APPROVED **[2023] IEHC 727**

THE HIGH COURT
JUDICIAL REVIEW

2023 206 JR

BETWEEN

PERCY PODGER

APPLICANT

AND

MINISTER FOR AGRICULTURE

RESPONDENT

JUDGMENT of Mr. Justice Simons delivered *ex tempore* on 15 November 2023

1. This ruling is delivered in respect of an application for leave to apply for judicial review. The leave application has, by direction of the High Court (Meenan J.), been heard on notice to the respondent.
2. The legal test governing an application for leave to apply for judicial review has recently been considered by the Supreme Court in *O'Doherty v. Minister for lth* [2022] IESC 32, [2022] 1 I.L.R.M. 421. The Chief Justice, O'Donnell C.J., explained at paragraph 39 of the judgment that the threshold to be met is that of arguability:

> "[…] The threshold is a familiar one in the law. It is, in essence, the same test which arises when proceedings are sought to be struck out on the grounds that they are bound to fail, or the test that is normally required in order to seek an interlocutory injunction. It must be a case that has a prospect of success (otherwise it would not be an arguable case) but does not require more than that. While, inevitably, individual judges may differ on the application of the test in individual cases at the margins, the test itself is clear. This test – it must be stressed – is solely one of arguability: it is emphatically not a test framed by reference to whether a case enjoys a reasonable prospect of success, still less a likelihood of success. Any such language obscures the nature of the test and may on occasion lead to misunderstanding, appeal and consequent delay."

3. The Chief Justice also confirmed (at paragraph 40) that the same threshold test applies irrespective of whether the application for leave is made *ex parte*, or, as in the present case, is made on notice to the other parties.

4. It follows, therefore, that in assessing the merits of the grounds of judicial review pleaded, the High Court must do so by reference to the low threshold of arguability.

5. The approach to be taken in respect of time-limits is somewhat different. Order 84 of the Rules of the Superior Courts indicates that the question of whether the leave application has been made within the time-limit prescribed is a matter which should normally be decided at the leave stage. If it is obvious that the leave application is out of time, then the judge hearing the leave application may properly refuse leave on this basis. This is so notwithstanding that the grant of leave does not necessarily preclude these issues from being revisited at the full hearing. In a complex case, the judge subsequently hearing the substantive application for judicial review may be prepared to revisit the question of delay having had the benefit of arguments from the respondent.

6. In the present case the court has had the benefit of detailed submissions from both parties and is in a position to reach a definitive view in relation to delay and time-limits.

7. The statement of grounds, as initially formulated, makes out a series of complaints in relation to the administration by the Minister of Agriculture of the Basic Payments Scheme. That scheme is governed by a number of EU Regulations. These are identified in Annex 2 of a publication entitled the EU Basic Payments Scheme (BPS) / Greening Payment and other Area Based Schemes Terms and Conditions. This document summarises the governing legislation and sets out the procedure for applying for BPS/Greening Payments. Relevantly, there are various rights of appeal identified, including a right of appeal to the Agriculture Appeals Office ("*AAO*"), an independent statutory agency.

8. Article 7 of Regulation (EU) No. 1306/2013 provides:

> "1. Paying agencies shall be departments or bodies of the Member States responsible for the management and control of expenditure referred to in Article 4(1) and Article 5.
>
> With the exception of payment, the carrying out of those tasks may be delegated.
>
> 2. Member States shall accredit as paying agencies departments or bodies which have an administrative organisation and a system of internal control which provide sufficient guarantees that payments are legal and regular, and properly accounted for. To this end, paying agencies shall comply with minimum conditions for the accreditation with regard to internal environment, control activities, information and communication and monitoring laid down by the Commission pursuant to point (a) of Article 8(1).
>
> […]"

9. Article 59(1) of the same Regulation provides for a general principle of systematic administrative checking of all aid applications and payment claims.

Article 74 of the same Regulation provides for verification of eligibility conditions and reductions.

