THE HIGH COURT

[2023] IEHC 615

[Record No.: 2022/977 JR]

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

VASYL KRAVTSOV

RESPONDENT

JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 8th day of November, 2023

INTRODUCTION

1. This matter comes before me as an application for an order of *certiorari* quashing the return for trial dated the 16th of June, 2020 sending the Respondent forward for trial to Dublin Circuit Criminal Court. The Applicant seeks to have the matter remitted to the District Court to be further processed in accordance with law.

BACKGROUND

2. The Respondent has been charged with 105 offences which are alleged to have occurred in 2017 and 2018. Offences charged include offences of deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 (57 counts) and money laundering contrary to s. 7(1)(a), s. 7(1)(b) and s. 7(3) of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010 (48 counts) arising out of an alleged Ghost Broker scheme. The alleged offences were committed in Louth, Kildare and other places unknown within the State. The accused resides in County Kildare. He was arrested in Leixlip, County Kildare and brought before Blanchardstown District Court where evidence of arrest, charge and caution was duly given in December, 2019. The Book of Evidence was served in June, 2020. By order made pursuant to s. 4A(1) of the Criminal Procedure Act, 1967, the Respondent was sent forward for trial to Dublin Circuit Criminal Court on Bill No. 580/20.

3. The Respondent appeared before Dublin Circuit Criminal Court on some eight separate occasions between the 10th of July, 2020 (return for trial) and 8th of November, 2022 when a jurisdictional issue with the return for trial was notified to that Court. During the period of more than two years that the matter was before Dublin Circuit Criminal Court that Court made various orders including an arraignment order and orders varying bail conditions.

4. On the 3rd of November, 2022, the matter was listed before Dublin Circuit Criminal Court to deal with a logistical issue regarding dates for the trial of the Respondent and his co-accused which at that time was listed to commence at the beginning of the term in January, 2023. The Circuit Criminal Court was informed that there was an issue and a short adjournment was sought. The matter was relisted on the 8th of November, 2022 when the Circuit Criminal Court was informed of the jurisdictional issue and an intention to proceed by way of an application for judicial review. The Circuit Criminal Court was asked not to vacate the trial date as fixed. The Circuit Criminal Court was advised that it was hoped to have the return quashed, the charges struck out and the Respondent recharged and sent forward so that the trial with his co-accused could still proceed. The matter was adjourned to the 16th of December, 2022 for mention on this basis and these proceedings were commenced by the filing of a Statement of Grounds and grounding affidavit on the 10th of November, 2022 and opening the leave application to the High Court on the 14th of November, 2022.

JURISDICTION OF THE CIRCUIT COURT IN CRIMINAL MATTERS

5. The Circuit Court is a court of local and limited jurisdiction. Section 53 of the Courts of Justice Act, 1924 (hereinafter "the 1924 Act") provides that, in respect of criminal matters, a Court has jurisdiction where either:

i. The offences were committed;
ii. The accused resides; or
iii. The accused was arrested.

6. The Dublin Circuit Criminal Court can only have jurisdiction in respect of the alleged offences if one of these three conditions are met.

7. Leixlip, where the Respondent was arrested, is part of the Dublin Metropolitan District (DMD) by operation of law (s. 79 of the Courts of Justice Act 1924) but located in County Kildare. As Leixlip is in the DMD, the District Judge sitting in Blanchardstown had jurisdiction to hear evidence of arrest, charge and caution and make orders however, if the place of arrest is to be relied upon for jurisdiction, Kildare Circuit Criminal Court is vested with jurisdiction in respect of arrests in Leixlip. It is common case that none of the conditions of s. 53 of the 1924 Act have been met in this case and that Dublin Circuit Criminal Court has no jurisdiction in this matter. Accordingly, the parties are agreed that the trial of the Respondent cannot proceed before Dublin Circuit Criminal Court on the basis of the return for trial made in December, 2019.

PROCEEDINGS

8. When the application for leave to proceed by way of judicial review was first opened to the High Court in November, 2022, it was confirmed that the intention of the Applicant had always been to have the Respondent tried in Dublin with his co-accused. The case was advanced on the basis that the Applicant was seeking to have the return for trial quashed so that the Respondent could be remitted to Blanchardstown District Court where it was proposed the charges would be struck out, the Respondent re-arrested (seemingly this time in Dublin), recharged with the same 105 offences and served with a new Book of Evidence in identical terms to that already served (as set out at para. 5(xxii) of the Statement of Grounds) and the District judge would then have jurisdiction to send the Respondent forward to Dublin Circuit Criminal Court for trial together with his co-accused.

