSK* made a clear distinction between a motion on notice in which time was stopped when the notice of motion was served on the parties, that is to say when it was both filed and served on the relevant parties named in the subsection and an *ex parte* application. There is an explicit statement in the case that the filing of the notice of motion is not sufficient. While, as Humphreys J. states in *McCreesh v. An Bord Pleanála*, the reference to the *ex parte* application is strictly speaking *obiter dicta* in the judgment of Finlay C.J., it is the logical corollary of the distinction the Supreme Court made between applications made by notice of motion and those made by *ex parte* motion. In any event, it is perfectly clear that even a notice of motion cannot stop the time running by merely lodging the papers.

53. I do not accept the appellant's submission that Barr J. "preferred the case of *Reilly*" to *KSK*. There is no conflict between those decisions. Instead, in attempting to resolve the apparent conflict between the High Court decisions in *McCreesh v. An Bord Pleanála* and *McDonnell v. An Bord Pleanála*, Barr J. referred to the decision in *Reilly v. Director of Public Prosecutions* which he noted did not appear to have been brought to the attention of Humphreys J. The Supreme Court (Dunne J.) in delivering judgment in *Reilly v. Director of Public Prosecutions* referred to the judgment in *KSK* in approving terms as follows:

*"There is obviously a clear distinction being made in the passage set out above between an application by way of origination (sic) made ex parte and an application made by an originating motion on notice. The nature of an application being made by motion ex parte is such that it cannot be made until it is actually moved in court."*

54. Contrary to the appellant's submissions, the foregoing quotation makes it crystal clear that the Supreme Court in *Reilly v. Director of Public Prosecutions* was relying on what had been said in *KSK*. The facts in *Reilly v. Director of Public Prosecutions* disclose that it was not a criminal case in the sense of a criminal prosecution, rather it concerned an application to forfeit cash originally seized and detained in certain circumstances by a member of An Garda Síochána or an officer of customs and excise under provisions of the Criminal Justice Act, 1994 ("the 1994 Act"). Under s. 38 of the 1994 Act pursuant to an application made to the District Court, the District Court could detain the cash for periods not exceeding three-month intervals and for a total period not exceeding two years from the date of the order for detention. Section 39 of the 1994 Act permitted a Circuit Court judge to order forfeiture of any cash which has been seized under s. 38, *on an application made while the cash is detained under that section*, if certain conditions were satisfied. Thus, the section required the application to be made within two years of the date of the detention of the cash. The Circuit Court rules specifically provided that applications made under s. 39 were to be made by originating motion on notice. The application was made by notice of motion issued and served within the two-year period. However, the first appearance in court seeking forfeiture was outside the two-year period. The High Court (Clarke J.) and the Supreme Court rejected the argument that the application was time barred.

55. Dunne J. in *Reilly v. Director of Public Prosecutions* reviewed a number of previous decisions concerning when proceedings are deemed to be brought. The Supreme Court in both *FMcK v. AF (Proceeds of Crime)* [2005] IESC 6 and *Director of Public Prosecutions v. England* [2011] IESC 16 had referred to the decision in *KSK* in approving terms. In *FMcK v. AF* Geoghegan J. had stated that:

*"Given the uncertainties of the availability of courts and judges at any given time and the systems of listing, a statute which creates a time limit for the bringing or making of an application or uses any such cognate words should be interpreted as meaning the date of issuing if the proceedings require a summons or filing or possibly in some cases filing and serving if what is involved is a motion but unless there are express words in the statute that require it, it should not be interpreted as meaning the actual moving of an application in open court."*

The relevant provisions in that case referred to an application for the making of an interlocutory order being brought within the 21-day time limit. Geoghegan J. said there was no significant difference between the use of the word “made” as in *KSK* and the word “brought” in the relevant section of the Proceeds of Crime Act, 1996.

