APPROVED **[2021] IEHC 552**

THE HIGH COURT
JUDICIAL REVIEW

2020 No. 619 JR

BETWEEN

MICHAEL WATERS

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA
THE DIRECTOR OF PUBLIC PROSECUTIONS
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 25 August 2021

INTRODUCTION

1. These judicial review proceedings seek to challenge the validity of a criminal conviction entered against the applicant and since upheld on appeal.

2. The applicant stands convicted of a single offence of assault causing harm contrary to section 3 of the Non-Fatal Offences against the Person Act 1997. This conviction was entered following a three-day trial before a judge and jury in the Circuit Court in June and July 2013. This conviction was upheld on appeal by the Court of Appeal in a detailed written judgment delivered on 1 June 2017, *People (Director of Public Prosecutions) v. M.W.* [2017] IECA 175. An

application for leave to appeal to the Supreme Court was refused on 6 July 2018, *Director of Public Prosecutions v. W.* [2018] IESCDET 99.

3. The applicant remains aggrieved as to the manner in which disclosure had been made in the context of the proceedings before the Circuit Court. Notwithstanding that this issue was fully ventilated before the Court of Appeal and the conviction upheld, the applicant now seeks an order of *certiorari* quashing the conviction.

4. The respondents have raised two procedural objections in their opposition papers. First, it is said that the judicial review proceedings represent an abuse of process and a collateral challenge to the judgment of the Court of Appeal. Secondly, in any event, the proceedings are said to have been brought out of time. Order 84, rule 21 of the Rules of the Superior Courts prescribes a three-month time-limit for judicial review.

5. The application for judicial review came on for hearing before me on 29 July 2021. The parties were requested to address the two procedural objections first. Judgment was reserved to today's date.

6. Finally, it should be noted that the parties are all agreed that there is no requirement to redact the title of these proceedings nor any need for reporting restrictions.

THE CRIMINAL PROCEEDINGS

7. The criminal proceedings arise out of an incident on 4 January 2012. In order to understand this incident, however, it is necessary to commence the narrative at an earlier stage. This narrative is taken from the judgment of the Court of Appeal, which in turn prepared the narrative from the transcript of the evidence before the Circuit Court.

8. The applicant and his estranged partner are the parents of a young child. It seems that an arrangement had been entered into between the parents whereby the applicant would be permitted to collect their child from a crèche on certain days. The arrangement involved the mother telephoning the manager of the crèche in advance to advise her that the applicant would be collecting the child.

9. On 3 January 2012, the manager of the crèche received an email from the mother revoking permission for the applicant to take the child from the crèche. The applicant attended at the crèche the next day (4 January 2012) and was not allowed to collect the child. There then followed an altercation between the applicant and members of the staff of the crèche. In the course of this altercation, the manager of the crèche suffered certain injuries to her nose. (At the subsequent trial, the manager would give evidence that the applicant had headbutted her straight into the face).

10. An Garda Síochána were called and arrested the applicant at the scene.

11. The applicant was subsequently charged, and ultimately convicted of a single offence of assault causing harm contrary to section 3 of the Non-Fatal Offences against the Person Act 1997. This conviction was entered following a three-day trial before a judge and jury in the Circuit Court in June and July 2013. By order dated 11 October 2013, the Circuit Court imposed a three-year sentence of imprisonment, suspended for a period of three years.

12. Thereafter, the applicant filed an appeal against his conviction and sentence to the Court of Appeal. (The appeal against sentence was ultimately withdrawn).

13. Prior to the full hearing of the appeal before the Court of Appeal, the Office of the Director of Public Prosecutions, on dates in May and October 2016, furnished the applicant with additional material in the form of two witness statements taken

by An Garda Síochána in respect of a separate incident at the crèche, and handwritten notes prepared by members of the staff of the crèche facility in January 2012 and a handwritten note prepared by the manager in March 2012. This material had not been furnished to the applicant in advance of the trial before the Circuit Court in June/July 2013. The Director acknowledges that this material should have been provided.

14. One of the principal grounds of appeal advanced before the Court of Appeal had been that the applicant had been prejudiced in his defence by the non-disclosure of this material. In particular, it was asserted by the applicant that the undisclosed witness statement could have been used to cross-examine the complainant, i.e. the manager of the crèche facility, and to demonstrate that she was an unreliable narrator prone to making improbable complaints.

15. The Court of Appeal, having noted that the undisclosed witness statement related to a different incident at the crèche, held that the ground of appeal did not engage with the actual evidence adduced in support of the prosecution case nor with the defence that had actually been advanced. It had never been put to the prosecution witnesses that they had fabricated their evidence or were in collusion *inter se* or with the complainant. In the circumstances, the Court of Appeal found it hard to see how the witness statement would have been deployed in support of the defence actually run. Moreover, the undisclosed witness statement did not, in fact, establish that the complainant was an unreliable narrator prone to making improbable complaints.