9. In circumstances where the trial had been fixed for hearing in January, 2023 and the Applicant's hope was that the trial date could be retained assuming an early disposal of these proceedings, directions were made that the Respondent be put on notice of the application for leave by order of Meenan J. on the 14th of November, 2022. A return date of the 8th of December, 2022 was given on the Notice for Motion. On the return date the Respondent did not consent to orders being made but indicated an intention to oppose leave on grounds of delay in the commencement of proceedings. Written submissions were filed on behalf of the Respondent directed to this time issue. A date for the hearing of the application for leave on notice was given. No application for a telescoped hearing was made.

10. By Order dated the 27th of March, 2023, Meenan J. granted leave to proceed by way of Judicial Review to seek the reliefs identified in the Statement of Grounds including an extension of time. Thereafter a Statement of Opposition was filed on the 8th of May, 2023. Relief was opposed on the grounds of time, and it was contended that no basis had been identified to ground the exercise of a discretion to order an extension of time. It was further objected that the proceedings were improper in that the Applicant's plainly stated intention, if successful in obtaining an order of *certiorari* with remittal to the District Court, was to strike out the proceedings and immediately re-arrest or direct the re-arrest of the Respondent within the jurisdiction of the Dublin Circuit Court in order to enable the Applicant's wish to try him in Dublin.

11. The matter came on for hearing before me in November, 2023, almost a year after the leave application was first moved. In written submissions filed on behalf of the Applicant in advance of the hearing, the Applicant modified her position regarding her intentions in the event of a quashing order and remittal stating:

> *"The Applicant seeks the quashing of the return for trial and his remittal to the District Court to be tried in due course of law – i.e. to be sent forward to Kildare Circuit Criminal Court which does have jurisdiction to deal with his trial."*

12. Although not expressly stated the previous intention to try the Respondent together with his co-accused appears to have been abandoned and the trial date fixed for January, 2023 is long since passed.

ISSUES

13. In the written submissions filed on behalf of the Applicant in advance of the hearing it was submitted that there were three issues which I must determine:

1. Should the return for trial be quashed;
2. Should the matter be remitted to the District Court; and
3. Should an extension of time be ordered.

14. Written submissions on behalf of the Respondent were only delivered shortly before the hearing and dealt only with the time issue in circumstances. The case was opened on the basis that the issues had narrowed in view of the fact that the Applicant was no longer seeking remittal to send the Applicant forward to Dublin Circuit Criminal Court for trial with his co-accused but rather remittal to send forward for trial before Kildare Circuit Criminal Court, it was indicated that the Respondent would not oppose an entitlement to the substantive relief claimed in the proceedings (*certiorari* and remittal), if I decided to exercise my discretion to extend time. This position was taken in circumstances where it was common case that Dublin Circuit Criminal Court has no jurisdiction to deal with the trial of the Respondent. The Applicant's entitlement to an extension of time was, however, being strenuously opposed.

15. The net issue for determination before me therefore is whether the Applicant is entitled to an extension of time to seek relief by way of an application for judicial review on the facts and circumstances of this case.

ORDER 84, RULE 21 OF THE RULES OF THE SUPERIOR COURTS, 1986

16. Order 84, rule 21 of the Rules of the Superior Courts, 1986 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. In the case of a challenge to a court order, the date when grounds for the application first arose shall be taken to be the date of that order (Order 84, rule 21(2)), in this case the 16th of June, 2020.

17. Order 84, rule 21(3) and (4) confers 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 subrule (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."

18. 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.

DISCUSSION AND DECISION

19. The within proceedings are out of time and an extension of time is necessary if the claim for relief is to be maintainable at all. The three months fixed under the Rules ended on the 15th of September, 2020, three months after the order returning the Respondent for trial made on the 16th of June, 2020. These proceedings were only issued in November, 2022, approximately 26 months out of time.