56. In addressing the decision in *Director of Public Prosecutions v. England*, Dunne J. accepted that the statute had to be interpreted in its ordinary and natural meaning. She then referred approvingly to the decision in *KSK* and stated:

*“There is obviously a clear distinction being made in the passage above between an application by way of origination (sic) motion made ex parte and application made by an originating motion on notice. The nature of an application being made by motion ex parte is such that it cannot be made until it is actually moved in court. That is not the case in relation to a motion on notice.”*

Dunne J. then applied what Finlay C.J. had pointed out, that “*in the case of a motion on notice it could not be said to have been made until notice of it had been given to the parties concerned.*” She stated that an application is made pursuant to s. 39(1) once the motion has been issued and served on the parties who required to be notified in the relevant period. She agreed with the trial judge that to interpret the time limit as requiring the application to be made in open court “*would be imprecise and subject to the vicissitudes and vagaries of Court calendars and work loads and cannot have been intended by s. 39(1).*”

57. The Supreme Court authority on this issue is very clear. The words of the statutory provisions and the rules of court implementing those provisions must be adhered to. The date of application to a court is either the date the application is moved in court when it is required to be brought *ex parte* or it is the date on which the motion is issued and served on relevant parties where the application is required to be made by originating motion on notice.
58. Humphreys J. in *McCreesh v. An Bord Pleanála* placed considerable reliance on the fact that, on the day following the judgment in *KSK*, a new High Court practice direction HC02 entitled “*Ex parte applications for judicial review*” was issued. The practice direction expressly states that “*the original statement and grounding affidavit should be filed in the Central Office beforehand and a certified copy bearing the record number issued by the Central Office, provided to the court on moving the application*”. In the view of Humphreys J., this brought about a significant change in the way such *ex parte* applications were brought and introduced considerably greater formality in that regard and “*fundamentally changed the context in which the obiter statement in K.S.K. should be viewed.*” Humphreys J. viewed the Central Office as an arm or instrument of the High Court and that “[a]n application which is made by being filed in the Central Office is therefore an application that is made to the court” (emphasis that of Humphreys J.). He considered that the matter was definitively addressed by Geoghegan J. in *FMCK. v. AF* and he cited the passage I have referred to at para. 55 above.

59. I would respectfully disagree with the reasoning of Humphreys J. in *McCreesh*. I rely upon the importance of the wording in the statute and the rules implementing the statute when interpreting the relevant provisions. In general, there are two types of applications: (a) a motion on notice to the parties; or (b) a motion *ex parte*. The provisions of s. 50(6) are patently clear in that they refer to an application for leave to apply for judicial review being made within the eight-week period. These applications for leave to apply for judicial review must be made in accordance with Order 84 RSC. Rule 20(2) thereof requires the application for leave to be made by motion *ex parte*. As the *dicta* in *KSK* makes clear, time will only stop running when that type of application is made in open court. The judgment of the Supreme Court (Dunne J.) in *Reilly v. Director of Public Prosecutions*, supports the original interpretation in *KSK* even if the *dicta* is strictly speaking *obiter*.
60. In so far as a practice direction may be at issue, a practice direction cannot overrule the clear words of a provision of an Act or of the rules of court. The words of Order 84, rule 20(2) RSC are clear, they require an application by motion *ex parte*; that application is only made when it is moved in open court. In any event, I do not consider that the change to the practice direction had the effect, or was intended to have the effect, that Humphreys J. thought that it had.
61. While the practice direction might have been intended to bring some formality into the position with *ex parte* applications, I would disagree with Humphreys J. that his interpretation of it would bring the type of certainty he envisaged. If he is correct that time stops when the motion *ex parte* is lodged in the Central Office, there will be an even greater uncertainty as to when the application would even be heard. Unlike the situation with a motion on notice where a return date is given for the motion, there is no date given by the Central Office for the hearing of the *ex parte* application. It follows that a significant period of time could elapse between the filing of the papers and the making of an application for leave. During that period, the planning authority/the Board or another interested party (including the developer) may have no knowledge that the decision was under challenge. This would be wholly inconsistent with the underlying rationale of the statutory regime as explained in the *KSK* line of authority referred to above. It is not an answer to this to say that even when leave is granted there is a period between the granting of leave and service on the respondent/notice party; this is because the provisions of Order 84, rule 22(3) RSC require service within seven days or such other period as the Court may direct. Where appropriate, the Court can direct immediate notification of the making of the order. Therefore, the position is not the same as would arise if the mere presentation of the papers to the Central Office was taken to stop time for the purposes of s. 50 of the 2000 Act.
62. Humphreys J. made the point that there would be nothing to stop a change in procedure whereby a date is given on the lodging of the *ex parte* docket. Yet, if the purpose of the practice direction was to impose certainty as to timing, this begs the question as to why it was not included within it in the first place. The answer, I believe, is because the practice direction was not addressing this issue at all. In other words, the position as set out in the Rules, that there are two types of applications to the Court, either by motion on notice or by motion *ex parte*, remains unchanged. So too does the position, repeated now on at

