THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 399 J.R.]

BETWEEN

PETER O'TOOLE

APPLICANT

AND

CHILD AND FAMILY AGENCY

FIRST NAMED RESPONDENT

AND

INDEPENDENT SOCIAL WORK SERVICES

SECOND NAMED DEFENDANT

JUDGMENT of Ms. Justice Ni Raifeartaigh delivered on the 11th day of October, 2017

Nature of the case

1. This is a case in which the applicant seeks an extension of time within which to bring judicial review proceedings, and *certiorari* of the decision of an appeal body of the HSE confirming a determination that an allegation of child sexual abuse against the applicant was "well founded." Essentially, if the applicant can overcome the hurdle in respect of the time limit for judicial review proceedings, he asks the Court to quash the determination of the appeal body on the basis that its decision was reached at a time when the applicant had an appeal pending before the Court of Appeal in respect of the appeal body's procedures (specifically regarding the issue of disclosure). He had been given notice that the appeal body would be holding a meeting but had failed to reply to this correspondence, and the appeal body had proceeded to an adverse determination in respect of him.

Time limit for judicial review and extensions of the time limit

2. As noted above, the applicant faces a preliminary difficulty by reason of the time limit for judicial review proceedings. Order 84, rule. 21 subs. 1 of the Rules of the Superior Courts as amended provides that an application for leave to apply for judicial review shall be made within three months from the date on which grounds for the application first arose. Subsection 2 provides that where the relief sought is an order of *certiorari* in respect of any judgment, order, conviction or other proceedings, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding. The decision which the applicant seeks to challenge in the present proceedings is a decision made by the appeal body on 29th February, 2016. He did not bring his application for judicial review until June 2016 and was therefore outside the three-month period at that stage.

3. Subsection 3 of rule 21 deals with extensions of time. It provides that notwithstanding subs. 1, the court may, on an application for that purpose, extend the period with which an application for leave to apply for judicial review may be made, but the court shall only extend such period if it is satisfied that:

> "(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 mentioned in sub-rule (1) either—
>
> (i) were outside the control of, or
>
> (ii) could not reasonably have been anticipated by the applicant for such extension."

4. Essentially the case made by the applicant with regard to the time limit is that he was not aware that the appeal body had made any decision or determination adverse to him until April 2017, in the circumstances described below. However, strange though this may seem, it does not appear that subs. 3 of r. 21 gives the Court any discretion to grant an extension of time on the basis that the applicant was not aware that a decision had been made. The matters set out in sub para. (a) and (b), as set out above, are cumulative, and therefore an applicant must satisfy both conditions in order to obtain an extension of time. Even if I were to take the view that the applicant *bona fide* did not realise from the correspondence that the appeal body had made a determination on the 29th February, 2016, this would probably satisfy the first condition of "good and sufficient reason", but it would not satisfy condition (b), namely that the circumstances which resulted in the failure to make the application were outside his control or could not reasonably have anticipated by him. In the present case, taking the applicant's case at its height, the circumstances that resulted in the failure to make the application were his mistake/lack of knowledge that a decision had been made. It seems to me that it would be artificially stretching condition (b) to say that its terms cover this situation. While it seems harsh that an applicant in such a situation is shut out from a judicial review by reason of the fact that he may have made a genuine error and did not understand the effect of a letter from the appeal body (namely that it consisted of an actual determination as distinct from a notice that a determination might be made in the future), I am constrained by the wording of r. 21. It seems to me that the wording of subs. 3 of r. 21 is very narrow and that the circumstances of the present case do not fall within it, unjust though that may appear.

5. I should perhaps set out the background to this matter to place the above in context. The background to the case is that there was a HSE investigation of allegations of sexual abuse made in respect of the applicant. The investigation commenced in 2012 and the somewhat complicated history of the matter is set out in the various affidavits and exhibits put before the court. At its simplest, the chronology can be divided into five distinct time periods (including the present judicial review proceedings as the fifth period).