16. As to the handwritten notes from March 2012, the Court of Appeal again noted that these related to a different incident. The court held that while the document ought to have been disclosed, there was no evidence to suggest that the document

had been deliberately withheld or concealed. It was further held that there was no reality to the submission that the handwritten notes could have been deployed for the purpose of demonstrating that it was inconsistent in certain matters of detail with the formal statements given to An Garda Síochána, with a view to demonstrating that the complainant was an unreliable historian.

17. The Court of Appeal also rejected a submission that the handwritten notes revealed that a relative of the complainant had made an improper intervention in the decision to prosecute.

18. Insofar as a separate series of handwritten notes made by the members of the staff of the crèche facility (including the complainant) in January 2012 were concerned, the Court of Appeal held as follows (at paragraphs 130 to 132).

> "Overall Impression
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> This Court has considered, in the case of each of the witnesses in question, the undisclosed statements, the formal statements made to An Garda Síochána, and the testimony actual given before the jury. None of the undisclosed statements contains a dramatic inconsistency in the true sense of containing something radically different from what was said on another occasion. There are some differences certainly in terms of the detail provided, and in the way in which minutiae of the event are described or characterised; but the fact that in describing the same event on two or more occasions different phraseology or adjectives are used, or that some point or points of detail are either omitted or added, does not render the statements in question necessarily inconsistent.
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> We are satisfied that the appellant in complaining about the non-disclosure of the statements of the 4th of January 2012, which we agree was regrettable, has not engaged with the evidence actually given at the trial and demonstrated how the undisclosed material might realistically have made a difference to the outcome. He has not said he would defend the case differently had he known about this material, nor has he been able to persuade us that it discloses the sort of radical or dramatic inconsistency or inconsistencies that might have fatally undermined the testimony of one or more of the relevant witnesses.

> We are not therefore disposed to uphold the general complaint in ground of appeal No 2 that non-disclosure of the statements of the 4th of January 2012 resulted in unfairness to the appellant and consequently rendered the trial unsafe and unsatisfactory. We dismiss ground of appeal no 2."

19. The applicant had issued a motion, within the appeal proceedings, seeking the disclosure of certain specified documents. This motion issued on 14 July 2016 and had been heard by the Court of Appeal on 22 February 2017. The Court of Appeal refused the motion for disclosure and indicated that the reasons for this refusal would be given at the same time that the court gave its decision on the appeal. The applicant is critical of the manner in which this motion is dealt with in the judgment of 1 June 2017, describing the approach as "confused".

20. The applicant applied for leave to appeal to the Supreme Court against the Court of Appeal's judgment of 1 July 2017. The Supreme Court refused leave by written determination dated 6 July 2018, *Director of Public Prosecution v. W.* [2018] IESCDET 99.

21. Relevantly, the Supreme Court expressly addressed the question of non-disclosure as follows in its determination (at paragraphs 21 and 22).

> "The Court is not satisfied that any of the issues raised by the applicant reach the constitutional threshold for a further appeal to this Court. The Court of Appeal meticulously analysed each of the undisclosed statements in great detail and concluded that they could not have availed the applicant even if he had had possession of them before his jury trial. That was the clear basis for the outcome of the appeal and is itself sufficient to dispose of this application insofar as it purports to raise matters of general public importance. The decision was one entirely specific to the facts of this particular case. The outcome of the judgment turned on those facts and no great issue was taken with the law to be applied by the Court of Appeal. In this sense the judgment in question has little application beyond the circumstances of this case. Indeed the principles in respect of the obligation on prosecuting authorities to seek out and preserve relevant evidence are particularly well-trodden ground for this Court and the

> applicant has not demonstrated that any of the issues raised by him require the Court to revisit that area of the law.
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> Similarly, the Court is not of the view that any issue concerning third party disclosure or the test for the admission of newly discovered evidence arises on this case which meets the constitutional threshold. The applicant has not highlighted any uncertainty or ambiguity in the law arising out of the judgment of the Court of Appeal. Moreover, even if an otherwise suitable point was raised in this regard, it would not be appropriate to grant leave on any such issue in this case in light of the critical finding that none of the documents in question would have had an effect on the jury verdict in any event. Thus notwithstanding the failure to disclose the said documents, in no sense could it be said that the applicant's trial was unfair or that his conviction is unsafe."

22. The Supreme Court also rejected an argument that the Court of Appeal hearing was defective in a number of ways that went beyond mere "error" and amounted to proceedings so defective that it would be contrary to the interests of justice for the Supreme Court not to hear the appeal. See paragraphs 24 and 25 of the determination as follows.

