APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2022/253

Donnelly J.
Ní Raifeartaigh J.
Allen J.

Neutral Citation Number [2023] IECA 176

BETWEEN:

CORNELIA MOCANU

APPELLANT

AND

THE CHIEF APPEALS OFFICER

SOCIAL WELFARE APPEALS OFFICE

RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 11th day of July, 2023

Introduction

1. This is an appeal against the judgment of the High Court (Hyland J.) delivered on 23rd September, 2022 ([2022] IEHC 577) and consequent order made on 11th October, 2022 refusing to extend the time for a statutory appeal against a decision of the Chief Appeals Officer of the Social Welfare Appeals Office.

2. The impugned decision of the respondent was made on 8th January, 2021. The appellant's originating notice of motion was issued on 7th April, 2021 and served on 21st April, 2021. The time limit prescribed by O. 84C, r. 2(5) of the Rules of the Superior Courts is twenty-one days.

3. At the date of issue of the originating notice of motion the time for an appeal had long passed but from the time the papers were filed in the High Court, the appellant's focus was on the arguments she would make in support of the intended appeal rather than on the extension of time which she needed if her appeal was to be entertained. If the hope or expectation was that the perceived merits of the intended appeal would somehow excuse the fact that it was out of time, that was mistaken.

4. The extension of time which the appellant needed was (bar further and other relief and costs) the last of the reliefs sought by the originating notice of motion and in the notice of appeal to this court, the High Court judge's refusal of the extension of time was the last of the grounds of appeal. However, the High Court judge correctly identified the first issue to be dealt with as the appellant's need for an extension of time.

Background

5. The appellant is a Romanian national who has resided in Ireland since about 12th October, 2011. She lives with and is dependent on her adult daughter, who is a Romanian citizen living and working in the State. On 15th January, 2020 the appellant, in anticipation of attaining pensionable age in the following April, applied to the Department of Social Welfare for what is nowadays called a State Pension (Non-Contributory). The application was refused *inter alia* on the ground that although the appellant might have been living in the State, she had failed to prove that she had a right of residence in the State. On appeal by the

appellant to the Social Welfare Appeals Office, the decision of the Deciding Officer was upheld.

6. The essence of the decision of the Appeals Officer, as set out in the judgment of the High Court, was that:-

> *"…The [European Communities (Free Movement of Persons) Regulations 2015] provide in Regulation 6(5) for an EU citizen to derive a right to reside in another Member State from another family member, provided they inter alia, are a direct family member in the ascending line, of an EU citizen exercising EU Treaty rights. In this case this would be the Appellant's daughter who is working in Ireland since at least 2011. However, in order to establish this right the Appellant must demonstrate pre-dependency in her country of origin and continued dependence in Ireland. Furthermore, such a right is conditional on continued employment by the employed EU Citizen. The evidence on file has not established such a pre-dependency existed between the Appellant and her daughter prior to the former's arrival in Ireland. On the contrary the Appellant has stated that she supported herself by working. Additionally, the Appellant was living with her Spouse in their privately owned apartment."*

7. The foundation of the appellant's intended appeal to the High Court was the argument that there was no requirement in Article 2(2) of the Citizens' Directive 2004/38/EC or in art. 3(5)(b) of the European Communities (Free Movement of Persons) Regulations, 2015 (S.I. No. 548 of 2015) that she must demonstrate pre-dependency in her country of origin to qualify as a dependent direct relative of her daughter, who is an EU citizen worker.

8. On 31st March, 2023 in a case of *Holland v. Minister for Justice and Equality* [2023] IECA 74, this court, in a decision of Binchy J., with which Faherty and Ní Raifeartaigh JJ. agreed, decided that in the case of a relative in the descending line, there is a requirement of

pre-dependency in the country of origin. On the hearing of this appeal on 17th April, 2023, the basis of the intended appeal was modified to the proposition that this did not apply to relatives – like the appellant – in the ascending line.

