APPROVED **[2023] IEHC 228**

THE HIGH COURT
JUDICIAL REVIEW

2022 No. 207 JR

BETWEEN

MICHAEL DONNELLY

APPLICANT

AND

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 8 May 2023

INTRODUCTION

1. This judgment is delivered in respect of an *inter partes* application for leave to apply for judicial review. The principal issue to be addressed in this judgment is whether the initial *ex parte* application for leave was made within time; and, if not, whether the criteria for an extension of time under Order 84, rule 21 of the Rules of the Superior Courts have been met.

NO REDACTION REQUIRED

PROCEDURAL HISTORY

2. The applicant seeks to challenge a decision of the Ombudsman dated 13 December 2021. The impugned decision takes the form of a decision to discontinue the investigation of a complaint which the applicant had made against a financial services provider (Danske Bank). The chronology is unusual in that the decision to discontinue the investigation had only been made at a very advanced stage of the process: the Ombudsman had already circulated his "*preliminary decision*" on the merits of the complaint to the parties.

3. (It should be explained that the practice of the Ombudsman is to circulate a "*preliminary decision*" in advance of his formal decision. The parties are afforded an opportunity to make submissions on the "*preliminary decision*" within fifteen working days. If no submissions are received, then what is described as a "*legally binding decision*" will be issued to the parties on the same terms as the "*preliminary decision*").

4. It is submitted on behalf of the Ombudsman that the investigation of the applicant's complaint had been discontinued on the grounds that an alternative and satisfactory means of redress is available to the applicant. As discussed at paragraph 13 to 17 below, this rationale is not apparent from the decision-letter.

5. There is a statutory right of appeal against certain categories of "*decision*" made by the Ombudsman: see Part 7 of the Financial Services and Pensions Ombudsman Act 2017. The parties are agreed, however, that the statutory right of appeal does not extend to a decision to discontinue an investigation. Rather, an application for judicial review is the only remedy available to a person aggrieved by such a decision. See, by analogy, the discussion in *Suarez v.*

Financial Services and Pensions Ombudsman [2022] IEHC 46 (at paragraphs 24 to 27).

6. The applicant filed a statement of grounds and a verifying affidavit in the Central Office of the High Court on 14 March 2022. The applicant has since explained that he had, in fact, prepared the paperwork on an earlier date (10 March 2022) but had been unable to file same in the Central Office in circumstances where the incorrect stamp duty had been paid. The applicant avers that this arose as a result of an error on the part of an official in the stamping office and that it, accordingly, represents a circumstance which was outside his control.

7. At the time the statement of grounds and verifying affidavit were filed, special procedures governed the listing of applications for leave to apply for judicial review. In particular, the maximum number of applications which would be listed for hearing on any particular Monday was confined to fourteen. This formed part of the public health measures introduced in response to the coronavirus pandemic. The objective being to limit the number of lawyers and litigants who might attend physically in the designated courtroom at any particular time.

8. Notwithstanding that the paperwork had been filed in the Central Office of the High Court on 14 March 2022, the application for leave was not listed for hearing before a judge of the High Court until 28 March 2022. On that date, the High Court (Meenan J.) directed that the application for leave be made on notice to the respondent. The applicant issued a notice of motion and same was first returnable before the High Court on 31 May 2022. The *inter partes* application for leave was then allocated a hearing date and the matter ultimately came on for hearing before me on 27 February 2023. There was some confusion at that

hearing as to when the application for leave had first appeared before a judge of the High Court. The applicant suggested that he had, in fact, attended before the High Court on or about 14 March 2022. Given this confusion, I directed that the motion be adjourned for a number of weeks to allow enquiries to be made with the relevant registrars as to when the proceedings had first appeared before a judge of the High Court. This enquiry indicated that the matter had, in fact, first appeared before a judge on 28 March 2022.