20. I have power to extend time where I am satisfied:

i. There is good and sufficient reason for doing so; and
ii. The circumstances that resulted in the failure to make the application for leave within the prescribed period of 3 months were outside the control of the Applicant or could not reasonably have been anticipated by the Applicant.

21. The Affidavit grounding the application in these proceedings is very bare. It does however, verify the facts relied upon in the Statement of Grounds. I read the requirement in O. 84, r. 5 as extending beyond a mere verifying of the facts relied upon in the Statement of Grounds when seeking an extension of time because it is required, in mandatory language, that the affidavit "*shall set out the reasons for the applicant's failure to make the application for leave*". I accept on the authority of *Corrigan v. DPP* [2023] IEHC 550 identified on behalf of the Applicant that where facts recited in the Statement of Grounds are verified by affidavit without necessarily reciting those facts, then this is sufficient to establish the facts relied upon

unless they are disputed. I note, however, that *Corrigan* was not decided in the context of an extension of time application. As the issue was not pressed on behalf of the Respondent at hearing before me, I am proceeding on the basis that such facts as have been relied upon by the Applicant in the Statement of Grounds and have not been disputed on behalf of the Respondent, are the facts relied upon as the reasons for the failure to make the application for leave in accordance with time limits fixed under the rules.

22. The facts relied upon in the Statement of Grounds relevant to the time issue are shortly stated and are contained at paragraph 5(xix) where it is stated:

> *"the issue with the return for trial was only identified in recent weeks. It was initially thought that the matter could be rectified before the trial court, but there is no legal mechanism to do so."*

23. Neither the actual date the issue was discovered nor the circumstances in which the discovery was made at that stage are stated either in the Statement of Grounds or on affidavit. The verifying affidavit goes a little further than the Statement of Grounds in terms of establishing the facts because it also exhibits a letter dated the 3rd of November, 2022, advising the Respondent's solicitors as follows:

> *"Having notified your Office last week of the issue in respect of the Return for Trial we are now putting you on notice that we will be instituting judicial review proceedings seeking to quash the Return for Trial and your client will be named as a notice party in those proceedings.*
>
> *Please note that in those circumstances we will be asking the Circuit Court on the 8th inst. To make no further order in respect of Mr. Kravstov.*
>
> *In due course, and further to the Return for Trial being quashed, it is our intention to re-charge our client with the relevant offences and tried with his co-accused."*

24. Accordingly, it seems that when the issue was discovered (seemingly sometime in September or October, 2022 based on the words "*in recent weeks*" used in the Statement of Grounds), the Respondent's legal team were informed of the issue by the end of October, 2022. As confirmed in the Statement of Grounds and by the terms of this letter which has been placed

in evidence through the Affidavit sworn on behalf of the Applicant, the matter was brought to the attention of the Circuit Criminal Court in early November, 2022. In essence, although it is not stated in express terms, the evidence before me is that a mistake was made and was not discovered until in or about September/October, 2022. I am satisfied that, once the mistake was discovered, steps were taken relatively quickly to rectify the position by advising the Applicant, the Circuit Criminal Court and commencing proceedings before the High Court seeking relief by way of judicial review.

25. For present purposes and despite the paucity of affidavit evidence, I am prepared to accept that the reasons advanced to justify an extension of time are those given in the Statement of Grounds, namely that through inadvertence a mistake was made and not detected. The mandatory exhortation to set out the reasons for the failure in O. 84 r. 5 is important, however, not only in requiring an evidential basis for the exercise of the power to extend time but also in construing the powers of the Court under O.84, r.21(3) because it makes clear the burden on the applicant for an extension of time to explain its lapse.

26. The stark position the Applicant finds itself in, on the facts as established in evidence before me, is that even though the matter was before the Circuit Criminal Court on numerous occasions during this period and that Court was invited to and made orders, the mistake was simply not adverted to. No explanation is offered for the failure to advert to the issue over the period of more than two years that the matter had been before the Circuit Criminal Court prior to this other than a submission by Counsel on his feet that the mistake would not be apparent from the face of the Order returning the Respondent for trial.