The appellant's case for an extension of time

9. The originating notice of motion set out three reasons for which it was contended that the extension of time should be granted. It was said, first, that there was good and sufficient reason for extending the time and that an extension would not result in an injustice to the respondent. Secondly, it was said, a member of the appellant's household had tested positive for COVID-19 and in consequence she and her daughter and son-in-law on whom she depends were self-isolating for fourteen days, which coincided with the delivery of the respondent's decision on or about 11th or 12th January, 2021. Thirdly, it was said, the appellant formed a clear intention to challenge the decision within the prescribed time in circumstances in which she had authorised her daughter to instruct a solicitor by leaving voicemail messages and sending an e-mail on 17th January, 2021.

10. The application to the High Court was initially grounded on an affidavit of the appellant's solicitor, Ms. Carol Sinnott, sworn on 2nd April, 2021. An affidavit of Mr. Csongor Ferencz, an interpreter, and a short affidavit of the appellant, confirmed that Ms. Sinnott's affidavit had been read over to the appellant in the Romanian language and understood by her.

11. Ms. Sinnott set out the appellant's background and circumstances in detail and gave a comprehensive account of her application to the Social Welfare Services Office and her appeal to the Social Welfare Appeals Office. Ms. Sinnott exhibited all of the correspondence in relation to the application and appeal and – as far as could be ascertained – all of the

documentation that had been submitted to both offices. In the pre-penultimate paragraph of her affidavit, Ms. Sinnott deposed that:-

> *"Between 9th and 19th January, the Appellant was self-isolating at home because a member of her household (her son-in-law) had tested positive for Covid-19. On 17th January 2021 the Appellant's daughter tried to contact several solicitors by phone. She left voicemail messages but was never called back. Also the Appellant's daughter sent an email to one solicitor on 17th January 2021 (which I have seen but not exhibited hereto in circumstances where it is a privileged document); I am instructed that again no reply was ever received to this email either. I say and believe that there is good and sufficient reason for extending time to bring this appeal in the foregoing circumstances. I say that it is further relevant to this Honourable Court's determination of the Appellant's application to abridge (sic.) the time-limit that she did not seek to pursue an application for judicial review, though she would have been within time to do so, in circumstances in which she was advised that the statutory appeal mechanism may be considered to be the more appropriate remedy in the particular circumstances of this case."*

12. Following objection by the respondent that Ms. Sinnott's affidavit was hearsay, that affidavit was redrafted to be sworn by the appellant, translated into Romanian, and sworn by the appellant in English and Romanian on 22nd June, 2022, when an affidavit of a translator verifying the translation was also sworn. In the pre-penultimate paragraph of her affidavit, the appellant deposed (only) that:-

> *"Between 9th and 19th January, I was self-isolating at home because a member of my household (my son-in-law) had tested positive for Covid-19. On 17th January 2021 my daughter tried to contact several solicitors by phone. She left voicemail messages but was never called back. Also my daughter sent an email to one*

solicitor on 17th January 2021 (which is not exhibited hereto in circumstances where it is a privileged document); no reply was ever received to this email either."

13. On 15th October, 2021 an affidavit of Mr. Paul Bourke, Appeals Officer, was filed in opposition to the application. As far as is material for present purposes, Mr. Bourke referred to the Points of Opposition – which were filed on the same date – by which the respondent had indicated its preliminary objection that the appeal was out of time and its objection to an extension of time. He noted – without objection that it was hearsay – the evidence of the appellant that her daughter had sought assistance from a number of solicitors in January, 2021 but observed that no explanation had been offered for the delay between January and April, 2021. In the circumstances, he said, he was advised that there was no basis on which an extension of time might be granted.

14. On 12th November, 2021 an affidavit of Claudio Cojanu was filed on behalf of the appellant. Mr. Cojanu is the appellant's son-in law. Mr. Cojanu deposed that the appellant had received the respondent's decision rejecting her appeal on or about 12th January, 2021. The appellant had not previously said when she received the decision other than inferentially that it must have been before 17th January, 2021 when her daughter made her phone calls and sent her e-mail. Mr. Cojanu said that between 9th and 19th January, 2021 they were all self-isolating at home because he had tested positive for COVID-19. He said that he could clarify that although his wife, the appellant's daughter, was assisting in the search for a solicitor, most of the direct contact was being made by him.

15. Mr. Cojanu deposed that he had first started to look for a solicitor to help his mother-in-law on the day she received the decision, 12th January, 2021. He said that he made several calls that day to (unidentified) solicitors offices but all of those who answered said that they did not deal with pensions. On the same day, by an internet search, Mr. Cojanu identified a

named solicitor in a named firm who he thought might be able to help and spoke to the solicitor's secretary twice on the telephone and left a voicemail for the solicitor.