9. Lest there be any doubt, however, as to the chronology, I made a further order on 13 March 2023 giving the applicant liberty to file an affidavit expressly addressing the sequence of events leading up to the proceedings appearing before the High Court (Meenan J.) on 28 March 2022. The applicant duly filed an affidavit on 23 March 2023, and a replying affidavit on behalf of the Ombudsman was filed on 6 April 2023.

10. The application for leave was listed again on 24 April 2023 and judgment was reserved to today's date.

THRESHOLD FOR THE GRANT OF LEAVE TO APPLY

11. 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 Health* [2022] IESC 32, [2022] 1 I.L.R.M. 421. The Chief Justice, O'Donnell C.J., explained at paragraph 39 of his 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."

12. The Chief Justice also confirmed 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 respondent.

13. For the reasons which follow, I am satisfied that the applicant has demonstrated arguable grounds for challenging the validity of the decision by the Ombudsman to discontinue the investigation of the applicant's complaint.

14. The rationale for the decision to discontinue the investigation is summarised as follows in the decision-letter of 13 December 2021:

> "Once again, I must inform you that neither this Office or myself have dealt with you or your complaint in a biased manner. Your assertions are ill placed and unfounded. As I have pointed out on numerous occasions, I cannot complete the adjudication of your complaint in such circumstances where you do not believe that the investigation has been carried out in a fair and impartial manner.
>
> I must therefore inform you that your complaint has now been closed and the Provider has been informed accordingly. In accordance with fair procedures this correspondence will be shared with the Provider."

15. Whereas the Ombudsman enjoys a broad discretion, under Section 52 of the Financial Services and Pensions Ombudsman Act 2017, to decline to investigate, or to discontinue an investigation of, a complaint, this must be done by reference to the statutory criteria prescribed. Counsel on behalf of the Ombudsman, in his speaking note, has drawn the court's attention to subsection 52 (1)(d) which provides that the Ombudsman may discontinue an investigation where there is

or was available to the complainant an alternative and satisfactory means of redress in relation to the conduct complained of. It is submitted that this criterion is fulfilled in that the applicant may be within time to litigate against Danske Bank. The implication being that, in circumstances where legal proceedings against Danske Bank do not appear to be barred under the Statute of Limitations, such putative proceedings represent an alternative and satisfactory means of redress.

16. With respect, it is not at all obvious from the terms of the decision-letter that the decision to discontinue the investigation of the complaint had, in fact, been informed by a finding by the Ombudsman that there was an alternative and satisfactory means of redress available to the applicant. Moreover, no explanation has been advanced for why it is that—notwithstanding the supposed existence of an alternative and satisfactory means of redress—the Ombudsman had proceeded as far as circulating a "*preliminary decision*" on 24 September 2020. The "*preliminary decision*" indicates an intention to direct the financial services provider to pay a sum of €5,000 to the applicant by way of compensation. The covering letter also states that the "*adjudication of the above complaint has now concluded"*.

17. Having regard to the chronology of the complaint investigation process, where matters had advanced to the stage of a "*preliminary decision*" on the merits of the complaint, there are arguable grounds for saying that the Ombudsman's eleventh hour decision to discontinue the investigation was unreasonable and/or was informed by considerations other than the statutory criteria prescribed.

JUDICIAL REVIEW TIME-LIMIT

18. 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. The Court of Appeal has recently confirmed, in *Heaney v. An Bord Pleanála* [2022] IECA 123 (at paragraphs 57 to 65), that an *ex parte* application for leave is only "*made*" when it is moved in open court. It is not sufficient that the statement of grounds and verifying affidavit have been filed in the Central Office of the High Court within time.