27. I have been referred by both sides to the decision of Finlay-Geoghegan J. in *MO'S v. Residential Institutional Redress Board* [2018] IESC 61 where an order extending time was made following a very lengthy delay. The principal factor relied upon by the Applicant in *MO'S* in support of the extension of time in that case had been that there had been a significant change in the case law since the date of the administrative decision which it was sought to challenge in the judicial review proceedings. The Applicant had been legally advised that based on prevailing jurisprudence an application for judicial review on his part would be unsuccessful. Mr. O'S decided not to pursue judicial review proceedings at that time. Several years later, the Court of Appeal delivered a judgment which effected a change to the interpretation of the relevant legislation. Mr. O'S then instituted judicial review proceedings.

It was accepted that were an extension of time to be granted, then Mr. O'S would be entitled to an order of *certiorari* setting aside the administrative decision based on the intervening decision of the Court of Appeal. The Supreme Court divided on the question of whether an extension of time should be granted. Whereas both the majority and minority judgments accepted that a change in the case law could, in principle, represent a good and sufficient reason for an extension of time, the judgments differed on the outcome. Finlay Geoghegan J., writing for the majority, in allowing an extension of time stated:

> *"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.'"

28. The considerations relied upon by the Supreme Court in making an order extending time in *MO'S* included the fact that the applicant had taken legal advice at the time the administrative decision was made and had determined not to seek judicial review based upon advice that he was not likely to succeed and that it was probable that an order for costs would be made against him if he failed. The judgment attaches weight to the fact that the impugned administrative decision had been made pursuant to legislation which was for the purposes of administering a no-fault redress scheme for a class of vulnerable and injured persons.

29. It is urged on me on behalf of the Applicant that in conducting a balancing exercise in accordance with the dicta in *MO'S* I should have regard to:

I. The strength of the case – it is maintained that but for the time issue, there is no valid opposition to the substantive relief sought.
II. The public interest in prosecuting crime – reference is made to the number of charges and the nature of the offences.
III. Third party interests – the interest of the victims of the alleged crimes.
IV. Absence of prejudice – it is maintained that the delay which has ensued arises from the Respondent's opposition to the application.
V. DMD – reliance is placed on the fact that the circumstances of the DMD is unusual and the mistake while regrettable is understandable.

30. In written submissions reliance was also placed on the absence of an alternative remedy as a factor to be weighed in the exercise of discretion and it was urged that where the delay in identifying an error was caused by human oversight, the Respondent should not be afforded the windfall benefit of his trial being effectively prohibited and his victims denied of due process, this argument was not pursued in oral submissions. Instead, in oral submissions, a factor which I was urged to weigh was the absence of prejudice to the Respondent arising from the fact that there was no impediment to the prosecution being maintained and the existing proceedings simply being struck out.

31. The case urged on behalf of the Applicant in oral submissions is that there has been no prejudice whatsoever to the Respondent arising from the mistake made. He has always been on bail and delay in his trial could have been avoided had he consented to the course of action proposed on behalf of the Applicant allowing for a timelier disposition of these proceedings. The Respondent's opposition to these proceedings was castigated as being without purpose in that it was claimed there was, in fact, no impediment to the Applicant simply re-charging the Respondent and proceeding against him before a Court properly seised of the matter. It was submitted that the return for trial made was a nullity and as the Respondent had not yet been tried no issue of *autre fois* convict or acquit or double jeopardy arose as an impediment to just simply proceeding against the Respondent. When queried by me as to why these proceedings were necessary at all if this were the case, the Applicant's position through counsel was that proceeding by way of judicial review had the benefit of being transparent and procedurally neater. It had also been considered at the outset that it would be quicker and that it might therefore have been possible to preserve the trial date assigned for January, 2023 and to achieve a situation by means of legal manoeuvre whereby the trial against each co-accused could proceed together.

32. In argument, the Applicant sought to distinguish the decisions in *DPP v. Tyndall* [2021] IEHC 283 and *DPP v. O'Brien* [2021] IEHC 284 where Simons J. refused to extend time under O.84, r.21(3) of the Rules of the Superior Courts, 1986 in circumstances where the accused persons had derived a benefit from the mistake made (in those cases a mistake of the Circuit Court in making an order allowing an appeal in full when the appeal had been against sentence only) which benefit had endured during the period of delay (a period of some five months and three and a half months respectively), making it unfair to revisit the matter.