> "The Court is not satisfied that any of these points reaches the threshold for a further appeal. First, this Court has previously indicated that procedural and case management matters will satisfy the constitutional threshold for leave to appeal only in 'exceptional circumstances' (see *Dowling & ors v. Minister for Finance* [2015] IESC DET. 13 and *Lyons v. Ireland* [2015] IESC DET. 38). The Court is not satisfied that any such circumstances exist in the within case. The direction in respect of the filing of written submissions was within the discretion of the Court of Appeal, particularly in circumstances where the applicant had repeatedly delayed in progressing his appeal. Second, it was not necessary for the Court of Appeal to deal with the disclosure motion given the manner in which it had disposed of the appeal, and in particular its finding that there had been no deliberate non-disclosure. Third, the applicant was not prejudiced by the remarks of the appeal judge at the outset of the hearing 'blaming' him for what had happened at the crèche. While it is true that this Court has acknowledged that matters which arise for the first time on appeal may reach the 'interests of justice' threshold in light of the fact that no appeal therefrom would otherwise exist, this is not such an occasion. Indeed

> the applicant did not seek to have the judge recuse himself from hearing the appeal or make any objection at the time, which steps were known to be open to him if he had been of the view that he could not get a fair hearing.
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> Moreover, the Court does not see any relevance to the accused's argument regarding the fact that the original prosecutor of the case has deceased and thus was not available to the Court of Appeal to discuss matters of non-disclosure; such matters were nonetheless fully explained to the Court of Appeal, which accepted that the reasons for same were inadvertence and the fact that the investigating and prosecutorial authorities did not know of the relevant documents, which were in the complainant's private file. It is not clear what further explanation could have been required."

23. The Supreme Court's determination brought the criminal proceedings to an end.

SUBSEQUENT EVENTS

24. Notwithstanding that his complaints in respect of the non-disclosure of the witness statements and handwritten notes had been carefully considered by the Court of Appeal, and the fairness of his conviction upheld in a comprehensive judgment, the applicant continues to insist that his conviction is undermined by the non-disclosure and should be set aside in these judicial review proceedings.

25. The applicant has also made complaints to the Minister for Justice; the Director of Public Prosecutions; and the Commissioner of An Garda Síochána.

26. The Commissioner of An Garda Síochána appointed a superintendent to inquire into the complaint. The applicant was notified of the outcome of that investigation by letter date-stamped 11 December 2019, as follows.

> "With reference to your correspondence, addressed to the Garda Commissioner, dated 3rd September 2018, I can inform that a thorough investigation has been conducted into the matters raised in same by a member of An Garda Síochána, independent of the original investigation.
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> The material contained in the substantial Garda files pertaining to your allegations has been fully considered. The

> allegations have been carefully examined and I can conclude that, throughout all the investigations undertaken by Garda Members, no act of commission or omission was performed that would have impinged upon your constitutional rights or where proper procedure was not applied."

27. Both the Director of Public Prosecutions and the Minister, respectively, declined to entertain the applicant's complaints, albeit for different reasons as follows.

28. The Director of Public Prosecutions, by letter dated 1 August 2018, deemed the complaint to be invalid in that it sought to re-litigate matters which were dealt with by the court of trial, the Court of Appeal and the Supreme Court.

29. The Minister's private secretary, by email letter dated 18 September 2018, explained that the office of Director of Public Prosecutions is an independent office. This position was reiterated in further correspondence dated 18 October 2018 and 20 November 2018.

30. The upshot of these various complaints and the responses thereto was that, as of 11 December 2019, the complaints made by the applicant had all been rejected. The applicant now seeks declarations that the determinations of 1 August 2018; 18 September 2018; and 11 December 2019 are invalid or violate his rights.

31. The within proceedings were instituted by way of an *ex parte* application for leave to apply for judicial review. The High Court (Barr J.) granted leave to apply on 28 September 2020. A return date was fixed for 17 November 2020. The applicant failed to issue and serve a notice of motion in accordance with the directions of the court. This necessitated the making of an application to the High Court (Meenan J.) on 23 November 2020 for a new return date of 19 January 2021.

32. The application for judicial review ultimately came on for hearing before me on 29 July 2021.

GROUNDS OF OPPOSITION

33. The Director of Public Prosecutions is represented separately to the other respondents. The Director filed a comprehensive statement of opposition on 4 February 2021. In addition to addressing the substance of the challenge, the Director has raised a series of procedural objections to the proceedings. It is pleaded that the proceedings represent an abuse of process as they are an attempt to convert the function of the High Court on judicial review into a further court of appeal whereby the applicant seeks to relitigate matters the subject of the criminal proceedings. It is said that the application for judicial review is misconceived in circumstances where criminal proceedings against the applicant have proceeded to finality on appeal. The invocation of judicial review proceedings to quash the conviction is inappropriate given the subsisting decision of the Court of Appeal.