least two occasions by the Supreme Court, that an *ex parte* application is only made when it is moved in court (and court does not mean the Central Office).

63. I would also emphasise that the reference to imprecise times and to the vagaries and vicissitudes of lists, referred to by Clarke and Dunne JJ. in their respective decisions, is a reference to the inability to be quite sure when an application consequent on a motion on notice might be heard. The date of any such application would depend on the listing system in any given court. In *Reilly v. Director of Public Prosecutions* Dunne J. was concerned with an application to the Circuit Court, where, for example, each different Circuit (and each different venue on Circuit) might have different waiting times for the hearing of a motion. In other words, in Circuit A the date might be two weeks from the date of issue but in Circuit B it might be two months before the motion will be first listed for hearing. That would be a vagary that would not bring the certainty required by the legal provisions as to when time begins to run. Naturally, judicial review challenges to planning decisions must be brought before the High Court. Motion lists before the High Court can have long delays before a motion that is issued will receive a hearing date. The concern of Geoghegan J. about uncertainties as to court availability in relation to when statutory time limits might be met, were met where filing was required (for a summons) or filing and serving (of a motion), instead of actually moving of an application in open court. Conversely, an application required to be made *ex parte* (as per Order 84 RSC) can only be made on the date it is moved in Court. That brings the same clear certainty to *ex parte* applications as the date of an application by notice of motion being the date on which the motion is issued and served on the parties requiring to be served.
64. I have no doubt therefore that the time commenced on the 27th September, 2018 and ended on the 21st November, 2018. The application in the present case was made when it was moved in open court on the 26th November, 2018.
65. I would also repeat, *mutatis mutandis*, what I have said earlier about the principle of effectiveness having no effect on the interpretation of these provisions as to when time stops running. In so far as the appellant contends that there is an uncertainty in the law unless time is stopped on the date of lodgement of the papers, I reject this; for the reasons set out, there would be no certainty as to the date the matter was brought to court and to the attention of any affected third parties. Moreover, any issue of blameworthiness on the part of the authorities does not arise here as the appellant has given no evidence as to why she did not move her application on the Thursday (but even more importantly on the Wednesday or the preceding Monday) but instead waited until the Monday. There is no evidence that she was prevented from moving the application or advised not to move the application by court staff until the following Monday. In any event, those matters can be dealt with under the rubric of an extension of time. The overall effectiveness of the remedy could only be assessed by taking into account how those provisions and how the applicant's situation falls to be treated thereunder. I would also note that even an argument that there was an uncertainty, because of the conflicting decisions in *McCreesh* and *McDonnell*, would not avail this particular appellant because, leaving aside the lack of averment as to her reliance on one decision over the other, this appellant was out of time for statutory purposes



even when she lodged her *ex parte* docket in the Central Office. In other words, this particular argument had no bearing on the fact that she was out of time; it could only bear on the length of the period in which she was out of time.

**The application for an extension of time**

66. Even where a party is out of time for making an application for judicial review, there is provision for an extension of time. Section 50(8) of the 2000 Act permits an extension to the eight-week period as follows:

*"The High Court may extend the period provided for in subsection (6) or (7) within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that —*

*(a) there is good and sufficient reason for doing so, and*

*(b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension."* (emphasis added)

67. The appellant contended that Barr J. had erred in how he approached the application for an extension of time in which to challenge the Board's decision. In particular, the appellant submitted that the judge had failed to give sufficient weight to the substance of the judicial review application which concerned the test to be applied by the respondent when carrying out screening for appropriate assessment. Counsel submitted that, while the High Court judge had correctly accepted that s. 50(8) had two tests which cumulatively had to be satisfied, he failed to apply them correctly. The judge wrongly, as submitted by the appellant, considered the first limb of the test by reference to the appellant's failure to make the application in time.