16. On 17th January, 2021 Mr. Cojanu sent another e-mail to the named solicitor and got a call back from one of the other solicitors he had called on 12th January, 2021. The solicitor who called back said that he did not deal with pensions but – according to Mr. Cojanu – suggested that Mr. Cojanu might ring Law Society Security *(sic.)*. He rang Law Society Security but they could not assist.

17. On 19th January, 2021 Mr. Cojanu telephoned another named firm of solicitors and left a voicemail message but never heard back. In the following paragraph he deposed that he *"also"* – he did not give a date but it appears to have been on the same date – stopped by at the offices of a named firm of solicitors in Lusk and another in Swords, but both were closed due to lockdown.

18. Mr. Cojanu deposed that after all these efforts to engage a solicitor, *"we"* waited for somebody to contact us back but no-one did.

19. *"Then,"* said Mr. Cojanu, *"around mid-February, a friend of the family suggested that we contact Sinnott Solicitors as he was already a client of this firm and was aware that their offices were open during the lockdown and that they deal with EU migrants' issues. This friend advised us to prepare all the papers and that he would then arrange an appointment. In between our work schedule and the availability of Sinnott Solicitors, we managed to first meet on 19th March, 2021. Thereafter, once advices were obtained from Counsel, the matter was prepared as quickly as possible so that it could be lodged with this Honourable Court on 7th April, 2021. We were advised that a judicial review of the decision might be possible and that we would still be within time to do this but that the statutory appeal procedure was more appropriate in this particular case."*

20. Mr. Cojanu then continued:-

"The 'Covid 19' lockdown restricted and delayed my mother-in-law's search for a Solicitor because most law offices were closed to the public and because of travel restrictions that were in place after Christmas. My mother-in-law is also a 67-year old woman with very limited English. As a result, she depends very heavily on my wife and I for such supports and assistance. My wife and I had to balance this need for support with our own household, family and work commitments at the time."

The High Court judgment

21. The High Court judge ([2022] IEHC 577) commenced her consideration of the appellant's application for an extension of time by identifying the prescribed time limit and the jurisdiction to extend the time in O. 84C, r. 2(5) of the Rules of the Superior Courts. Order 84C, r. 2(5)(b) allows the court to grant an extension of the time for:-

"... such further period as the Court, on application made to it by the intending applicant, may allow where the Court is satisfied that there is good and sufficient reason for extending that period and that the extension of the period would not result in an injustice being done to any other person concerned in the matter."

22. Having set out the arguments and identified the authorities relied on on either side, the judge concluded that the appellant had not identified a justifiable excuse for the delay. The judge noted that the prescribed time period was a short one – twenty-one days – and that the period of delay was almost four times that.

23. Applying the principles identified in the judgment of Baker J. in *Keon v. Gibbs* [2015] IEHC 812, the judge noted that there had been an early flurry of activity which had tapered off after the family were no longer required to isolate; that there was then a delay of two months between the initial flurry and the first meeting with Sinnott; and that thereafter there

was no particular urgency in bringing the application. The judge acknowledged that finding legal representation can be difficult, particularly for non-English speakers, and Mr. Cojanu's need to balance his own family obligations against the needs of his mother-in-law but concluded that that was not a substantive excuse which justified the delay. The judge accepted that there was an intention to appeal formed within the prescribed period; that the appeal was not vexatious; and that an extension of time would not prejudice any third parties. Nevertheless, she concluded that in the absence of a substantive explanation for such a significant delay relative to the time allowed, an extension of time would undermine the policy decision to set a short limitation period.

24. I pause here to make three observations on the evidence.

25. At para. 21 the judge referred to Mr. Cojanu contacting Sinnott solicitors in mid-February. I am not sure that that is quite right. As I understand Mr. Cojanu's evidence, what happened in mid-February was that Sinnott was identified by an unidentified friend of the family as a firm of solicitors who might be in a position to help and whose offices were open and that it was agreed that the friend would make an appointment after the papers had been assembled. I do not see any evidence of when the appointment for 19th March, 2021 was first sought or to what extent the availability of Mr. Cojanu and Sinnott contributed to the delay between mid-February and 19th March. There is no evidence of what papers it was thought might be necessary to assemble or how long it took to assemble them. On the evidence, it seems to have been left to the friend to make the appointment with the solicitors.