33. On the other hand, Counsel for the Respondent relied on the paucity of information given by the Applicant to explain delay and justify and extension of time and the terms of the test under the Rules which it was contended had not been met on the case made by the Applicant. In addition to the decisions of both Finlay-Geoghegan J. (for the majority) and O'Donnell J. (minority decision) in *MO'S*, reliance was also placed on the decision of the Court of Appeal (Murray J.) in *Arthropharm (Europe) Limited v. the Health Products Regulatory Authority* [2022] IECA 109 to make the case that the test as pronounced in these judgments has not been met on the circumstances of this application.

34. A useful summary of the principles which guide the exercise of the O.84, r.21(3) discretion, relied upon by the Respondent, appears at para. 87 of the judgment of Murray J. as follows:

> *"87. The text of the rule when viewed in the light of those decisions and the law as it developed around the original form of Order 84 Rule 21(1) suggests that the following are now clear:*
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> *(i) The period fixed by Order 84 Rule 21(1) is not a limitation period properly so called (Sfar v. Revenue Commissioners [2016] IESC 15 at para. 19 (per McKechnie J.)). The requirement to proceed within that time instead derives from a rule of court which, while having the force of law, is subject to the possibility of an extension if the court is satisfied, in accordance with the relevant law, that time should be extended (MO'S at para. 69 per Finlay Geoghegan J.).*
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> *(ii) The effect of the rule is clearly to place an obligation on the party seeking an extension of time to identify on oath the reasons the application was not brought during the period fixed by Order 84 Rule 21(1) and during the time between the expiry of that point and the date on which the application was eventually bought (MO'S at para. 60). It is the obligation of the court when presented with such reasons to assess them 'carefully and critically' (SC SYM Fotovoltaic Energy SRL v. Mayo County Council (at para. 72(7)). It should undertake this exercise conscious of the purpose underlying the rule in its present form: the present version of Order 84 Rule 21 'is framed in terms which indicate - 53 - a clear intent to reduce delay and to further limit time periods which previously existed for applications for judicial review' (Heaphy v. Governor of Cork Prison at para. 99 per Whelan J.).*
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> *(iii) Before it can extend time, the court must be satisfied that the reasons so given explain and objectively justify the delay in bringing the application and are sufficient to justify the court in exercising its discretion in favour of the applicant (O'Donnell v. Dun Laoghaire Corporation [1991] ILRM 301, at p. 315 to 316; MO'S at para. 60). In this regard the addition of the word 'sufficient' to the 'good reason' previously required by the rule will not in most cases add to the preexisting test (MO'S at para. 60), although it may be relevant in situations where the*

explanation given is in theory a good one, but the evidence adduced in support of it is insufficient to sustain it (AB v. XY at para. 44).

(iv) *In conducting that exercise the court must take account of all relevant circumstances, including the decision that is sought to be challenged, the nature of the claim that it is invalid and 'any relevant facts and circumstances pertaining to the parties' (MO'S at para. 60). In applying the factors so found, the essential function of the court is to engage in a 'balancing exercise' (AB v. XY at para. 46).*

(v) *In this regard, factors of which account may be taken will include the nature of the order or actions the subject of the application, the conduct of the applicant, the conduct of the respondent, the effect of the decision it is sought to challenge, any steps taken by the parties subsequent to that decision, and the public policy that proceedings relating to the domain of public law take place promptly except where good reason is furnished (De Róiste v. Minister for Defence [2001] 1 IR 190, at p. 208 per Denham J.). The 'blameworthiness' of the applicant is relevant, albeit as only one such factor to be weighed in the balance (Kelly v. Leitrim County Council [2005] IEHC 11, [2005] 2 IR 404 at para. 19(d)).*

(vi) *It follows that the court may be required to balance the rights of an applicant with those of a respondent or notice party, taking into account also the prejudice to either consequent upon the failure of the applicant to proceed to make its application within the time fixed by the rules. This, in particular, requires the court to take account of the effect of the extension of time upon a third party affected by the decision in question (see AB v. XY at para. 47).*

(vii) *It is 'probable that in most instances where a court has been satisfied of good and sufficient reason to extend time it will also be in a position to make a positive finding under sub-rule (3)(b) in relation to the circumstances which resulted in the failure to apply within the three month period' (MO'S at para. 100).*