68. The appellant in the present case submits that the test set out in s. 50(8)(a) had to be read in light of the principles of equivalence and effectiveness because the judicial review concerned a matter of EU law. She submits that an examination of the findings of the High Court judge demonstrated that he had not considered the substance of the case when he assessed whether that provision was met. Counsel confirmed to the Court that she was not making the point that the High Court had to decide her substantive point in her favour, but it had to make its decision taking into account the substance of the matter.

69. Counsel for the appellant submits that although the High Court judge referred to the principles set out by Clarke J. in *Kelly v. Leitrim Co. Council*, there was no engagement with the substance of the case when he came to make his decision from para. 29 of his judgment onwards. In particular, she criticises the motion judge's concentration upon the fact that there was no reason given by the appellant for the delay in making the application and absence of a statement that it was outside the control of the appellant. In the appellant's submission, any issue on delay should only come into consideration of s. 50(8)(b) *i.e.* as to whether it was outside the control of the appellant but that the motion judge had to consider the broader circumstances of the nature of the judicial review and the factors surrounding the delay as an initial and primary consideration under the first limb. In the appellant's

submission, the most important consideration was that the present case concerned important matters of substance regarding the protection of habitats under EU law where the time had been shortened by the failure of the Board to follow the usual procedures in notifying the appellant, and by the courts failing to provide a court to hear the application of the appellant.

70. It is a matter of fact that the appellant never gave an explanation as to why she could not make the application within the eight-week period. The appellant only referred in her application to extend time to the decision not being posted the same day it was made and that she found it difficult to accept that the Board should be entitled to defeat her claim in respect of a decision which was not posted on the day it was made and which was not received until four days after it was made. She never explained at any point why she could not have moved her application at some earlier point in the eight-week period. Indeed, she did not state that she had operated under the misapprehension that she had eight weeks from the Monday on which she had received the decision (and it is noteworthy that by the time she swore her affidavit for an extension of time she was legally advised and must have known of the importance of providing an explanation).
71. There is also no evidence before the Court as to why the appellant did not seek to move her application even on the Thursday when she lodged the papers (although she would have been out of time on this date). There is no evidence that she was told by any person within the Courts Service that she could only move her application on a Monday; that being the day when *ex parte* applications are to be moved in the ordinary way. It must be borne in mind that there is a possibility of urgent matters being moved, even if only for the sake of complying with time limits, on a day other than a Monday.
72. Moving back to the appellant's contention that the principle of effectiveness requires greater consideration of the merits of the case, the appellant relies upon the decision of the CJEU in *Flausch*. She relies upon this case in support of her submission that while the principle of legal certainty is vital, it must give way to the objective of wide access to justice. In her submission, the failure to extend time in the present case was a denial of effective protection for the EU law rights at issue. The appellant accepts that the facts in *Flausch* were extreme but nonetheless the decision requires that a Court in implementing s. 50(8) has to do so in a manner which has regard to the principles pointed out in *Flausch*.
73. The respondent strongly contests that the fact that EU law was at issue was a matter to which the Court must have regard in the assessing of time. EU law requires adherence to the principles of equivalence and effectiveness which were adhered to in the principles set out in the 2000 Act. If the appellant's arguments were correct, there would be a lack of certainty as the time issue/extension of time would be decided differently for each ground of an applicant's case, assuming that the applicant was challenging a planning decision on domestic as well as EU law grounds. The respondent submits that Clarke J. in *Kelly v. Leitrim Co. Council* was placing in the hands of a respondent the option to argue at the extension stage that no arguable case had been made out for judicial review, and that therefore time should not be extended regardless of the reasons for the delay. The

respondent also relies upon the decision of Haughton J. in *Sweetman v. An Bord Pleanála* [2017] IEHC 46. Ultimately, the respondent submits that s. 50(8) had to be interpreted on the basis that the second part (b) *i.e.* circumstances outside the control of an applicant, would only be considered after the foundational basis had been laid as to what those circumstances were. In the present case no such circumstances had been identified.