6. The *first period* (13th August 2012 to September/October 2013) comprises the initial HSE investigation and determination, which took over one year. On the 13th August, 2012, the HSE received a complaint from or on behalf of a now adult female who had previously made allegations to the gardaí that she had been sexually abused by the applicant some decades earlier, when she was a child. There then followed an investigative process in accordance with the HSE's own procedures, carried out by an individual named

Mr. Tommy McLarnon. One of the unusual features of this investigation was that the applicant, when requested to disclose certain medical records which would have assisted with ascertaining dates relevant to one of the allegations, declined to do so. At that stage of the process he was not represented by counsel. He denied the allegations. At the conclusion of his investigation, Mr. McLarnon determined that the allegation of sexual abuse was "well founded", employing the terminology used in such investigations. This conclusion was set out in a report dated the 2nd September, 2013 and was communicated to the applicant by way of a letter dated the 18th September, 2013. This letter indicated that it was a 'provisional determination' and invited the applicant's response. No response was forthcoming within the time period set out. Accordingly, this 'provisional determination' became a 'final determination', which was communicated to the applicant by a letter dated the 2nd October, 2013.

7. The *second period* of time runs from approximately November 2013 to November 2015, and covers the commencement, and pre-hearing phase, of an appeal within the HSE. The applicant, following an exchange of correspondence in October 2013, had indicated by letter in November 2013 that he wished to avail of the appeal procedures within the HSE system itself. There is a HSE document which sets out the procedures for such an appeal, which I have had an opportunity to examine, and this was furnished to the applicant in the course of the pre-hearing phrase. This document makes it clear that it is not envisaged as part of the process that there would be any oral hearing at which the complainant would be questioned by, or on behalf of, the applicant. An applicant can choose to make written submissions or can attend at a meeting/hearing at which oral representations are made by him.

8. Notable features of this second period of time are that counsel was instructed on behalf of the applicant, and that there was a lengthy exchange of correspondence between the solicitor for the applicant and the solicitors for the HSE. In particular, the letters on behalf of the applicant show that the view being put forward was that disclosure from the HSE was inadequate and that disclosure along the lines of disclosure required in a criminal investigation and prosecution should be carried out. The correspondence is characterised by bitter complaints on behalf of the applicant, on the one hand, about the disclosure process, and queries by the solicitors on behalf of the appeal body, on the other, for information as to why particular matters sought by way of disclosure were considered relevant for the purposes of the appeal. The applicant, being dissatisfied with how matters were progressing, then instituted judicial review proceedings in the High Court.

9. This leads into the *third period*, into which I place the unsuccessful application for judicial review before Humphreys J. The judgment of Humphreys J., dated the 15th February, 2016, has been made available to me. It appears that while Humphreys J. was somewhat sympathetic to the disclosure issues raised on behalf of the applicant, the reason he refused to grant leave to bring judicial review proceedings was because the applicant refused to swear an affidavit. His solicitor had sworn an affidavit for the purpose of judicial review proceedings, and the court explicitly invited the applicant to swear an affidavit, but he declined to do so. In those circumstances Humphreys J. considered that it would be inappropriate to exercise this discretion in favour of granting leave to the applicant. Judgment was given on the 15th February, 2016, and the order refusing leave was perfected on the 15th June, 2016.

10. The *fourth period* consists of events in February, March and April, 2016. The applicant lodged an appeal to the Court of Appeal shortly after the perfection of the order of Humphreys J. A notice of appeal to the Court of Appeal against the decision of Humphreys J. was lodged on the 26th February, 2016. I note that no stay appears to have been sought from the Court of Appeal in respect of the appeal before the HSE appeal body. Meanwhile the appeal body gave notice that they would conduct their meeting/hearing on a particular date. The applicant did not respond to this letter inviting him to the meeting/hearing. As a result of his silence in response to their invitation to the meeting/hearing, the appeal body decided to confirm the determination that had been made by the original investigator, namely the determination that the allegation of child sexual abuse was well founded. The appeal body notified the applicant of this by letter dated 29th February, 2016. However, the applicant now claims not to have realised that this was in fact a letter notifying him of a determination as such, but believed instead that this was an indication that they might do so in the future. The letter states "The appeal panel received no response from you or on your behalf to our letter dated 17th February, 2016 sent to you by registered post. A meeting had been arranged with the Appeal Panel at Social Work Department, Enterprise, Trim Road, Navan, Co. Meath on Thursday, 3rd March 2016 at 11.00am. It was requested you respond within 7 days as we are required to confirm the venue booking etc. As you have not engaged with your requested appeal the Appeal Panel now proposes to close this file and the original conclusion stands."