19. The case law also establishes that time runs from the date of the impugned decision. An intending applicant cannot postpone the running of time by entering into correspondence with the decision-maker following the decision and then seeking to characterise a reiteration of the initial decision as a *fresh* decision which resets the clock. This point has recently been restated by the Court of Appeal in *Arthropharm (Europe) Ltd v. Health Products Regulatory Authority* [2022] IECA 109 (at paragraph 141) as follows:

> "[…] an applicant for judicial review cannot obtain an extension of time by corresponding with the original decision maker, asking them to reconsider their decision and then asserting that there is a new 'decision' to review when they respond (or as the case may be, fail to do so): '*[a] decision which is a reiteration of a previous decision is not a new decision. Time therefore begins to run when the final decision is first made'* (*Finnerty v. Western Health Board* [1998] IEHC 143 per Carroll J., approved in *Sfar v. Revenue Commissioners* at para. 40)."

20. On the facts of the present case, the impugned decision was made on 13 December 2021. The decision took the form of a detailed letter, running to some seven pages. This decision-letter was emailed to the applicant and informed him that the Ombudsman had closed the file on the applicant's

complaint against Danske Bank. The applicant received the decision-letter on 13 December 2021, and he replied by way of email of the same date. The applicant in his email questions the legality of the Ombudsman's decision, stating, *inter alia*, that the Ombudsman has no power to deny a final adjudication.

21. Accordingly, the three month time-limit for judicial review ran from 13 December 2021. The fact that the applicant engaged *subsequently* in correspondence with the Ombudsman's office does not alter the legal position in this regard.

22. The applicant has sought to suggest that time should be reckoned as running from one or other of the following dates:

23 December 2021	The applicant received a detailed response from the head of customer experience and innovation at the Ombudsman's office in respect of customer service concerns. This letter explained that it is not the role of the customer service team to examine the fairness or appropriateness of any decision of the Ombudsman to decline or discontinue the investigation of a complaint.
7 January 2022	The applicant received a further letter from the head of customer experience and innovation at the Ombudsman's office. This letter again explained that it is not the role of the customer service team to examine the fairness or appropriateness of any decision by the Ombudsman to decline or to discontinue the investigation of a complaint.

13 January 2022	The head of customer experience and innovation responded to subsequent correspondence from the applicant by confirming that she had nothing further to add to her previous communications of 23 December 2021 and 7 January 2022.

23. None of this correspondence can be relied upon as postponing the running of the three month time-limit. This is because the grounds of challenge had crystalised as of 13 December 2021. As of that date, the Ombudsman had clearly communicated that he had closed the file on the applicant's complaint against Danske Bank. The decision-letter sets out the Ombudsman's reasons for taking that course. The applicant had sufficient information at that stage both to understand the nature of the decision made and to formulate grounds of challenge. Indeed, the gravamen of the complaint as ultimately pleaded in the statement of grounds is presaged in the email which the applicant sent to the Ombudsman on 13 December 2021. The subsequent correspondence (above) did not add to the applicant's state of knowledge. The correspondence does not disclose a "*fresh*" decision, separate and distinct from that of 13 December 2021, which might be amenable to judicial review.

24. Tellingly, the only decision which the applicant sought to challenge in the statement of grounds is that made on 13 December 2021. It is only since the time-limit point has been raised by the Ombudsman, in defence of the judicial review proceedings, that the applicant has, for the first time, sought to suggest that he is seeking to challenge a decision supposedly made on 23 December 2021, 7 January 2022, or 13 January 2022.

25. Accordingly, the three month time-limit began to run from 13 December 2021. A three month period running "*from*" that date would expire at midnight on 13 March 2022. However, as 13 March 2022 was a Sunday, an application for leave made the following day would have been deemed to be within time: see Order 122, rule 3. Accordingly, the *ex parte* application for leave should have been moved before a judge of the High Court on 14 March 2022 at the latest. In the event, however, the application for leave to apply for judicial review was not moved before a judge of the High Court until 28 March 2022. The application was, therefore, "*made*" outside the three month time-limit prescribed under Order 84, rule 21.

26. It is necessary next to consider whether an extension of time should be granted.

APPLICATION FOR AN EXTENSION OF TIME

27. Order 84, rules 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:
>
> (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) 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."

28. 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.

29. 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.

30. 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.'"