10. As initially pleaded, the statement of grounds made a series of complaints. However, following case management by Meenan J., the claim is now confined to a single relief which reads as follows:

> "[An Order] compelling the Minister of Agriculture to re-engage with me meaningfully, being mindful of the defined by law, Set in Statute, Equity Property Curragh Sheep Grazing Rights, further to the July 26th, 2021 meeting, to resolve and make decisions on the matters of business at issue, and protect the Applicant from Adverse Costs (in light of the fact that the above reliefs sought are at the core of the function of an Administrative Authority)."

11. As appears, there is a reference in the revised statement of grounds to a meeting of 26 July 2021. Given the centrality of this meeting to the claim which is now pursued, it is appropriate to consider the nature of the evidence adduced in relation to that meeting. The meeting is described as follows in the grounding affidavit of the Applicant at paragraphs 8 and 9:

> "With poor to no progress, I paid for legal advice, from Gabriel Toolan and Peter Bland. Gabriel Toolan and Mr. James Winston, knew each other, and they agreed that the clock stand still and would not be applied with respect to MoAg internal appeal procedures. At first it appeared some progress though again slow was being made, but eventually, Mr. James Winston failed to communicate/reply on time or at all to Gabriel Toolan, so, Gabriel Toolan put it back to me that I should try myself. With the greatest of extreme difficulty, I managed to get a meeting again in Portlaoise for the 26th July, 2021 with James Winston.
>
> James Winston, Barbara Ohlig (EU lawyer) Elizabeth Burke, and I met on the 26.7.2021. The affidavit, my contracts, the MoAg legal position and more were central in discussion. It concluded with J. Winston undertakings to revert to us promptly and within a few weeks, but he did not do so at all, inspite of Reminders. So after 6 and 1.5 Years, I am here in Court".

12. The meeting is also referred to briefly at paragraphs 18 and 19 of the grounding affidavit:

> "I say if this Court does anything that supports an administration, here the MOA do nothing, - in particular since July 26th, 2021 meeting with the MOA's legal representatives and his undertakings made, (not withstanding that the MOA doing next to nothing prior to that in this matter). - then both the Court and the administration are abdicating their functions, and while the administration would then become obsolete, moreover clearly then, the Court will be seen to have made itself part of the problem instead of part of the solution.
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> In light that this instant challenge relates to an inaction/non-action of the Respondent the clock has not even started, in terms of taking JR. However the Applicant cannot wait any longer thus is here seeking leave to challenge the decision making processes of an administrative body – the MOA, the Respondent, – and his lack of making a decision, and their failure to deliver a result, being mindful that senior executive direction was given that the matter be expedited thru' legal and then delivery expedited, but the matter is stuck in legal following the July 26th, 2021 meeting and the MOA's Legal representative's undertakings made, but failure to deliver."

13. The response made to all of that by the Minister is set out in the replying affidavit of Geraldine Howard. Ms. Howard is an assistant principal officer in the Department of Agriculture, and she deals with the meeting as follows in paragraph 12 of her affidavit:

> "I say that by letter dated 12th July 2021 the Respondent invited the Applicant to a meeting on the 16th July 2021. I say that by letter dated the 18th July 2021 the Applicant stated that attending a meeting was not possible, but suggested the 26th July 2021 at 10 a.m. as a meeting date and time."

14. Ms. Howard refers to those letters and then continues as follows:

> "The meeting occurred on the 26th July 2021 and the Applicant was informed what documents were required in order for him to make his claim for subsidies. I say that the requisite documents were not furnished."

15. That is as far as the affidavit evidence goes.

16. It appears from the submissions made today that the gist of the complaint made by the Applicant is that a senior official within the Department had given undertakings to revert to him in relation to certain matters. The Applicant indicated in his oral submission that his understanding was that this was to be done in a matter of weeks. The chronology of events subsequent to the meeting on 26 July 2021 has not been set out in the Applicant's affidavit. However, in response to a question from the court this morning, the Applicant indicated that he had put certain additional documentation before Meenan J.