(viii) *That said, the rule clearly positions an inquiry as to whether the applicant had within its 'control' the effluxion of time: it is clear from the rule that in addition to being satisfied that good and sufficient reasons exist for an extension of time, the court must be satisfied as a matter of fact that the circumstances which resulted in the delay were outside the control of the applicant (per Baker J. Irish Skydiving Club Ltd. v. Kilkenny County Council at para. 9). Where a delay arises from circumstances which were within the control of the applicant, the court may not extend (id. at para. 10).*

(ix) The court is also free to take account the interests underlying the proposed proceedings. Commercial cases – in which the requirements of certainty may be particularly pressing and in which it is reasonable to assume that the parties are well resourced and in a position to readily obtain access to legal advice – may justify a stricter approach than in other types of challenge (MO'S at para. 62; Hogan and Morgan 'Administrative Law' (5th ed. 2019) at para. 18-179)."

35. It was contended on behalf of the Respondent that on an application of the principles summarised in *Arthropharm* the facts in evidence do not demonstrate "*good and sufficient reason*" to extend time. It was further contended that noticing the error of jurisdiction was "*within the control*" of the Applicant and a mistake of this nature could have been reasonably anticipated. It was pointed out that the return for trial is an essential proof and ought to have been carefully considered. The Respondent placed emphasis on the fact that the Applicant is the agent tasked with the bringing and prosecution of indictable offences allegedly committed within the jurisdiction of the State and was therefore in a uniquely advantageous position to have full knowledge and understanding of the applicable law relating to a return for trial including the jurisdiction of the Circuit Criminal Court. The Applicant is similarly well versed in the time requirements for judicial review. It was submitted that the Applicant does not enjoy a special status as prosecutor. It was urged on me that to accede to an application for an extension of time in this case would beg the question as to why an extension of time would not be available in every case where an error of some kind was made and overlooked.

36. Each case falls to be determined by reference to its own circumstances. What constitutes "*good and sufficient reason*" is also impacted by the particular facts as to delay including the length of the delay but also factors such as the nature of the case, its implications for the parties including third parties and the merits of the case. The Supreme Court in *M. O'S. v. Residential Institution Redress Board* [2018] IESC 61; [2019] 1 I.L.R.M. 149 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. I consider the emphasis placed on justification to be important.

37. This case differs from *MO'S* to the extent that a clear explanation for delay was advanced on affidavit in that case in a manner which sought to justify the failure to move the application sooner. The sparse affidavit filed on behalf of the Applicant in this case verifying the facts relied upon in the Statement of Grounds is in stark contrast to the affidavit evidence available to the Court in *MO'S*. That said the circumstances here are not ones which necessarily allow for great explanation, but an attempt could be made to justify delay by outlining the systems and safeguards in place to prevent mistakes of this kind and explaining how they failed on this occasion, presuming such systems and safeguards exist.

38. This case is notably similar to *MO'S* in one respect. Like in *MO'S* the only ground of opposition to the relief sought is that of time. This is a factor which would weigh in favour of the grant of an extension of time in measuring the adequacy of the reasons for delay provided and in determining whether, in all the circumstances, they were good and sufficient and the failure to move within three months in accordance with the time limits under the Rules was outside the control or reasonable anticipation of the Applicant. The fact that the case is otherwise strong or even unanswerable cannot be ascribed an overriding weight, however, because as Simons J. pointed out in *Tyndall*, the logic of any time-limit is that there will be "*hard cases*" where what might well otherwise have been a successful application for judicial review cannot be pursued precisely because the proceedings were not instituted within time as otherwise the objective of the three-month time-limit in ensuring that public law proceedings are prosecuted promptly would be defeated.

39. This case differs from *Tyndall*, however, in that the Respondent does not have the benefit of a decision in his favour which the Applicant is seeking to remove following a delay. While the public interest in expedition, finality and certainty were weighty considerations in that case given that the circumstances were that a significant order, affecting the liberty of the accused was sought to be impugned, those interests are not engaged in the same way and to the same extent in this case. If one excludes from consideration the fact that the trial has yet to proceed and the charges remain hanging over the Respondent as prejudice on the basis that this has occurred because the Respondent has not cooperated in the Applicant obtaining relief in these proceedings as the Applicant urges I should do, then one could conclude that the delay in this case has not been prejudicial to the Respondent. Specifically, the Respondent at no time was led to believe that the proceedings against him would not be maintained. No steps have been identified as having been taken in the conduct of the criminal proceedings before the

Circuit Court to date such as might alter how the Respondent orders his affairs, perhaps on the assumption that proceedings would take a particular course and he would not be exposed to further prosecution. Certainly, if there were evidence of this type of alteration of position, the question of prejudice would be more tangible and more easily weighed.