11. The appeal body then lodged a notice of opposition to the appeal that had been lodged before the Court of Appeal on the 22nd April, 2016 in which it said that because of the determination made on the 29th February, 2016 the appeal was now moot. The applicant says that it was only at this stage that it was realised by him and his legal team that a determination had actually been made. Only then did he move to bring judicial review proceedings, although even then, this was done only after the lapse of a further month.

12. An *ex parte* application dated the 7th June, 2016 brings us into the *fifth period*, namely the period encompassed by the present judicial review proceedings. The orders sought by the applicant included an order for an extension of time for leave to apply for judicial review and an order of *certiorari* quashing the findings and determination of the second named respondent.

13. That particular application was grounded upon an affidavit sworn by the applicant himself. Leave to seek the above-mentioned relief was granted by Humphreys J. on the 13th June, 2016, the papers were duly served, and a statement of opposition appears to have been filed in November, 2016. A preliminary objection was raised by the respondent based upon the time limit for judicial review.

14. In written submissions filed on behalf of the applicant, there is no mention of the extension of time application. In oral argument, Counsel relied on the applicant's lack of awareness that the letter of the appeal body dated the 29th February, 2016. consisted of a determination as distinct from notice of an intention that it might make such a determination in the future.

15. These, then, are the events giving rise to the time limit issue described at the outset of this judgment. As I have indicated, it does not appear to me that the strict wording of subs. 3 of r. 21 can be stretched to cover the circumstances of the applicant in the present case, and accordingly I feel compelled to refuse the grant of an extension of time, although in view of the seriousness of the matters in issue before the HSE, this is an outcome I find unsatisfactory.

The substantive arguments in this judicial review

16. If it were not for the time limit issue, I would have decided the matter in favour of the applicant, albeit reluctantly. The applicant's engagement with the HSE throughout the investigative process left much to be desired. Further, it does not reflect well on him that he refused to swear an affidavit in the first set of judicial review proceedings and was to that extent the author of his own misfortune in having to bring an appeal to the Court of Appeal in the first place. He then proceeded to make no response or ignore the letter dated the 17th February, 2016 from the appeal body setting a date for the hearing/meeting. He did not ask the Court of Appeal for a stay on the HSE appeal, and he did not formally ask the appeal body itself for a stay of the hearing pending the outcome of the appeal before the Court of Appeal. There was mention at the oral hearing that there had been an informal encounter with a legal adviser from which the applicant made the assumption that the appeal body would not proceed to a determination while the appeal

before the Court of Appeal was pending. This does not excuse the absence of a formal request for a stay.

17. However, a finding that a person has committed child sexual abuse is a grave matter and carries significant consequences. Although the applicant did not formally request a stay, the appeal body was apparently in fact aware that the appeal had been lodged with the Court of Appeal. Further, it is the case that there was no explicit warning that a determination would be made if he did not attend the meeting/hearing, and it is also the case that the language used in the letter of the 29th February, 2016 was somewhat ambiguous in the use of the word "proposes." In all of the circumstances, although each of the parties has accused the other of failing to engage with the issues raised by it, it seems to me that there may have been an element of their having been at cross purposes, and that a matter as serious as this should not be determined in a sense, by default, simply because the applicant did not make himself available for a particular hearing/meeting. However, it seems to me that I am bound by the words of O. 84, r. 21 subs. 3 and it is not possible for me to allow the matter to proceed in the circumstances.

18. In the circumstances, I am of the view that I am constrained and refuse the relief sought by reason of the applicant's failure to fall within the conditions prescribed by the Rules of the Superior Courts for a successful application for extension of time within which to seek leave.