17. In particular, it is said that correspondence, which had been sent to the Department but not responded to, had been brought to the attention of Meenan J. during the case management that occurred between March and June. None of this correspondence has been put formally before the court by way of affidavit. However, counsel on behalf of the Respondent, very reasonably, adopted the pragmatic position that the court could have regard to this material in circumstances where it had, seemingly, been before Meenan J.

18. This material indicates that on a semi-regular basis the Applicant was writing to the Department and seeking a response to the issues raised at the meeting on 26 July 2021. The Applicant had indicated an intention to apply for judicial review in December 2022. In the event, the within proceedings were not instituted until March 2023. Thereafter, following a process of case management, the High Court directed that the leave application be heard on notice. The application for leave came on for hearing before me today: 15 November 2023.

19. I turn, then, to discuss the merits of the case. The first issue to be addressed is whether the Applicant has made out an arguable ground for judicial review. It appears from the revised statement of grounds that the Applicant is seeking to have the High Court direct the Minister for Agriculture to "*engage*" with him. Although reference is made in the revised relief to the meeting on 26 July 2021, the relief sought is not confined to that meeting, and, in particular, is not confined to seeking a response to the undertaking supposedly provided at that meeting. In effect, what the Applicant is seeking from the court is a *mandatory order* directing a Minister of Government to engage with him in relation to his claim for subsidies. With respect, the Applicant has failed to make out any legal basis for such mandatory relief. The terms of the subsidy scheme are prescribed under EU legislation. The Applicant is, of course, entitled to apply under that legislation, and, relevantly, to avail of any rights of appeal provided. There is, however, no basis upon which this court could direct some sort of parallel engagement between the Applicant and the Minister. The Applicant's rights are those that are provided for under the scheme and no more. If the Applicant is dissatisfied with the decision reached in relation to an application for a subsidy under the scheme, then, having exhausted any right of appeal that he may have, he would be entitled, in principle, to seek judicial review. He is not, however, entitled to have the Minister engage with him directly in relation to these matters.

20. I have carefully considered whether the events of 26 July 2021 might be said to have given rise to some sort of legitimate expectation, whereby the Minister (or more correctly, the departmental officials) gave an undertaking to afford *additional* procedural rights to the Applicant, over and above those prescribed

under the legislation. However, there is nothing in the papers before the court which would justify such a conclusion. The description of the meeting as *per* the Applicant's grounding affidavit is sparse in the extreme. It is important to emphasise that it is the Applicant, as the moving party in these judicial review proceedings, who bears the onus of proof. If the Applicant had wanted to put forward some sort of argument based on legitimate expectation, it behoved him to set out on affidavit what it is that he alleges was said or promised at the meeting; how he relied on those promises; and how they were not complied with ultimately. None of that has been done: there is, as I say, the scantest reference to what occurred at the meeting. There is no proper evidential basis upon which this court could make orders against the Minister in that regard. Therefore, I am satisfied that the Applicant has failed to make out any arguable ground for the relief that he sought. It is simply not there on the papers: there is no basis for granting that relief and therefore leave must be refused.

21. For completeness, I should also address the issue in relation to time-limits. The Applicant's case is predicated largely on events of July 2021. However, these judicial review proceedings were not instituted until March 2023, which is a period of almost eighteen months later. Order 84, rule 21 of the Rules of the Superior Courts prescribes a three-month time-limit for the taking of judicial review proceedings. Clearly, that time-limit has been exceeded in this case. There might have been some debate at the margins as to when precisely it is that the Minister could be said to have been in default of the undertaking supposedly given at the meeting. The Applicant has indicated that his understanding is that the undertaking would be fulfilled, and information provided, within a matter of weeks. Therefore, had the proceedings been

issued some four or five months after July 2021, there might have been a debate then as to whether the Applicant was right to have allowed the Minister a period of one or two months before contemplating judicial review. Or to put it another way, the three-month time-limit for judicial review would not begin to run until the Minister had been allowed a reasonable period of time within which to comply with the undertakings he is said to have given at the meeting. However, that nuance falls away in circumstances of a delay of eighteen months. There can be no question of the proceedings having been brought within time.

