AN CHÚIRT UACHTARACH

THE SUPREME COURT

[2023] IESC 28

Supreme Court Record No. S:AP:IE:2022:000030

Court of Appeal Record No. 56/2021

High Court Record No. 2004 19212 P

Charleton J.

O'Malley J.

Baker J.

Woulfe J.

Murray J.

Between/

JOHN COLM MURPHY

Appellant

-and-

THE LAW SOCIETY OF IRELAND

Respondent

Judgment of Baker J. delivered on the 29th day of November 2023.

1. I gratefully adopt the outline of the facts in the appeal and the arguments set out in the judgment of my colleague Woulfe J., and I agree with the order he proposes.

2. I wish to take this opportunity to comment on one aspect of the appeal, that concerning the argument made by Mr Murphy that the justice of the case requires that time to appeal be extended, because the facts and in particular the findings of the High Court and Court of Appeal inevitably lead to the conclusion that he will be wholly successful in that appeal. His argument in essence is that the interests of justice are not served if a litigant with an unanswerable ground of appeal is refused leave to appeal on that ground, and in particular when the evidence supporting that ground was not available within the time fixed for an appeal in the ordinary way.

3. The starting point of the argument made by Mr Murphy is the observation at para. 90 of the judgment of the Court of Appeal (Noonan J.) that the finding of misconduct was "factually and technically incorrect". Mr Murphy argues that on this account his appeal would succeed, that his appeal was unanswerable and that the observation of Noonan J. offers ample support for that proposition.

4. Noonan J. did not accept Mr Murphy's contention that the Healy letter presented a total defence to the allegation of misconduct. His observation does not amount to a finding that the appeal would invariably succeed. Any reading of the details and careful judgments of the High Court and the Court of Appeal will show this.

5. Mr Murphy argues that as a matter of certainty he will win the substantive appeal, and Woulfe J. accepts that he has at least met the high bar of arguability for which the authorities provide (para. 72 of his draft). I wish to address the issue whether a high, or a close to certain, chance of success in an appeal can of itself be a reason to extend time in the interest of justice. This is an appeal in which no third party rights are affected, although the finding of misconduct was part of a series of findings that ultimately impacted on Mr Murphy's status as a solicitor

and affected his constitutional right to work in his chosen profession. Mr Murphy argues that the concession made at the hearing of the High Court concerning the "missing months" means that even if there has been due to the passage of time a loss of memory or an inevitable unavailability of witnesses, which he does not accept, there would be, on a rehearing, sufficient evidence to support his appeal and that this could be done without any great degree of prejudice to the respondent. The question presents as to whether the interests of justice must mean that, when an applicant for extension of time has a certainty or near certainty of success in an appeal, that leave to appeal should always, or for the most part, be granted.

6. Certain factors are relevant in the consideration that would be had in such a scenario such as the need for closure or legal certainty, and the fact that the passage of time may mean in many cases events have occurred, rights have been established or foregone, or positions taken which cannot now be unravelled.

7. In this regard I would like to offer some reflections on the majority judgment of Finlay Geoghegan J. in this Court in *M. O'S v. The Residential Institutions Redress Board and ors* [2018] IESC 61, [2019] 1 I.L.R.M. 149.

8. That appeal involved the refusal of the respondent to extend time for an application pursuant to s. 8(2) of the Residential Institutions Redress Act 2002 and whether "good and sufficient reasons" existed for the purpose of an extension of time under O. 84 r. 21(3)(a) of the Superior Court Rules. The appellant there had spent two years in an industrial school where he was subjected to severe physical, emotional, and sexual abuse and neglect. His application for redress was made outside the statutory time limit and the Board refused to extend time as it did not consider that there were exceptional circumstances within the meaning of s. 8(2) of the Act of 2002 justifying an extension. Counsel's advice was sought by the appellant's

solicitor whether an application for judicial review might succeed, and the advice was that such an application was unlikely to succeed and that an unsuccessful application for judicial review could expose the appellant to legal costs.

9. Some three years later this Court in its decision in *A. O'G v Residential Institutions Redress Board* [2015] IESC 41 held that the term "exceptional circumstances" in s. 8(2) of the Act of 2002 was to be seen in the light of the fact that the statute was remedial in nature and noted also that the scheme did not require an applicant for redress to establish fault. Thereafter, the Court of Appeal in *J. McE* v *Residential Institutions Redress Board* [2016] IECA 17 (Hogan J., Kelly, and Edwards J.J. concurring) held that in light of *A O'G,* "the 2002 Act should be construed 'as widely and liberally as can fairly be done' " (para. 6). It was accepted in the hearing before this Court in *M. O'S* that that judgment changed the test or approach required of the Board in assessing whether exceptional circumstances existed.