40. I do not consider it a full or proper approach to the question of prejudice, however, to fully discount delay in the prosecution of the charges against the Respondent on the basis that it might have been avoided had the Respondent simply acquiesced in the orders sought on behalf of the Applicant in these proceedings. While the Applicant wished to have the judicial review determined sooner, the Respondent was entitled to oppose these proceedings on the grounds of time given the obvious time issue which arises. A likely consequence of the Respondent's decision to exercise his entitlement to oppose relief in these proceedings on the grounds of time was that the scheduled trial did not proceed. The fact that the Respondent elected to oppose these proceedings does not mean that the abortion of the trial date fixed was then the Respondent's fault. There has been delay in disposing of the criminal charges against the Respondent resulting directly and causatively from the error made as to jurisdiction by the Applicant and the failure to advert to this error in a timely fashion. The fact that the Respondent remains subject to criminal prosecution without that prosecution being progressed is a prejudice which could only have been avoided had the Respondent acquiesced in a legal strategy engineered by the Applicant to ensure that the prosecution of both co-accused proceeded on the assigned trial date before Dublin Circuit Criminal Court, a scenario which the Respondent was entitled to object to. Even though an aborted trial date might have been avoided had the Respondent taken a certain course and not stood on his rights, this does not mean that it should be discounted altogether. The loss of the trial date and delayed trial resulting from the mistake made requires to be considered on this application together with other factors in deciding on whether an extension of time should be granted.

41. The Applicant queries to "*what end*" the Respondent opposes this application by way of judicial review contending that the approach of the Respondent in objecting on the grounds of time can serve no purpose at all. The Respondent for his part, however, does not share the Applicant's benign view of the consequences of a refusal of relief in these proceedings for the further maintenance of criminal charges before a Circuit Criminal Court properly seized of same. I note in this regard that when commencing these proceedings, the Applicant did so on the express basis that there was no effective alternative remedy. It seems to me that a refusal

of relief in these proceedings could have some consequences for the further prosecution of the Respondent, albeit that this may be a more possible than probable consequence. I do not attach much weight to this as it remains unclear to me what those consequences might be, if any. If the consequences are none or negligible as the Applicant suggests, this weighs on both sides of the balance, as it would be a factor both for (no prejudice to the Respondent) and against (no prejudice to the public interest in the prosecution of crime) the granting of the extension of time sought.

42. Even accepting as I do that the Applicant was motivated in moving by way of judicial review by the possibility of preserving a trial date if the Respondent co-operated, it does not seem to me that the public interest in expeditious determination of proceedings which is served by the three-month time limit in the rules can be discounted where the late application is sought to be justified as the most expeditious way forward. A relaxed application of time limits in judicial review because the proceedings might have been determined more quickly had the Respondent adopted a certain course would undermine the purpose of the time limits which is to ensure expedition in a manner which treats parties fairly. These time limits should be applied even where the professed motivation for moving the application is to avoid further delay. Similarly, time limits under O.84, r.21 are not less strict because further delay occurs after the bringing of the application arising from the position of the Respondent in opposing proceedings and resulting delays in securing a hearing date for the determination of the issue raised in the judicial review proceedings.

43. The length of the delay in this case is significant. The length of delay is sought to be explained simply by reference to the fact that the error was not adverted to. An attempt was made in submissions to make the point that the mistake would not have been apparent from the terms of the Order returning for trial itself and would have required fuller knowledge of where the Respondent resided, where the offences were committed and where the Respondent was arrested, the implication being that a thorough command of the file would have been required to identify that an error had occurred. While I understand how mistakes can happen, I find the argument that the mistake was not readily apparent unpersuasive. This file required careful attention from the outset. Charges had been laid, a book of evidence served and an earlier trial date had been vacated. The obligation under O.84, r.21(3) extends to justifying the delay. The requirement to justify delay goes beyond simply explaining what happened. What constitutes "*good and sufficient reason*" in this case must be assessed in the light of the fact that the