34. It is further pleaded that the repetition of the allegations made by the applicant against the Director of Public Prosecutions are an abuse of process and the matters raised are *res judicata*.

35. It is expressly pleaded that the applicant is out of time to seek the reliefs sought.

36. A similar plea is contained in the statement of opposition filed on behalf of the other respondents on 5 February 2021.

37. These procedural objections have been elaborated upon in the written submissions filed by the respondents in advance of the hearing on 29 July 2021.

DETAILED DISCUSSION

COLLATERAL CHALLENGE TO COURT OF APPEAL'S DECISION

38. These judicial review proceedings are inadmissible as an abuse of process in that they involve a collateral challenge to the decision of the Court of Appeal. It is readily apparent from the written legal submissions filed by the applicant on 20 July 2021 that he seeks to use these judicial review proceedings as a vehicle to reagitate the grounds of appeal rejected by the Court of Appeal. Some six pages of the written submissions are dedicated to an attempt to demonstrate that his conviction by the Circuit Court is "already undermined". The content of the written legal submissions closely resembles the arguments which had been advanced before—and rejected by—the Court of Appeal (as summarised in the judgment of 1 July 2017). In his oral submission to this court, the applicant was highly critical of what he perceives to have been errors on the part of the Court of Appeal.

39. The principal relief sought in the judicial review proceedings is an order of *certiorari* quashing the conviction. Crucially, this conviction has been upheld by the Court of Appeal and the Supreme Court have refused leave to appeal against the decision of the Court of Appeal. The criminal proceedings are thus concluded. In effect, what the applicant seeks to do is to have the High Court, under the guise of judicial review proceedings, overrule the decision of the Court of Appeal. The High Court has no jurisdiction to do so.

40. The only circumstances in which the High Court could have had any possible role in the criminal proceedings is if the applicant had instituted judicial review proceedings in 2013 challenging the validity of the Circuit Court order, instead of exercising his right of appeal to the Court of Appeal. Had this been done, the

High Court would, in principle, have had jurisdiction to review the legality of the conviction.

41. In practice, had the applicant instituted judicial review proceedings at that time, there is a significant likelihood that same would have been dismissed on the basis that an appeal to the Court of Appeal represents an adequate alternative remedy. The Supreme Court has made it clear in its decision in *E.R. v. Director of Public Prosecutions* [2019] IESC 86 that recourse should only be had to judicial review in criminal proceedings in exceptional cases. In most instances, an accused is expected to pursue the architecture provided for criminal proceedings including, relevantly, an appeal to the Court of Appeal.

42. It is academic now as to whether or not such an application for judicial review in 2013 would have been dismissed on the basis of the existence of an adequate alternative remedy. This is because the fact of the matter is that the applicant did not institute judicial review proceedings at that time; but instead pursued to conclusion his right of appeal to the Court of Appeal. The High Court has no jurisdiction to review a decision of the Court of Appeal. The Court of Appeal is a superior court of record and is not amenable to the High Court's judicial review jurisdiction.

43. If and insofar as authority is needed for a proposition that is so trite and obvious, same is to be found in Hogan, Morgan and Daly, *Administrative Law in Ireland* (Fifth edition, Round Hall, 2019) and in the case law cited therein. The learned authors summarise the position as follows (at §18–14).

> "One important limitation to the scope of judicial review ought to be immediately stated: it is not available to review a decision of a superior court of record. Thus, decisions of the High Court, Court of Appeal and the Supreme Court cannot be reviewed by means of judicial review. The High Court's power of judicial review is an inherent one which is designed

> to ensure that inferior courts, tribunals, university visitors (subject to justiciability arguments), Oireachtas committees, and other bodies exercising public functions do not exceed their jurisdiction. However, judicial review will lie to quash decisions of officers such as the Master of the High Court or a Taxing Master, as it has been held that the High Court is not thereby making an order against itself or any other 'superior court', but rather against an officer 'attached' to the High Court."
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> *Footnotes omitted.

44. A party who is dissatisfied with a decision of the Court of Appeal is entitled to apply to the Supreme Court for leave to appeal in accordance with Article 34.5.3° of the Constitution of Ireland. The applicant availed of this entitlement. The Supreme Court refused leave by written determination dated 6 July 2018, *Director of Public Prosecutions v. W.* [2018] IESCDET 99. The relevant passages from the determination have been set out earlier (at paragraphs 20 to 22 above). As appears, the Supreme Court rejected an argument that it would be contrary to the interests of justice for the Supreme Court not to hear the appeal.

45. The applicant has sought to get around the obvious difficulties in his case by suggesting that different considerations apply where the complaint being made is that there has been suppression of documentation by the prosecuting authorities. The implication here being that the High Court should be prepared to exercise an enlarged jurisdiction. With respect, this argument is untenable. A precise statutory remedy has been prescribed for alleged miscarriages of justice. The Criminal Procedure Act 1993 provides a procedure whereby a person who has previously brought an unsuccessful appeal to the Court of Appeal may invoke that court's jurisdiction once again where the statutory criteria are met.

