THE HIGH COURT

JUDICIAL REVIEW

[2022 No. 283 JR]

BETWEEN

PETER NOWAK

APPLICANT

-AND-

THE COURTS SERVICE OF IRELAND

RESPONDENT

-AND-

THE DATA PROTECTION COMMISSION

THE SUPERIOR COURTS RULES COMMITTEE

NOTICE PARTIES

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 20th day of March, 2024.

INTRODUCTION

1. This judgment concerns an application brought by Mr. Nowak seeking leave for judicial review, which was directed to be made on notice to the respondent. The parties agreed that the application before this court should be treated as a telescoped hearing, and, for that reason, the court will address both the substantive claims for relief, and the application for leave. Mr. Nowak represented himself in these proceedings, and the respondent was represented by counsel. The notice parties did not participate in the hearing. The respondent is the Courts Service of Ireland, and its staff members were involved in processing the necessary papers. Where I refer to the respondent, this should

be taken as including registrars and other officials employed by the respondent in the Central Office.

2. Mr. Nowak has sought orders of mandamus and declarations arising from what is characterised as a decision by the respondent not to accept four notices of appeal from decisions of the Circuit Court. His challenge is premised on three main contentions: first, that the notices of appeal complied with the relevant rules and ought to have been processed; second, that Order 61 of the Rules of the Superior Courts ("the RSC") does not apply to appeals to this court pursuant to s. 26 of the Data Protection Act, 1988 ("the 1988 Act"); and third, that the Courts of Justice Act, 1936, as amended ("the 1936 Act"), does not apply to appeals from the Circuit Court under s. 26 of the 1988 Act. The respondent disputed all of those substantive contentions and made the further argument that the proceedings were out of time.

3. For the reasons set out in this judgment the court has decided to refuse the relief sought. The proceedings were out of time by a substantial margin, and Mr. Nowak has not explained that delay or sought an extension of time. If the court is incorrect in that assessment, the court also is satisfied that the substantive points raised by Mr. Nowak are incorrect.

BACKGROUND

4. The legal issues raised by Mr. Nowak arise in connection with his attempts to institute appeals on a point of law to the High Court against certain orders made in the Dublin Circuit Court pursuant to s. 26 of the 1988 Act. In turn, the matters in the Circuit Court involved appeals against decisions made by the Data Protection Commissioner. From the papers, the Circuit Court dismissed four separate appeals brought by Mr. Nowak

against the Data Protection Commissioner, with each involving different groups of notice parties. The Circuit Court orders were made on the 23 November 2021, and Mr. Nowak had 10 days to lodge an appeal to this court.

5. Following the decisions in the Circuit Court, Mr. Nowak, who, at the time, was based outside the jurisdiction, prepared notices of appeal in each case and transmitted the notices by registered post to the Central Office of the High Court. The notices of appeal were received by the Central Office of the High Court on the 2 December 2021, one day before the time period expired. The appeals were processed the same day, and the respondent identified that they were not in the correct format and had not used the correct title. Mr. Nowak had not provided any contact information other than his postal address, so the respondent wrote to him explaining that they considered the forms to be incomplete, and that if he required an extension of time, he could use a template form attached to the rejection note.

6. I should note that, at the hearing, the respondent contended that while Mr. Nowak chose to post his forms, rather than attending the Central Office, he could have appointed an agent to attend on his behalf. Had this been done, the deficiencies in the forms would have been addressed in person and any necessary amendment made there and then. A further point was made that if Mr. Nowak had engaged constructively with the respondent, it would have been possible to regularise the notices and he would have been in a position to make the necessary application to extend time for his appeals. I consider that these propositions are well made. If Mr. Nowak had taken the course suggested to him instead of erroneously insisting that his position was correct, these proceedings, with the associated costs for the respondent and the use of scarce court time, would have been avoided.

7. On the 6 December 2021, Mr. Nowak communicated with the respondent, saying, in effect, that their refusal of the forms was not satisfactory to him. Mr. Nowak emailed again on the 7 December 2021. The respondent then emailed Mr. Nowak, advising him of the correct template form to use and provided him with a copy of same. There were subsequent email exchanges between the parties with Mr. Nowak insisting that the notices of appeal should be accepted.