#### **Decision and analysis**

74. In its decision in *TD (A Minor)*, the Supreme Court confirmed that a national court must, of its own motion, set aside any provision of national law that conflicts with either the principle of equivalence or the principle of effectiveness. In this case, the appellant submits that in order for the principle of effectiveness to be respected, it was necessary for the High Court, not to set aside s. 50(8)(a) of the 2000 Act, but to interpret it in accordance with those principles of EU law. On looking at the relevant subsection it is important to bear in mind that these are time limits (and extension provisions) which are imposed, not simply by the general time provisions in the RSC, but by an Act of the Oireachtas. As Baker J. observed in *Irish Skydiving Club v. An Bord Pleanála*, the extension provisions must be construed strictly.
75. The two factors which had to be satisfied must be considered together and in the context in which they appear in the 2000 Act. The object is to give certainty to decisions and acts of planning authorities. An applicant for an extension of time must comply with both limbs of the test, which can only be granted if the High Court is satisfied that: (a) that there is good and sufficient reason for doing so; and (b) the circumstances that resulted in the failure to make the application for leave within the eight-week period were outside the control of the applicant.
76. To repeat; this appellant has not placed before the Court any evidence to show that this time limit results in the remedy of judicial review not being an effective remedy. The eight-week time limit also applies to challenges to acts and decisions of planning authorities which rely solely on domestic legal grounds. There is no factual evidence that the remedy of judicial review is not an effective remedy as regards any or all planning matters including those concerning the protection of the environment.
77. I also reject the appellant's submission that the principle of effectiveness requires s. 50(8)(a) to be interpreted as a category which is separate to subsection (b), and her argument that the consequence of such interpretation is that delay must not be considered in assessing whether there is "*good and sufficient*" reason to extend time. In the first place, this does not fit with the plain meaning of the 2000 Act. The wording of the 2000 Act requires the Court to consider the "*good and sufficient*" reason first *and*, thereafter, to consider if *the circumstances* which resulted in the failure to apply in time were outside the control of the applicant. Logically, that wording requires that all matters are to be considered under subsection (a) when assessing "*good and sufficient reason*" and thereafter the Court, under subsection (b), is to assess if the circumstances in which the application was not made were outside the control of the applicant.

78. That interpretation is also consistent with the state of the law prior to the enactment of these provisions which were substituted for the original s. 50 of the 2000 Act by s. 13 of the Planning and Development (Strategic Infrastructure) Act, 2006 ("the 2006 Act"). The original provisions (s. 50(4)(a) of the 2000 Act) dealing with time limits and the extension of time were considered by Clarke J. in the case of *Kelly v. Leitrim Co. Council*. That case was referred to by the High Court judge in his judgment in the present case. The original subsection of the 2000 Act stated that "[t]he High Court shall not extend the period referred to in subparagraph (i) or (ii) unless it considers that there is good and sufficient reason for doing so." It is immediately apparent that the current subsection (b) did not form part of the original test which must be met before the High Court was entitled to extend time. In *Kelly v. Leitrim Co. Council*, Clarke J. considered the meaning of "good and sufficient reason".
79. In his judgment, Clarke J. identified a number of factors which "may need to be considered prior to a decision as to whether or not to exercise a discretion conferred to extend time" for judicial review of a planning matter. He identified the length of time specified in the statute, the issue of third party rights, the overall integrity of the planning process itself, blameworthiness (or lack thereof), the nature of the issues involved (highlighting the difference between a case where severe consequences of deportation are at issue as compared with planning issues) and the merits of the case. He later clarified in the judgment that it is a matter for a respondent to determine whether it wishes to urge upon a court that no arguable case has been made out and thus require the court to enter into a consideration of that issue. He stated that if the respondent does not wish to raise the matter, then "it is not necessary for the court to engage in a consideration of the merits of the case." Within that context, Clarke J. was clear that one of the issues to which the court has to have regard is the extent to which the applicant may be able to explain the delay and in particular to do so in circumstances that do not reflect any blame on the applicant.
80. The decision in *Kelly v. Leitrim Co. Council* was handed down on the 27th January, 2005; the 2006 Act was not enacted until 18 months later. Indeed, the Bill was not introduced until 2006. The legislature must be taken to have had regard to the wide nature of the enquiry that the High Court had indicated was required when considering whether there was "good and sufficient" reason to extend time. The amendment brought about by the 2006 Act was to include the requirement that the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension. This is a requirement that goes beyond an assessment of "blameworthiness", or even lack thereof, as one factor amongst others; rather it requires absence of control by an applicant who seeks an extension.
81. There is something of an air of unreality about this appeal. The appellant has put no evidence before the Court as to the reasons for the delay or indeed that any of these matters were outside her control. She has sought, through counsel, to demonstrate some error on the part of the High Court judge in how he interpreted subsection (a), with a view, it seems, that this Court would then remit the matter to a rehearing. In the absence of any evidence that a High Court judge could reach the conclusion that the delay was caused by