46. Put otherwise, the remedy provided for an alleged miscarriage of justice is to reapply to the Court of Appeal. The High Court does not have a function, at first

instance, in determining whether there has been a miscarriage of justice. It is only in cases where the Court of Appeal has previously directed a retrial in the High Court that the latter court has a function under the Criminal Procedure Act 1993. In that specific contingency, the High Court can certify a miscarriage of justice under section 9 of the Act.

47. The applicant had initially made a submission, based on a misreading of the judgment of the High Court (Owens J.) in *People (Director of Public Prosecutions) v. Abdi* [2020] IEHC 434, to the effect that the High Court had a wider role. In his reply, however, the applicant fairly acknowledged that this submission is incorrect.

48. It follows, therefore, that the High Court has no function in determining whether or not there has been a miscarriage of justice as alleged by the applicant in respect of these proceedings. It is incorrect, therefore, for the applicant to suggest that this is a case of miscarriage of justice and that the normal rules in relation to the limitations on judicial review, the hierarchy of courts and *stare decisis* do not apply. The judicial review proceedings must be dismissed as representing an abuse of process.

49. Finally, for the sake of completeness, it should be recalled that the allegation that the accused had been prejudiced in the defence of the criminal proceedings (as a result of the non-disclosure of the witness statements and handwritten notes) has been roundly rejected by the Court of Appeal in its comprehensive judgment of 1 June 2017. The Court of Appeal also rejected any suggestion that documentation had been deliberately withheld or concealed.

THREE-MONTH TIME-LIMIT

50. Given the above finding that the proceedings represent an abuse of process, it is not strictly speaking necessary to address the separate procedural objection that the application for judicial review has been made out of time. Nevertheless, I propose to address the issue *de bene esse* so as to ensure that, in the event of an appeal, all matters are before the appellate court.

51. Order 84, rule 21(1) of the Rules of the Superior Courts provides that an application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose. Order 84, rule 21(2) provides, relevantly, that where the relief sought is an order of *certiorari* in respect of any conviction, the date when grounds for the application first arose shall be taken to be the date of that conviction.

52. The principal relief sought in these proceedings is an order of *certiorari* quashing the conviction of the applicant by the Circuit Court on 11 October 2013. The three-month time-limit thus began to run from that date. Yet the application for leave to apply for judicial review was not made until 28 September 2020, that is almost eight years later. The proceedings are thus hopelessly out of time.

53. If and insofar as it is suggested that the delay is explicable, in part, by reference to the fact that the applicant had been pursuing his appeal to the Court of Appeal, this rather misses the point. As explained under the previous heading, the consequence of pursuing the appeal to conclusion was to foreclose the possibility thereafter of an application for judicial review. Far from justifying the delay, the exhaustion of the right of appeal has cut off judicial review as a remedy. For the purpose of the discussion which follows, however, this jurisdictional difficulty will be left to one side temporarily and the time issue addressed in isolation. It

should be emphasised that the discussion which follows is entirely hypothetical (unless and until my first finding is overturned on appeal).

54. The criminal proceedings had come to a conclusion on 6 July 2018, with the determination refusing leave to appeal to the Supreme Court. To comply with the time-limit, an application for judicial review should have been made within three months of that date. Instead, it was not actually moved for another two years and three months. Even on this analysis, therefore, the applicant is out of time.

55. The analysis is not altered by the existence of the claims for declaratory relief. First, the declarations sought at paragraphs (d) (2) to (5) of the statement of grounds are all predicated on the argument that the trial before the Circuit Court had been unfair and the conviction invalid. The claims cannot, therefore, be severed from the principal relief sought in the proceedings. Secondly, and in any event, the declarations sought at paragraphs (d) (2) to (5) all relate to determinations which had been notified to the applicant more than three months prior to the institution of these judicial review proceedings.

56. As summarised at paragraphs 24 *et seq*., the applicant made complaints to a number of public authorities in August 2018. As of 11 December 2019, the complaints made by the applicant had all been rejected. The applicant now seeks declarations that the determinations of 1 August 2018; 18 September 2018; and 11 December 2019 are invalid or violate his rights. The applicant is out of time to challenge these determinations. The application should have been brought within three months of the date of the respective determinations.

57. The applicant has also sought a declaration of incompatibility pursuant to section 5 of the European Convention on Human Rights Act 2003 ("***ECHR Act***

2003"). The terms of the declaration sought are set out as follows at d (6) of the statement of grounds.