31. On the facts of the present case, the applicant had finalised his statement of grounds and had sworn his verifying affidavit by 10 March 2022, that is, within the three month time-limit. The applicant has averred, in his subsequent affidavit of 22 March 2023, that the registration of the judicial review application (in the Central Office of the High Court) was delayed on 11 March 2022 due to an error by the stamping clerk, which the applicant says was beyond his control. It seems that the amount of stamp duty initially levied was incorrect and a further sum had to be paid. At all events, the difficulty in relation to stamping was resolved and the statement of grounds and verifying affidavit were ultimately filed in the Central Office on the next working day, Monday 14 March 2022. (The 11th of March 2022 had been a Friday).

32. The applicant sent an email to the registrar on 15 March 2022 seeking a hearing date. It would appear that the next available hearing date for an *ex parte* leave application had been Monday 28 March 2022.

33. The chronology can be summarised as follows. Whereas the applicant filed his statement of grounds and verifying affidavit within the three month time-limit, the *ex parte* leave application was not listed for hearing until 28 March 2022. This represents a "*delay*" of approximately fourteen days: the leave application should have been moved on or before Monday 14 March 2022.

34. For the reasons which follow, I am satisfied that the criteria for an extension of time pursuant to Order 84, rule 21 are met and that the court should exercise its discretion to extend time until 28 March 2022. The failure to make the *ex parte* application for leave within three months was caused by a combination of (i) the error by the stamping office in calculating the correct duty payable, and (ii) the listing restrictions imposed as part of the public health measures introduced in response to the coronavirus pandemic. But for these factors, the *ex parte* application for leave could have been assigned a hearing date on 14 March 2022. These two factors represent circumstances which were outside the control of the applicant.

35. There is good and sufficient reason for extending time in circumstances where (i) the applicant had filed the statement of grounds and verifying affidavit within the three month time-limit; (ii) the applicant is not to blame for the listing delays; (iii) the delay of fourteen days is short relative to the three month time-limit; (iv) there is no suggestion that the delay has caused prejudice to the Ombudsman or Danske Bank; and (v) the judicial review proceedings raise a point of law of general public importance in respect of the Ombudsman's jurisdiction to refuse

to adjudicate upon a complaint following an initial decision to entertain same and the circulation of a "*preliminary decision*" on the merits of the complaint.

CONCLUSION AND PROPOSED FORM OF ORDER

36. For the reasons explained, I am satisfied that the applicant has demonstrated arguable grounds for challenging the validity of the decision by the Ombudsman dated 13 December 2021 to discontinue the investigation of the applicant's complaint against Danske Bank. I am also satisfied that the criteria for the grant of an extension of time pursuant to Order 84, rule 21 of the Rules of the Superior Courts have been satisfied.

37. Accordingly, the time for the making of the application for judicial review is extended by fourteen days to 28 March 2022; and the applicant is granted leave to apply for judicial review for the reliefs sought at Part (D) of his statement of grounds on all of the grounds pleaded at Part (E) thereof.

38. The applicant is directed, pursuant to Order 84, rule 22, to issue an originating notice of motion out of the Central Office of the High Court returnable before the Judicial Review List on 4 July 2023. (It will be necessary for the applicant first to take up a copy of the order granting leave). The originating notice of motion is to be served on the Ombudsman (through his solicitors) and on Danske Bank as a person directly affected by the proceedings.

39. As to costs, my *provisional* view is that the applicant, having succeeded in the contested application for leave to apply for judicial review, is entitled to recover the allowable costs of the application for leave as against the respondent. As the applicant is a litigant in person, i.e. without legal representation, the allowable costs before the High Court are confined to his expenses and outlay.

40. If either side wishes to contend for a different form of costs order than that proposed, they should file written submissions in the Central Office of the High Court within two weeks of today's date. A copy of the written submissions should be sent to the other side and to the registrar. The other side will then have a further two weeks within which to file written submissions in reply.

Appearances

The applicant represented himself
Francis Kieran for the respondent instructed by Fieldfisher

Approved Garrett Simons