22. The High Court does, of course, have discretion under Order 84, rule 21 to extend the time. However, the circumstances in which time can be extended are prescribed under the rules. An applicant is required to establish good and sufficient reason for an extension of time. An applicant is also required to show that the circumstances resulting in the delay were outside his control and could not have been reasonably anticipated by him.

23. The Applicant in the present case has not made any effort to explain the delay. All that has been done is to show to the court some correspondence which was being sent on a semi-regular basis to the Minister with no response. But, if anything, that points towards the need for the Applicant to have moved with expedition. The Applicant's case is that he simply was not getting any satisfaction from the Minister and the Department. Therefore, if he wanted to bring judicial review proceedings, he should have done so within three months of the elapse of a reasonable time for the Minister to respond. This is not a case where, for example, an individual had been engaging in active dialogue with a public body, and that individual had held off instituting judicial review

proceedings in the hope that that engagement might bear fruit. Here, the entire gravamen of the Applicant's case is that he simply was not being responded to by the Minister. Indeed, in his submissions, he describes it as if he had been "*sent to Coventry*". But having regard to all that, the need for expedition should have been obvious, and if he wished to bring judicial review proceedings, he should have brought them within the three months allowed.

24. In conclusion, therefore, I refuse leave to apply for judicial review on the basis, first, that there are no arguable grounds, and, secondly, and in any event, the application is out of time by reference to the three-month time-limit prescribed under Order 84, rule 21. I will hear any applications in relation to legal costs.

POSTSCRIPT: COSTS RULING

25. I will now deal with the issue of legal costs. The default position under Section 169 of the Legal Services Regulation Act 2015 is that a party who has been entirely successful is entitled to their costs. However, I am going to exercise my discretion and make no order for costs, for two reasons. First and foremost, I am dissatisfied with the nature of the affidavit evidence which was put forward by the Minister. This was a case where the application for leave was put on notice, that was done in the anticipation that the respondent would be of assistance to the court. In circumstances where the crucial issue in this case was the meeting of 26 July 2021, it is surprising, to put it charitably, that that is not dealt with in any meaningful way in the replying affidavit. There is no evidence from any departmental official who was at the meeting. The court will mark its displeasure at that omission by withholding costs which might otherwise have been awarded.

26. The second reason for making no order as to costs is one of more general application. It seems to me that the default position under Section 169 of the LSRA 2015 will not normally be appropriate in the context of a case, such as the present case, where the leave application had been put on notice. The leave application is ordinarily *ex parte*. That enures for the benefit of both parties. It is of benefit to a respondent in that, if the court is not convinced that there is an arguable case, leave will be refused and that represents a filter whereby public bodies are protected from frivolous or vexatious claims. But it also enures to the advantage of an applicant. An applicant is entitled to a preliminary view from the court as to whether or not his or her case has any merit. If it has no merit, then leave will be refused and no costs' liability will have been incurred because the application will ordinarily be *ex parte*. Here, for reasons which are sensible, the leave application was put on notice. I think it would be unduly harsh to make a costs award against an applicant in those circumstances.

27. For those two reasons, i.e. the paucity of the affidavit evidence supplied by the respondent, and the fact that these are judicial review proceedings in which the leave application would ordinarily be heard *ex parte*, I refuse the Minister's application for costs. Each party will instead bear their own costs. In conclusion, I will simply make an order refusing the application for leave with no further order.

Appearances

The applicant appeared as a litigant in person
Mema Byrne for the respondent instructed by the Chief State Solicitor

Approved Garrett Simons