> "A declaration under Section 5 of the European Convention on Human Rights Act 2003 that the lacuna in Irish Criminal Law whereby an accused has no right to obtain evidence in the possession of non-parties/witnesses in the book of evidence, which only comes to his attention post conviction (and so he cannot ask a Judge to halt a Prosecution), is incompatible with the state's obligations under the Irish Constitution and European Convention on Human Rights to ensure full disclosure and a fair Criminal trial.
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> or in the alternative, a declaration as to the powers that the Garda Commissioner and/or the Director of Public Prosecutions and/or Minister for Justice has to obtain discovery against witnesses in the book of evidence post any conviction."

58. It should be explained that the legal effects of a declaration of incompatibility, if granted, are very limited. It is expressly provided that a declaration of incompatibility shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made. Relevantly, the grant of a declaration of incompatibility will not affect the continuing validity of any criminal conviction notwithstanding that such conviction may have been predicated, in part, on the statutory provision or rule of law held to be incompatible. The attenuated status of a declaration of incompatibility reflects the fact that the principal remedy open to a party who wishes to challenge the validity of legislation is under the Constitution of Ireland.

59. The ECHR Act 2003 does not prescribe a specific time-limit for applying for a declaration of incompatibility. Nor does it prescribe a particular form of proceedings: it is not, for example, mandatory to go by way of judicial review. Rather, section 5(1) provides that a declaration of incompatibility may be made in "any proceedings" before the High Court or an appellate court.

60. The applicant has chosen to seek a declaration of incompatibility by way of an application for judicial review. Approaching the matter from first principles, it would seem to follow that the time-limits prescribed for such proceedings under Order 84 must be complied with. Put otherwise, the *ex parte* application for leave to apply for judicial review should have been made within three months from the date when grounds for the application first arose. It is apparent from the grounds pleaded in support of the declaration of incompatibility that the gravamen of the applicant's complaint relates to events at the time of his trial before the Circuit Court. The applicant implies that the European Convention on Human Rights confers a right to obtain evidence in the possession of non-parties/witnesses in advance of a criminal trial. It is then said that the right to disclosure (under domestic law) has in practice been replaced with discretionary power to obtain evidence in the possession of witnesses.

61. The applicant's criminal trial took place in June and July 2013. The application for leave to apply for judicial review was not made until September 2020. It follows that the claim for a declaration of incompatibility is years out of time.

62. Even if one calculates time by reference to the later date of the determination of the criminal proceedings, i.e. following the exhaustion of all rights of appeal, these judicial review proceedings are still out of time. The criminal proceedings came to a conclusion in July 2018 with the determination of the Supreme Court.

63. It should be explained that the allegation that domestic criminal law is in some way incompatible with the European Convention for Human Rights has only been raised for the first time in the judicial review proceedings. Critically, it did not feature as part of the arguments being advanced in the criminal proceedings. The Supreme Court determination of July 2018 expressly records the fact that the

applicant had not sought a declaration of incompatibility as part of those proceedings.

WHETHER TIME SHOULD BE EXTENDED

64. Order 84, rule 21(3) and (4) confer discretion on the High Court to extend time as follows.

> "(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:
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> (a) there is good and sufficient reason for doing so, and
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> (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either:
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> (i) were outside the control of, or
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> (ii) could not reasonably have been anticipated by the applicant for such extension.
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> (4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party."

65. The Supreme Court in *M. O'S. v. Residential Institutions Redress Board* [2018] IESC 61; [2019] 1 I.L.R.M. 149 ("***M. O'S.***") has confirmed that an applicant, who does not apply for leave to issue judicial review within the time specified, is required to furnish good reasons which explain and objectively justify the failure to make the application within the time-limit, and which would justify an extension of time up to the date of institution of the proceedings.

66. The majority judgment in *M. O'S.* (at paragraph 60 thereof) contains the following statement of general principle as to the exercise of the court's discretion.

> "I have concluded that the case law cited above, insofar as it applies to the extension of the time specified under Ord.84 for the bringing of judicial review proceedings, makes clear that the jurisdiction which the court is to exercise on an application to extend time is a discretionary jurisdiction which must be exercised in accordance with the relevant principles in the interests of justice. It clearly requires an applicant to satisfy the court of the reasons for which the application was not brought both within the time specified in the rule and also during any subsequent period up to the date upon which the application for leave was brought. It also requires the court to consider whether the reasons proffered by an applicant objectively explain and justify the failure to apply within the time specified and any subsequent period prior to the application and are sufficient to justify the court exercising its discretion to extend time. The inclusion of sub-rule (4) indicates expressly that the court may have regard to the impact of an extension of time on any respondent or notice party. The case law makes clear that the court must also have regard to all the relevant facts and circumstances, which include the decision sought to be challenged, the nature of the claim made that it is invalid or unlawful and any relevant facts and circumstances pertaining to the parties, and must ultimately determine in accordance with the interests of justice whether or not the extension should be granted. The decision may require the court to balance rights of an applicant with those of a respondent or notice party. The judgments cited do not, in my view, admit of a bright line principle which precludes a court taking into account a relevant change in the jurisprudence of the courts when deciding whether an applicant has established a good and sufficient reason for an extension of time. Further, the judgments cited above do not envisage any absolute rule in relation to what may or may not be taken into account or constitute a good reason or a good and sufficient reason. The court, in an application for an extension of time, is exercising a discretionary jurisdiction and in the words of Denham J. in *De Roiste*, '[t]here are no absolutes in the exercise of a discretion. An absolute rule is the antithesis of discretion. The exercise of a discretion is the balancing of factors – a judgement.'"