8. Mr. Nowak then proceeded to seek to commence this application for judicial review. There is some confusion about the precise timeline in this regard. The statement to ground the application for judicial review is dated 29 December 2001 and Mr. Nowak's grounding affidavit is dated 13 January 2022. In an order of this court (Meenan J.) dated 24 October 2022, it is noted that Mr. Nowak first made an *ex parte* application on the 16 May 2022. The matter was then adjourned to the 24 October 2022, when Meenan J. court directed that the papers be served on the respondent so that they would be on notice of the application for leave to apply for judicial review. As is apparent from a further order of Meenan J. on the 20 December 2022, Mr. Nowak had not served the papers (or served them properly) by that stage, so a further order was made on a peremptory basis requiring Mr. Nowak to file and serve a notice of motion returnable to the 13 January 2023.

9. By motion dated 11 January 2023, the applicant set out the orders for which leave was sought. The first relief sought was an order "*of mandamus directing the Central Office of the High Court to process Appeals against the Circuit Court Orders bearing the record numbers of 2020/712, 2019/8026 and 2019/6940 within a week from the date of the Order"*. The applicant also sought a declaration that Order 61 of the RSC does not

apply, in whole or in part, to the appeals pursuant to s. 26 of the Data Protection Act, 1988 and an order that his Notices of Appeal against the Circuit Court orders were "*valid and safe to process*".

THE POSITION OF THE PARTIES

10. The crux of Mr. Nowak's arguments is as follows:-

    a. that the titles of the proceedings were exactly the same as those in the Circuit Court proceedings and, thus, the contents of his Notices of Appeal were sufficient for the Central Office to accept and process them;

    b. that his Notices of Appeal contained the points of law he was appealing which, he says, he was required, and correct, to do under Hedigan J.'s decision in *Dublin Bus v. Data Protection Commissioners* [2012] IEHC 339;

    c. that Order 61 of the RSC does not apply to appeals under s. 26 of the Data Protection Act, 1988; and

    d. that even if Order 61 does apply, the applicant is not out of time because he was within the ten-day timeframe required by Order 61 and that he does not need to apply for an extension of time because it is the respondent who was wrong in rejecting his Notice of Appeal.

11. Mr. Nowak contends that while Order 61 has been applied to appeals pursuant to s. 26 of the 1988 Act, it does not, and cannot, apply due to procedural differences between the Part IV appeals under the 1936 Act and the 1988 Act. These procedural differences were highlighted as being, first, that the 1988 Act allows for appeals to go beyond the High Court whereas s. 39 of the 1936 Act says that appeals "*shall be final and conclusive and not appealable*". Second, an appeal to the High Court pursuant to s. 26

of the 1988 Act is restricted to a point of law, whereas s. 38 of the 1936 Act provides for a rehearing in the High Court. The applicant relies on the decision of *Nowak v. DPC* [2016] IESC 18, [2016] 2 IR 585, in stating that the Supreme Court confirms this position. Furthermore, the applicant seeks to argue that an appeal under the Data Protection Act 1988 does not apply to Part IV appeals of the 1936 Act as it does not mention, or refer to, the 1936 Act, in any way, in its text.

12. The respondent argued essentially that it was correct and entitled to refuse Mr Nowak's forms of the applicant. The respondent submits that the central issue in the case is whether Order 61 of the RSC applies to these appeals from the Circuit Court, and, if so, whether the respondent was correct to refuse his forms. The respondent argues that Mr Nowak has mis-read *Dublin Bus v. Data Protection Commissioners* [2012] IEHC 339, an authority which is heavily relied on to support his contention that his forms were correct under case law and "*common sense*".

13. The respondent argued that Mr. Nowak, in any event, was out of time to bring this application, where the first application for leave to apply for judicial review was made *circa* 5 months after the rejection of the forms was communicated to the applicant.