circumstances outside the control of the appellant, there is simply no basis on which this Court should remit the matter to the High Court. On the contrary, this Court on an appeal is permitted to make any order as the case requires. In a situation where there is no evidence demonstrating that the appellant's claim could be successful it would not be in the interests of justice to remit the matter to the High Court, thereby increasing costs and taking up valuable court time for no reason. On that basis alone, I would be content to dismiss this appeal. I will however deal with the matters raised by the appellant.

82. Reference must be made to *O'S v. The Residential Institutions Redress Board* [2018] IESC 61 where the Supreme Court considered the then recently amended extension of time provisions under Order 84 RSC, rather than under any statutory provisions. Those provisions, although slightly differently worded, require the Court to be satisfied that there was good and sufficient reason for the extension, and that the circumstances resulting in the failure to make the application for leave within time were outside the control of the applicant or could not reasonably have been anticipated. The facts in that case were somewhat complicated. The applicant, one of 17 children, had at the age of 12 been sent to an industrial school for two years for stealing food and a crown coin from a neighbour's house. He stated that he was subjected to severe physical and sexual abuse while there. He made an initial claim outside the three-year period for claims and was refused. He instructed further solicitors, obtained further psychiatric reports and made a fresh claim. He was again refused after an oral hearing. It was said that there were no exceptional circumstances within the meaning of the statute under which the Redress Board operated. He did not bring an application for judicial review having been told by his solicitor that one was not recommended as it was not likely to succeed, and he could face significant legal costs. At that time, two High Court decisions had agreed with the Board's interpretation of "*exceptional circumstances*". A third case was brought to the Supreme Court which indicated that "*exceptional circumstances*" had to be interpreted within the context of the Act at issue. A further decision of the Court of Appeal gave a broad meaning to the concept of "*exceptional circumstances*". Just over a month from that decision the applicant brought a judicial review and sought an extension of time. He was refused an extension in the High Court.
83. On appeal, in its interpretation of "*good and sufficient reason*", the Supreme Court referred back to the decision in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999* [2000] IESC 19 where the Supreme Court had been satisfied that the provision extending the 14-day period on good and sufficient reasons gave a discretion to the High Court sufficiently wide to enable regard to be had to all the circumstances of the case to ensure sufficient access to the courts for the purpose of seeking judicial review in accordance with their constitutional rights. Denham J. in the earlier decision had specifically referred to "*all the circumstances*" as including whether persons "*have shown reasonable diligence*". The Court also noted that, in *GK v. Minister for Justice* [2002] 2 IR 418, it was said that the phrase "*good and sufficient reason*" with regard to extending the period does not limit the factors and would, in principle, include the merits of the case, although it was recognised that those comments were made in the context of considering whether the applicant there had an arguable case.