10. The appeal to this Court in *M O'S* was predicated on an argument that the change in the law itself provided a good and sufficient reason to extend time, particularly when extending time involves a balancing exercise which must have regard to the potential restriction on the constitutional rights of an applicant to access to the courts. It was agreed that there was no likely third party prejudice and after considering the judgments of this Court in *De Róiste v Minister for Defence* [2001] IESC 4, [2001] 2 I.L.R.M. 241, [2001] 1 I.R. 190 , *Dekra Éireann Teoranta v. The Minister for the Environment and Local Government* [2003] IESC 25, [2003] 2 I.R. 270, and *O'Donnell v Dún Laoghaire Corporation* [1991] I.L.R.M. 301, Finlay Geoghegan J., noting the discretionary element of the jurisdiction to extend time, did so for the reasons she explained.

11. Since *G v Minister for Justice* [2002] 2 I.R. 418 at least, one of the factors to be tested in the discretionary exercise is the merits of the case or appeal. In most, if not all, of the jurisprudence this came to be framed as requiring an applicant to demonstrate an arguable case. (see *Eire Continental Trading Co. Ltd. v. Clonmel Foods Ltd.* [1955] I.R. 170 and *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3, [2020] 2 I.R. 441. In *M O'S*, Finlay Geoghegan J. accepted that the appellant had established that, were time to be extended, the applicant would undoubtedly have been entitled to an order of *certiorari*. However, she was clear that this factor alone was not sufficient, and an applicant had to satisfy the court as to the reason for the delay in bringing an application and whether the reasons objectively explained and justified the failure to meet the time limit. All "relevant facts and circumstances pertaining to the parties" fell for consideration (para. 60). The court is required to balance the rights of an applicant with those of a respondent or notice party.

12. She was clear that there was no "bright line principle" that precluded a court taking into account a relevant change in jurisprudence, nor was there any absolute rule in regard to what might be taken into account or what might constitute a good or a good and sufficient reason. The remedy is discretionary.

13. M. O'S, having taken legal advice, decided not to commence judicial review proceedings, and some similarity is shown with the facts in the present appeal, where Mr. Murphy had decided on the basis of the legal advice he received that an appeal would be pointless. It was later that the Healy letter offered him an evidential basis on which an appeal could succeed. But unlike the appellant in *M. O'S*, who had asked the Board to reopen his case on two later occasions, and applied for an extension of time within approximately one month of the judgment of the Court of Appeal in *J. McE*, Mr. Murphy did nothing for two years, and his delay is unexplained.

14. Further, there were a number of factors that positively influenced the exercise of discretion to extend time in *M.O'S,* including that the statute has remedial purpose, that the Board was to administer a no-fault redress scheme for a class of vulnerable and injured persons, the fact that the appellant had put forward reasons explaining and objectively justifying the commencement of judicial review, and that the application was made within a reasonable period of the judgment of the Court of Appeal which gave him hope of succeeding. To refuse him an extension of time would have been inconsistent with the judgment of appeal in *J. McE,* which the Board accepted correctly reflected the law and meant that its earlier decisions were not made in accordance with the law.

15. *M.O'S* is not authority for the proposition that an intended litigant or appellant will invariably, or even mostly, be successful in obtaining an order extending time on account of the fact that the underlying proceedings are likely to be successful. While the merits of the case is one of the factors which this Court considered relevant in *M O'S*, the other factors identified by Finlay Geoghegan J. were all relevant and bore on the discretionary exercise. It might be said that the decision to extend time was seen through the prism of the remedial nature of the jurisdiction exercised by the Board and the concession made by it that its decision refusing to extend time had not been done in accordance with the law. Indeed, the Board indicated to the Court that it had revisited other decisions in respect of which challenges had already been made, and that factor too weighed in the balance.

16. On other occasions the merits of an underlying appeal might operate as a threshold test, but not one that can conclusively determine the discretionary exercise.

17. Thus, it is important in any consideration of the application by the appellant in the present case to reject the broadly stated proposition that the observations of the Court of Appeal

that the findings of the High Court were "factually and legally incorrect" point to an overwhelming reason why time should be extended. There is no authority which suggests that even were the appellant to show that he would succeed in the appeal time should be extended. The prospect of success is one, and only one, of the possible grounds and arguments that must weigh in the balance. Whilst it might be the case that a person with an unequivocal and unanswerable appeal might succeed in persuading a court that absent all other considerations this factor alone warranted an extension of time. Mr Murphy's proposed appeal is not such, it would be wrong to extrapolate from the observation of the Court of Appeal taken alone and without regard being had to the other findings of that Court, that Mr Murphy had established a sufficient basis to extend time.