14. Finally in relation to the claim for mandamus, the respondent argued that the appeals have been out of time since the 4 December 2021, by reference to the ten-day appeal period under O. 61, r. 2 of the RSC. The respondent submits that the court is being asked to order the respondent to process and file appeal documents without Mr. Nowak seeking an extension of time where other parties may be prejudiced (or at least affected).

15. The respondent's evidence was in the form of an affidavit sworn by a Courts Service official, Ms. Kim Duffy the 24 March 2023. In her affidavit Ms. Duffy avers, in summary, the following: -

a. The functions of the respondent are administrative or practical and that the respondent has no role in the actual administration of justice, which is carried out by the courts and by members of the judiciary.

b. Section 26 of the 1988 Act provides for an appeal to the High Court on a point of law against such a decision of the Circuit Court and that Order 61, rule 2 of the RSC provides that the time period for the service of a notice of appeal such, as is at issue in this case, is ten days from the date on which the Order of the Circuit Court was pronounced in open court.

c. The Central Office of the High Court received Mr Nowak's four notices of appeal for filing via registered post, which were processed by an official of the Central Office on the 2 December 2021. On that same date, the official wrote to the Mr Nowak rejecting the notices, setting out the following explanation: "*Document content incorrect – The notice of appeal is the wrong format please see notice of appeal template enclosed – The title should be the same as the circuit court – If you are out of time a notice of extension of time to appeal is required please see template enclosed.*"

d. That having reviewed the file, Ms. Duffy was satisfied that Mr Nowak's notices of appeal were not in accordance with Appendix I of the RSC. Furthermore, Mr Nowak did not stipulate the Circuit Court venue in which his cases had been heard; she said this is a requirement of Order 61, rule 2 of the RSC having regard to the

provisions of Part IV of the Courts of Justice Act, 1936, specifically ss. 37 and 38 thereof.

e. Mr Nowak's notices of appeal were received on the ninth day of the ten-day time period; that they were correctly identified as being required to be dealt with urgently as a result, and that there was no other option available for communicating with the applicant except to return the notices via post.

f. The Central Office was open, at all material times, albeit with significant restrictions on visitors in person due to the exigencies of the Covid-19 restrictions. Had Mr Nowak, or a solicitor on his behalf, attended in person, Ms. Duffy expressed the belief that all queries could have been resolved on the day of attendance, by which she meant that the appropriate court to hear the appeal could have been ascertained and a form in the proper format prepared.

g. Ms. Duffy pointed to a notice on the Courts Service website from this period which directed that time sensitive matters should not be sent by post as the turn-around time was five days.

h. On the 6 December 2021, Mr Nowak emailed the High Court Central Office indicating he would resend the notices for reprocessing "*as they were filed in time and rejected for no valid reasons.*" A member of the Central Office replied advising Mr Nowak that in 2018 the template changed for notices of appeal to the High Court and provided him with an appropriate template. Several subsequent exchanges took place.

i. Under the RSC, in particular Order 61, the Central Office has no authority to accept a notice of appeal upon expiry of the ten-day period, of which Ms. Duffy avers the applicant was out of time.

j. The options available to Mr Nowak were, once the notices had not been filed and served within time, to seek the consent of the other side to the late filing of the notices or to seek an enlargement of time under Order 63, rule 1(5) RSC, so that his appeals could be filed and served within any extension of time granted to him. To the best of her knowledge, Mr Nowak did not seek to avail of either option.

k. Ms. Duffy reiterated that the respondent has no judicial function. This was in response to Mr Nowak's assertion that "*it is not open to the staff of the Courts Service not to accept or process the Notice of Appeal based on a view that the format of the Notice of Appeal was incorrect. The opinion in this respect is vested with the High Court to rule on the validity of any Notice of Appeal.*" Ms. Duffy avers that, "*the issue in this case was that the forms presented by the Applicant were deficient so as to prevent them from being accepted for filing by reference to incomplete information provided by him. It is not the case that the Respondent made any impermissible determination whatsoever as to whether the Notices of Appeal were invalid, as apparently contended for by him.*"

DISCUSSION

(A) The Substantive Claims for Relief

16. Section 26 of the Data Protection Act, 1988 provides for appeals to the Circuit Court from, *inter alia*, decisions of the Data Protection Commissioner in relation to a complaint made under the Act. Section 26(3) provides that appeals from the Circuit Court may be brought on a point of law. No special procedure is set out in the 1988 Act addressing how those appeals are to be regulated.