84. The issue of “*good and sufficient reason*” can and does incorporate a wide range of issues which may include the nature of the issue before the Court. The decision in *O’S v. The Residential Institutions Redress Board* demonstrates that there is no “*bright line exclusion of reliance on a development in relevant jurisprudence in an application for an extension of time*” (per Finlay Geoghegan J. at para. 61). It must be emphasised however that the decision of the Supreme Court in that case merely states that such an issue would be one among the other relevant facts and circumstances to be considered when addressing the question of whether there is good or sufficient reason to extend time. I would also emphasise that in the present case, there is no agreement on the merits of the underlying challenge (as there was in reality in the *O’S v. The Residential Institutions Redress Board* decision). Therefore, I am of the view that, in the absence of a situation where the underlying challenge is either unarguable or is highly meritorious based upon a change in jurisprudence, the merits of the case argument is not of any real relevance in assessing whether there is good and sufficient reason to extend the time.
85. The High Court decision of Haughton J. in *Sweetman v. An Bord Pleanála* dealt comprehensively with other issues as to time, such as whether it only began to run from the date an applicant became aware of the decision. Haughton J. reviewed relevant authorities in detail, including *Kelly v. Leitrim Co. Council* and *Irish Skydiving Club v. An Bord Pleanála*. In *Irish Skydiving Club v. An Bord Pleanála*, Baker J. had rejected arguments that time only began to run from the date an applicant became aware of the decision or the date upon which they decided to commence the action having taken legal advice. Haughton J. also rejected outright the argument that the court was only to consider the eight-week period after the decision in assessing the applicant’s justification for the delay. To ignore subsequent delay “*could lead to absurd results, and would be a licence to a party aggrieved...to sit on their rights.*” Those observations by Haughton J. are entirely apposite to the present case.
86. With respect to an application for an extension of time, Haughton J. said as follows at para. 6.8:

*“The applicant seeking an extensive (sic) of time must therefore firstly satisfy the court that the circumstances that result in the failure to make the application for leave within the period of eight weeks were outside of his or her control. Thereafter the applicant for extension must satisfy the court that there is good and sufficient reason for an extension. This phrase requires that the reason be both “good” and ‘sufficient’. Moreover it is incumbent on the applicant to satisfy the court that such good and sufficient reason encompasses the entirety of the period from the expiry of the eight weeks up to the date upon which the leave application was made in the High Court...”*

I agree with the main thrust of that statement of the law by Haughton J. because it reflects the twin points that must be established by an applicant.

87. I would diverge from Haughton J. in his prescription of the sequencing of the questions that a court must address in considering an extension of time application. The question of

good and sufficient reason may be so closely bound up with the issue of control that the Court may require a good overview of the case so that it can make an assessment of whether the matter was out of the control of the applicant. The Supreme Court decision in *O'S v. The Residential Institutions Redress Board* reflects that approach.

88. For the avoidance of doubt, the final part of the final sentence, which I have omitted, of the quotation in para. 86 above, in which Haughton J. says "*or at any rate the date upon which the leave papers were lodged in the Central Office*" does not represent the correct legal position. On the contrary, that issue was subsequently resolved by Haughton J. in *McDonnell v. An Bord Pleanála*, the decision which I endorsed earlier in this judgment.
89. From the foregoing, I am satisfied that the phrase "*good and sufficient reason*" incorporates a global consideration of the relevant issues, a non-exhaustive list of which was identified by Clarke J. in *Kelly v. Leitrim Co. Council*. The High Court judge commenced dealing with the issue of the extension by reciting the non-exhaustive factors cited in that case. The appellant criticises the High Court judge for failing to consider the nature of this case which was one of European law and for his focus, under the first limb, of the lack of explanation for the delay. That view of his judgment is much too restrictive; primarily because it fails to appreciate that the issue of "*good and sufficient reason*" does incorporate the issue of blameworthiness and the reason for the delay in the application. Those matters are part of the relevant considerations in good and sufficient reasons. They are matters that were not explained by the appellant, apart from a reliance on the small delay in being told of the decision and the fact, *per se*, that she lodged papers on the Thursday (already a day out of time) prior to making her application on the following Monday. The explanation for the delay is relevant to the consideration of what the good and sufficient reason was and there was no engagement with it at all. I also consider that it is too reductive to say that the High Court judge had failed to consider the subject matter of the proceedings; at the outset of his judgment he had set out the context of these proceedings, which were a judicial review based upon a claim that the relevant test had not been applied by the Board's inspector when carrying out screening as to whether an appropriate assessment was necessary under the provisions of the relevant EU Directives and the 2000 Act. He was well aware of the context. He was not required to make an assessment on the merits either for or against the appellant at the stage when he was considering whether the tests for an extension of time in which to seek judicial review ought to be granted.
90. The appellant's reliance on the decision of the CJEU in *Flausch* is misconceived. As indicated above, it concerned a situation where the local island population never had knowledge of the planned tourist development. In accordance with Greek law, notice had been given in a newspaper local to another island and which had no, or negligible, circulation on the island in question. The position here is entirely different. The appellant was a participant in the planning process. She received notification of the planning decision, albeit perhaps slightly later than might usually occur. She cannot say that she was totally deprived of her opportunity to enforce her rights, as was the situation in *Flausch* (see para. 56), and that therefore her situation is incompatible with the principle of effectiveness. On the contrary, she was well aware from an earlier stage that a development consent had been given