67. I turn now to apply these principles to the circumstances of the present proceedings. The making of an application for an extension of time was only mooted for the first time by the applicant during the course of the hearing on 29 July 2021. The applicant circulated a document during the lunchtime adjournment which set out the basis for an extension of time as follows.

> "Further that **time be extended*** in respect of all of the reliefs sought on grounds of the paramount interests of justice, that the subject matter of suppressed evidence should not generally be hampered by strict time limits, and the active steps taken by the Applicant at all stages to secure an investigation into the circumstances of the withholding of evidence by agents of the state and/or witnesses in the book of evidence, and to obtain guarantees that further material that would assist the Applicant has been fully disclosed."
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> *Emphasis (bold) in original.

68. The obligations to be complied with by an applicant who seeks an extension of time are prescribed under Order 84, rule 21(5). This rule provides that an application for an extension of time shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed, and shall verify any facts relied on in support of those reasons.

69. The purported application for an extension of time does not comply with these requirements. In particular, no affidavit has been sworn in support of the application. The applicant acknowledged the shortcomings in this regard. In the course of his reply, the applicant submitted that if the court were minded to permit him to make a formal application for an extension of time, the proceedings could be adjourned to allow this to be done. I indicated to the parties that I would consider this specific submission as part of my overall consideration of the case. If I came to the conclusion that the applicant should be permitted to make an

application to extend time, then the applicant would be given liberty to issue a motion grounded on an affidavit; and the other parties would, of course, be entitled to be heard in response.

70. Having since reread the papers in full, I have concluded that it would not be in the interests of justice to permit an application for an extension of time to be made at this late stage of the proceedings. The applicant has been on notice since February 2021 that the respondents were taking a time point against him. The point is expressly pleaded in both sets of opposition papers. The opposition papers were filed in February 2021, that is, some five months prior to the hearing on 29 July 2021. There was thus ample time for the applicant to issue a motion seeking an extension of time in advance of the hearing. No proper explanation has been proffered as to why this could not have been done. The applicant is a qualified barrister and should be aware of the importance of complying with time-limits in judicial review proceedings.

71. The failure to apply for an extension of time has to be seen in the overall context of the litigation. The assault the subject-matter of these proceedings occurred on 4 January 2012, that is more than nine years ago. The criminal proceedings concluded on 6 July 2018. These judicial review proceedings were not instituted until 28 September 2020. Thereafter, there was further delay in that the applicant failed to issue and serve a notice of motion in accordance with the directions of the court. This resulted in the return date being pushed back from 17 November 2020 to 19 January 2021.

72. Were this court to allow an application for an extension of time to be made now, at the eleventh hour, it would result in yet further delay. The hearing would have

to be reopened, with a concomitant delay in the determination of the proceedings. The parties would all incur further costs unnecessarily.

73. It would be disruptive to the expeditious determination of judicial review proceedings were the parties to be allowed to moot an application for an extension of time, for the first time, in their replying submission to the court. This is especially so where the delay issue had been identified in the statement of opposition and had been amplified in the written legal submissions filed by the respondents ahead of the hearing. In the absence of any justification for the failure to make the application earlier, the scales come down firmly against adjourning the proceedings further to allow the issuing of a motion to extend time.

74. Even if one were to overlook the failure to make an application in proper form, and to consider the arguments advanced on behalf of the applicant *de bene esse*, notwithstanding the absence of a grounding affidavit, it is clear that the requirements of Order 84, rule 21 have not been met. The applicant has failed to identify any good and sufficient reason for extending time, still less identified any circumstances outside his control which caused the delay. The principal relief in the proceedings seeks to set aside a conviction entered in 2013 and upheld on appeal in 2017. Even on the assumption that time only began to run against the applicant from the date of the Supreme Court's determination refusing leave to appeal on 6 July 2018, the judicial review proceedings are more than two years out of time. The length of the delay is a factor to be considered in accordance with the principles stated in *M. O'S.* by the Supreme Court. The applicant was an active participant throughout the criminal proceedings and cannot but have been aware of the various decisions at the time they were made.