26. Secondly, as to the judge's observation at para. 23 that even after the initial consultation with Sinnott the appellant did not move with particular urgency in bringing the application, the fact of the matter is that by 19th March, 2021 the appeal was long out of time and there was no explanation for the three weeks which elapsed between then and 7th April,

2021 when the originating notice of motion issued, still less for the further delay of two weeks in serving it.

27. Thirdly, I do not see the evidence that there was an intention to appeal formed within the applicable time. There was no cross-appeal against this finding but it was – correctly in my view – characterised as a generous finding. It is true that the notice of motion asserted that the requisite intention had been formed but the appellant did not say so. On the evidence, the appellant first took legal advice as to the correctness of the respondent's decision on 19th March, 2021. I can readily accept that the appellant may have been disappointed by the respondent's decision but for my own part I would struggle somewhat with the notion that anyone might sensibly have decided to appeal to the High Court without advice as to the prospects – if any – of success of any appeal. As was pointed out by Baker J. in *Keon*, there is no express requirement in O. 84C that an intending appellant should have formed the intention to appeal within the prescribed time, although this may be a factor. If I take it – as, absent a cross-appeal, I must take it – that the appellant did decide to appeal within the time, the appeal which was available to her was an appeal to the High Court on a complex point of law. If I take it that the appellant did form the requisite intention to appeal without knowing what, if any, prospect there was of her appeal succeeding but in the hope of finding a solicitor who would take it on, it is not a factor to which I would ascribe much weight.

28. For the reasons given, the conclusion of the High Court was that no extension of time should be granted. Against the eventuality that she might have been incorrect in that conclusion – or, perhaps, that this court might not agree with it – the judge went on to consider the substance of the intended appeal. However, as far as this court is concerned, unless the appellant can establish that the High Court judge erred in refusing the extension of time it will not be necessary or appropriate to go any further.

29. I need to pause again at this point to say something about the law.

30. In the High Court and on the appeal, it was common case that the principles to be applied in considering an application for an extension of time under O. 84C were those set out in the judgment of Baker J. in *Keon.*

31. *Keon* was an application for an extension of time for an appeal to the High Court on a point of law pursuant to s. 123(3) of the Residential Tenancies Act, 2004. The application was made pursuant to O. 84C of the Rules of the Superior Courts, which prescribes the procedures for statutory appeals and it was argued on the basis that the court had power under O. 84C, r. 5(b) to extend the prescribed twenty-one day period, if it was satisfied that there was good and sufficient reason and that an extension time would not result in an injustice to any other person concerned. Thus, the issue argued in *Keon* was whether the intended appellant had made out a good and sufficient reason why he should be permitted to bring an appeal out of time and whether an extension of time would result in an injustice to any person.

32. The decision of the High Court in *Keon* was upheld by the Court of Appeal on the ground that the appellant had failed to identify an arguable ground of appeal but the judgment of Hogan J. (in which Finlay Geoghegan and Peart JJ. concurred), delivered on 4th July, 2017 [2017] IECA 195 identified a jurisdictional issue as to whether the time limit prescribed by s. 123 was absolute.

33. Soon after the judgment of the Court of Appeal in *Keon*, the High Court was called upon to deal with another application for an extension of time for an appeal pursuant to s. 123 of the Act of 2004. In *Noone v. Residential Tenancies Board* [2017] IEHC 556 the RTB submitted that the twenty-one day time limit in s. 123 of the Act of 2004 was absolute, while the intended appellant submitted that the court was bound by *Keon* to apply O. 84C on the

same basis. That issue had not been argued in *Keon* and Noonan J. found that the time limit prescribed by the Oireachtas was absolute.

34. Strictly speaking, then, the power to extend the time for a statutory appeal was not engaged in *Keon* and this Court, in upholding the decision of Baker J. on the ground that no arguable ground of appeal had been advanced, pointedly did not consider whether she had been *"correct in respect of all of the various indicia she indicated should be taken into account in determining whether to extend time."* However, as I have said, the application in the High Court and the appeal were argued on the basis that the principles applicable to an application under O. 84C, r. 2(5) are those set out in the judgment of Baker J. in *Keon* and I am satisfied to deal with the appeal on that basis.