Applicant had access to all the information necessary to determine jurisdiction. The Applicant is the State agency responsible for the prosecution of crime in accordance with law and all the information necessary to identify the error was available to her had proper attention been paid to the file from an early stage, as it ought to have been. I agree with the sentiments expressed by Simons J. in *Tyndall* when he observed (para. 54):

> *"Some weight must also be given to the consequences for judicial review proceedings generally of an unduly lax approach to compliance with procedural requirements. As observed by Clarke J. (then sitting in the High Court) in Moorview Developments v. First Active plc [2008] IEHC 274; [2009] 2 I.R. 788, [14]*
>
> *"Where parties come to expect almost endless indulgence then such parties are likely to act on the not unreasonable assumption that they will be indulged again to the considerable detriment of the proper functioning of the timely administration of justice and with consequent significant potential injustice across a whole range of cases. That consequence is a matter which needs to be given all due weight in any consideration."*
>
> *Were this court to allow an extension of time to the Director, in the absence of an objective justification for the delay, merely on the basis that the period of default is said to be short, the same indulgence would be expected by all potential litigants. This would undo the good of the amendments introduced to Order 84 in 2011."*

44. The jurisdiction of the Circuit Criminal Court to try a criminal offence is a fundamental issue routinely arising for careful consideration at the beginning of every case. It is a pre-condition to every step the Applicant invites that Court to take. It is a primary consideration for a prosecutor and an essential proof. While mistakes of this nature can and do happen, it is imperative that systems are developed to ensure that errors are identified and addressed quickly. That did not happen in this case. No system is perfect and sometimes things fall between the cracks, but it seems to me that something more is required in this case in terms of an explanation for how this happened in the first instance and thereafter was not adverted to, to enable me to find that the delay can be treated as justified. A bare mistake does not constitute "*good and sufficient reason*" in the circumstances of this case. Were a mistake arising from a failure to properly consider the information available to persons with requisite knowledge and expertise considered a sufficient basis for an extension of time by the Applicant, a similar

indulgence could be expected by all potential litigants. Accordingly, I am not satisfied that "*good and sufficient reason*" within the meaning of O.84, r.21(3)(a) has been shown for the granting of an extension of time in this case.

45. As "*good and sufficient reason*" has not been demonstrated, it is not strictly necessary for me to consider the second limb of the test under O. 84 r. 21(3)(b)(i) and (ii), however, conscious that I may be wrong in my conclusions in this regard, I have also considered whether a human error of the type relied upon in this case could be treated as a circumstance outside the control or reasonable anticipation of the Applicant. It seems to me that I could not conclude that inadvertence through a failure to pay proper attention to a file qualifies to bring delay in identifying a mistake outside the "*control*" of the Applicant or outside its reasonable anticipation. While all relevant information does not appear on the face of the Order returning the Respondent for trial, it remains the case that the information necessary to make a correct decision on jurisdiction was within the possession of the Applicant from the time the return for trial was made in June, 2020, and no doubt earlier. There is no suggestion that some new piece of information was received onto the Applicant's file in October, 2022 changing the factual landscape and prompting the application. Indeed, none of the special considerations identified in *MO'S* apply in the present case and, as Simons J. observed in *Tyndall* (at para. 20):

> *"...far from coming within a category of vulnerable person or a class of litigant who might be unfamiliar with procedural requirements, the Director of Public Prosecution is a seasoned litigant and has the benefit of a well-resourced office with highly experienced lawyers."*

46. It behoves the Applicant to have systems in place to check that correct decisions regarding jurisdiction are made. This is not the type of error which can be treated as outside the control of the Applicant nor one that could not be reasonably anticipated. Irrespective of the reason for the mistake and whether the resulting delay could be overlooked on the basis that mistakes happen for the purpose of O.84, r.21(3)(a), I am satisfied that the failure to advert to the error in a timely manner did not arise from circumstances beyond the control of the Applicant or outside her reasonable anticipation within the meaning of O.84, r.21(3)(b)(i) and (ii).

CONCLUSION

47. For the reasons set out, I am refusing an order extending time in these proceedings. All relief is refused on the basis that the application is out of time. The proceedings will be dismissed.