despite her appeal. Furthermore, unlike the situation in *Flausch*, the appellant has not given any explanation as to why she did not make this application in time. Irish domestic law does not prevent challenges to development consents in the type of situation at issue in *Flausch*. Instead, it makes provision for an extension of time to bring applications to challenge planning decisions where the tests are met. The principle of wide access to justice was respected in the planning process, and is respected through the provisions of s. 50(6) and s. 50(8) of the 2000 Act.

91. In conclusion, the extension of time provisions in themselves and the application of those provisions to the circumstances of this case do not violate the principle of effectiveness.
92. For the reasons set out above, I reject the appellant's submission that the High Court judge erred in refusing her an extension of time in which to make an application for judicial review.

### **Conclusion**

93. The eight-week time limit set out in s. 50(6) for the purpose of challenging a planning decision by way of judicial review begins to run on the date of the decision. Time will only stop running when an application is made *ex parte* to the High Court. In other words, lodging papers in the Central Office in compliance with the Practice Direction HC02 does not stop time running. There is no basis for considering that this particular exercise of national procedural autonomy violates the EU law principle of effectiveness.
94. The extension of time provisions require compliance by an intending applicant who seeks to make an application for judicial review out of time of a two-limbed test. There must be good and sufficient reason for the extension, and the circumstances that resulted in the failure to make the application for leave within the period so provided must be outside the control of the applicant. The onus is on an applicant to demonstrate that their case comes within those criteria.
95. In assessing good and sufficient reason, the Court is entitled to take a holistic view of all the relevant circumstances, which includes blame on the part of the applicant and that of the authorities, as well as the reasons for the delay. An applicant must engage with the reasons why the application was not made in the time allowed as well as any delay after the time limit expired. The appellant has not provided any evidence as to the reason why she did not move her application within the allotted time period. Instead, she has sought to lay the blame on the Board for their failure to post the decision on the date it was made but instead to wait until the next day, which was a Friday, which further delayed receipt of the decision. The appellant has never addressed how her failure to bring the application in time was outside her control.
96. The fact that the underlying proceedings concern EU law (or matters of EU environmental law specifically) is not, *of itself*, a factor that requires an extension of time to be given. It is not a factor that requires particular weight to be attached to it in the assessment of extension of time. The decision of the CJEU in *Flausch* does not oblige a Court to extend



time because there may have been an element of blameworthiness on the part of authorities. The facts in that case were extreme and are not comparable to the situation of this appellant who was a party to the planning decision and who received notice of the decision well within the time. The principle of effectiveness is not violated in circumstances where, as here, the extension of time provisions permit an extension of time for good and sufficient reason, and where the failure to take proceedings within time was outside the control of an applicant.

97. This appellant has not demonstrated either (a) good and sufficient reason or (b) that the circumstances of her failure to take the proceedings were outside her control.
98. The appeal is therefore dismissed.
99. As regards costs, given that the appeal has been entirely unsuccessful, it would appear to follow that the Board is entitled to the costs of the appeal, those costs to be adjudicated in default of agreement.
100. If the appellant wishes to contend for a different form of order for costs, she will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing. If such hearing is requested and results in an order in the terms I have provisionally indicated above, the appellant may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms set out above will be made.

*As this judgment is being delivered electronically my colleagues Ní Raifeartaigh and Collins JJ. have authorised me to indicate their agreement with it.*