75. Insofar as the correspondence with the various public authorities is concerned, again the applicant would have been aware of the dates upon which the authorities refused to entertain his complaints. All of his complaints had been rejected by 11 December 2019.

76. The argument that "the subject matter of suppressed evidence should not generally be hampered by strict time limits" does not withstand scrutiny. First, the appropriate remedy for such cases is that prescribed under the Criminal Procedure Act 1993. A convicted person, who alleges that a new or newly discovered fact shows that there has been a miscarriage of justice in relation to their conviction, is entitled to apply to the Court of Appeal. For obvious reasons, there is no time-limit applicable to proceedings under that Act. Secondly, the difficulty the applicant faces under Order 84, rule 21 is that he is unable to identify any change in circumstances which would justify an extension of time. The fact that certain documentation had not been disclosed at the time of his trial before the Circuit Court had been brought to his attention on various dates in 2016. The applicant chose to pursue this non-disclosure in the context of his pending appeal before the Court of Appeal. The applicant has failed to point to any newly discovered material which would justify an extension of time.

77. Insofar as the claim for a declaration of incompatibility under the ECHR Act 2003 is concerned, it would not be appropriate to grant an extension of time in circumstances where the applicant failed to raise any issue in this regard during the course of the criminal proceedings. As discussed under the previous heading, the Supreme Court determination of July 2018 expressly records the fact that the applicant had not sought a declaration of incompatibility as part of those proceedings.

78. Finally, the case law establishes that there will not be good and sufficient reason to extend time where an application for judicial review is unmeritorious. For the reasons outlined earlier, these judicial review proceedings represent an abuse of process. This is not a case, therefore, where an extension of time would ever be justified.

APPLICATION TO AMEND

79. In the course of the hearing on 29 July 2021, the applicant indicated an intention to make an application for leave to amend his pleadings. The applicant circulated a document during the lunchtime adjournment which proposed an amendment to the declaratory relief sought at (d) 2 of the statement of grounds so as to include reference to a letter from An Garda Síochána dated 8 July 2020. The intent of this amendment is to address the time-limit point raised in respect of An Garda Síochána's determination of 11 December 2019.

80. The test governing an application for leave to amend in judicial review proceedings is that laid down by the Supreme Court in *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29; [2012] 2 I.R. 570. Where, as in the present case, the application to amend is made outside the time-limit prescribed for the institution of judicial review proceedings, then the delay must be explained. See paragraphs 33 and 34 of the judgment as follows.

> "Once an applicant has obtained an order granting leave to apply for judicial review, he is confined to the grounds permitted. He may not argue any additional grounds without leave of the court.
>
> If he applies for an amendment of his grounds within the judicial review time limit, he should, obviously, at least in normal circumstances, have no difficulty obtaining the amendment. If he applies for an amendment outside the time, he will have to justify the application. He will have to explain

> his delay, just as in the case of a late applicant. The court will expect him to give reasons to explain his failure to include the new proposed ground in his original application."

81. I turn now to apply these principles to the facts of the present case. The application to amend is refused for the following reasons. The applicant has failed to advance any meaningful explanation as to why it is that the declaration now sought had not been included in the original statement of grounds. The applicant had been in possession of all of the correspondence prior to the institution of the proceedings. At all events, the letter of 8 July 2020 does not represent a *fresh* decision which is amenable to judicial review. Rather, the letter simply confirms the decision previously notified on 11 December 2019. Indeed, it is telling that this is how the applicant himself interpreted the correspondence, and hence the declaratory relief is, correctly, confined to the letter of 11 December 2019.

CONCLUSION AND FORM OF ORDER

82. The principal relief sought in the judicial review proceedings is an order of *certiorari* quashing the conviction entered against the applicant in 2013. Crucially, this conviction has been upheld by the Court of Appeal and the Supreme Court have refused leave to appeal against the decision of the Court of Appeal. The criminal proceedings are thus concluded. These judicial review proceedings are inadmissible as an abuse of process in that they involve a collateral challenge to the decision of the Court of Appeal. In effect, what the applicant seeks to do is to have the High Court, under the guise of judicial review proceedings, overrule the decision of the Court of Appeal. (See paragraphs 38 to 49 above).

83. Separately, the judicial review proceedings have been brought outside the time-limit prescribed under Order 84.

84. The proceedings are therefore dismissed.

85. Insofar as the allocation of costs is concerned, the attention of the parties is drawn to the notice published on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

86. The default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been "entirely successful" in proceedings is *prima facie* entitled to costs against the unsuccessful party. The court retains a discretion, however, to make a different form of costs order.

87. The parties are directed to file short written submissions on costs by 1 October 2021.

Appearances

The applicant represented himself
Conor McKenna for the Director of Public Prosecutions instructed by the Chief Prosecution Solicitor
Mark Curran for the remaining respondents instructed by the Chief State Solicitor

Approved Gerrett Simons