17. The Court is satisfied that the process is governed by Part IV of the Courts of Justice Act, 1936, as amended, which makes provision, *inter alia*, for appeals to the High Court from the Circuit Court in civil matters. It is not material, as Mr. Nowak seems to suggest, that the 1988 Act post-dates the 1936 Act, or indeed that data protection as a concept was unknown in 1936. The 1936 Act speaks to the present, and, absent a particular statutory provision governing a particular type of appeal from the Circuit Court to the High Court, the provisions of the 1936 Act are applicable. It must be taken that when the Oireachtas enacted the 1988 Act, it was aware that provision already had been made for appeals from the Circuit Court to the High Court in the 1936 Act, and was satisfied that there was no need to make provision for a separate process.

18. Mr. Nowak suggests that it is anomalous to utilise Part IV of the 1936 Act for appeals that are restricted to points of law. Taking both the 1936 Act provisions together with s. 26 of the 1988 Act, I consider that the potential anomaly can be resolved without any real difficulty. Save where there is a specific process identified in statutes for the processing of specific appeals to this court from the Circuit Court, the 1936 Act provides a general framework for the processing of such appeals. The 1988 Act provides special rules, to be applied within the 1936 Act framework, for the subject matter and conduct of those appeals. If that were not so, there would be framework for the transmission of such appeals from the Circuit Court.

19. To understand the difficulty faced by the respondent's staff, it is also important to understand that under the 1936 Act, as amended, appeals from the Circuit Court are not dealt with in a uniform way. This explains why certain matters are required to be identified with some specificity in notices of appeal.

20. Section 37 of the 1936 Act provides that: -

"(1) An appeal shall lie to the High Court sitting in Dublin from every judgment given or order made ... by the Circuit Court in any civil action or matter at the hearing or for the determination of which no oral evidence was given." [emphasis added]

21. Section 38 of the 1936 Act, as amended, provides that:-

"(1) An appeal shall lie from every judgment or order ... of the Circuit Court in a civil action or matter –

(a) Where such judgment or order is given or made by a judge of the Circuit Court for the time being assigned to and sitting in the Dublin Circuit, to the High Court sitting in Dublin, and

(b) In every other case,

(i) subject to subparagraph (ii) to the High Court on Circuit sitting in the appeal town designated for the appeal in accordance with section 34(2), or

(ii) *where a direction has been given pursuant to section 24(7) in respect of the appeal town in which the appeal, but for such direction, would have been heard, to the High Court sitting in such other appeal town, or to the High Court sitting in Dublin, as the case may be, as directed in accordance with section 34(8).*" [emphasis added]

19. Hence, in order to process a notice of appeal and identify whether the appeal will be heard by the High Court in Dublin or on Circuit, there is a need for the notice to identify whether oral evidence was given and/or the Circuit Court in which the decision under appeal was made.

20. Order 61 of the RSC, as amended, provides for the time period within which appeals should be served, and the information that is required to be contained in the notice of appeal, and identifies the forms that should be used. There is no other specific rule applicable to appeals under s. 26 of the 1988 Act from the Circuit Court to the High Court, and as such Order 61 is the applicable rule.

21. Regarding the use of forms identified in the RSC, it is well established that there is no need to adhere slavishly to the forms that are appended to the RSC. However, that can only be on the basis that the forms used contain the necessary substantive information. In this case, the notices of appeal did not identify the Circuit Court in which judgment was given or whether oral evidence was given. These were material and important omissions.

22. The respondent carries out administrative functions that are adjacent to, and assist in, the administration of justice but does not discharge, or purport to discharge, judicial functions. The respondent has no legal authority to decide that the rules of court can be modified or waived, that function is reserved to the judiciary, and is, itself, regulated by rules of court and caselaw. For that reason, the respondent went as far as it could in trying – unsuccessfully – to engage with Mr. Nowak by suggesting how he could get over the problems that arose. The respondent did not have a legal power to process notices of appeal that were defective, or to permit the notices to be filed once the time limit had expired. That should not be a particularly difficult problem for an appellant to address as there are well established, straightforward, and relatively cost-effective procedures for applying to extend the time for an appeal from the Circuit Court.

23. Mr. Nowak contended that the observations of Hedigan J. in *Dublin Bus v. Data Protection Commissioner* [2012] IEHC 339, lead to a conclusion that his notices of appeal were sufficient. That is a misunderstanding of the judgment. That case addressed the issue of whether a notice of appeal in data protection matters should set out, in its body, the particular point of law that is sought to be agitated. The judgment is consistent with other judgments on statutory appeals on a point of law and makes clear that a notice of appeal may be defective if it does not identify the point of law that is said to arise. It is not authority for the proposition that the notice of appeal is valid if it identifies the specific point of law but fails to set out other necessary information.

24. For the reasons set out above, the court is satisfied that Mr. Nowak is not entitled to relief because his substantive legal arguments are incorrect. Moreover, in circumstances where the notices of appeal are now very significantly out of time, it is very difficult to understand how this court could grant orders of mandamus where the effect would be to compel the respondent to process court filings in those circumstances, with potential prejudice for the affected notice parties.

(B) <u>Application for Leave to Seek Judicial Review/ Delay</u>

25. In circumstances where I have found that Mr Nowak is not entitled to the substantive relief the question of leave appears redundant. However, it is important to address the delay arguments. As noted above, Mr. Nowak applied *ex parte* for leave to apply for judicial review on the 16 May 2022. The respondent informed Mr. Nowak that his notices were defective on the 2 December 2021, and following correspondence – which strictly speaking should not stop time running – the respondent sent an email on the 20

December 2021 informing Mr. Nowak that the notices would not be accepted. Hence there was a delay in instituting proceedings in the order of approximately 5 months.

21. The decisions of the Supreme Court in *KSK Enterprises Ltd v. An Bord Pleanála* [1994] 2 IR 128 and *Reilly v. DPP* [2016] IESC 59, [2016] 3 IR 229, establish that filing judicial review papers will not stop time running. In *KSK*, Finlay CJ made clear that there was "*no doubt in my mind that an application to the Court made by motion ex parte cannot be said to be made until it is actually moved in Court.*" Accordingly, while Mr. Nowak may well have formed the intention to bring this judicial review and prepared papers in that regard, the only relevant date for the purposes of addressing the initial question of whether the proceedings were brought in time is the date when an *ex parte* application was first moved by Mr. Nowak in court.

26. Order 84, rule 3 of the RSC permits the court to grant extensions of time. However, there must be an application for that relief grounded on evidence. The evidence supporting that application must satisfy the court that there is good and sufficient reason for doing so, and that the failure to make the application within the requisite period was the result of circumstances that were outside the control of the applicant or that could not have been anticipated by him. Here, Mr. Nowak was on notice that the respondent was raising a delay point but seems to have decided not to make the necessary application or to seek to swear an affidavit setting out any explanation for the delay.

27. Hence, the proceedings clearly are out of time and there is no application to the court or evidential basis for the court to grant an extension of time. In all the circumstances and for the reasons set out herein, the Court will refuse the relief sought by Mr. Nowak.

28. As this judgment is being delivered electronically, my provisional view is that the respondent should be entitled to the costs of, and associated with, these proceedings, to be adjudicated in default of agreement. This is because the respondent has been wholly successful in defending the application. If there is any dispute in relation to costs, the party seeking a different resolution should communicate that to the other party and will have 14 days from the date of issue of this judgment to file written legal submissions of no more than 1000 words. The responding party will have 7 days thereafter to file replying submissions of a similar length. I will then fix a date to address the question of costs.