35. For the avoidance of doubt, s. 317 of the Social Welfare Consolidation Act 2005 which provides for an appeal to the High Court on a question of law does not prescribe a time limit or procedure and accordingly, the applicable procedures are set out in O. 84C.

The appeal to the Court of Appeal

36. By notice of appeal filed on 15th November, 2022 the appellant appealed against the entire judgment of the High Court. As far as the refusal of the extension of time is concerned, the complaint – in two numbered paragraphs in the notice of appeal – is that:-

(i) The judge gave insufficient weight to the absence of any prejudice to the respondent;

(ii) The judge gave insufficient consideration to the reasons for which the extension of time was required, in particular to:

(a) The context being the third COVID-19 lockdown;

(b) COVID-19 self-isolation within the household;

(c) The appellant's language barrier;

(d) The appellant's dependency on others;

(e) Obstacles to accessing legal advice;

(f) *"and so forth"*;

(g) To the fact that *"seeing section 327 of the Social Welfare Consolidation Act, 2005 as the more appropriate remedy, the appellant proceeded by way of statutory appeal as opposed to judicial review even though she would have been in time to seek leave to pursue an order of certiorari."*

(iii) The decision to refuse an extension of time was unduly guided by the judge's judgment on the merits of the substantive case;

(iv) The judge erred in counting time up to the date of service as opposed to the date of filing and so overestimated the extension of time necessary.

37. As in the High Court, the appellant's written submissions in relation to the question of the extension of time accounted for about two of the total of nineteen pages.

Discussion and decision

38. It was common case on the appeal to this court, as it was in the High Court, that the applicable principles are those set out in the judgment of the High Court in *Keon*. Baker J. said, at para. 35:-

> *"35. I consider that the court in engaging the special provisions of O. 84C must look to the reason for the delay and to the other factors that might lead it to a view that there is good and sufficient reason to extend time. This requires analysis of the explanation offered for the delay, but also whether it can be said that there are sufficient reasons to permit the extension. The requirements are cumulative, and it*

seems to me that it is not intended that the court would look exclusively to whether the reason for the delay is good, but whether in all the circumstances there is a sufficient reason to extend time."

39. At para. 49, Baker J. summarised her conclusions as follows:-

"49. In summary, I consider that a court hearing an application for extension of time under O. 84C must have regard to the following factors:-

(a) the reason for the delay and whether a justifiable and sufficient excuse has been shown noting too that in general, and having regard to the test enunciated in Eire Continental Trading Company Ltd v. Clonmel Foods Ltd, and considered also by the Supreme Court in S. v. Minister for Justice, that a fault on the part of a legal adviser is not generally regarded as a sufficient excuse or reason for a failure;

(b) the length of the delay, noting that a short delay can relatively easily be excused;

(c) there is no express requirement that an intending appellant should have formed the intention to appeal within the relevant time, but this can be a factor;

(d) whether the appeal is arguable, or to put it in the negative, whether the attempt to engage the appellate process is arguably vexatious, frivolous or oppressive to the other party; and

(f) whether the extension of time is likely to cause prejudice to the other party, which can include litigation prejudice, where the passage of time has resulted in the loss of evidence or witnesses, but also a more general prejudice that an extension of time delays the conclusion of litigation and prevents the winning

party from recovering on foot of the judgment or order, and circumstances where an appeal may be merely tactical, or is unlikely to succeed."

40. In this case, the High Court judge identified the principles and factors set out in *McKeon* and considered them *seriatim* in assessing whether the appellant had established that there was good and sufficient reason for the granting of the order sought.

41. As to the argument that the judge gave insufficient weight to the absence of prejudice to the respondent, the judge clearly accepted that an extension would not prejudice any third parties but no less clearly, said that absent a substantive excuse, an extension of time of the order sought would undermine the statutory scheme. Sight must not be lost of the fact that the statutory appeal which the appellant would bring is a public law remedy. If it could fairly be said that the respondent would be in no worse position in defending a late appeal than he would have been in defending any appeal that might have been brought in time, nevertheless the respondent has a legitimate interest in upholding the statutory scheme and it seems to me that the respondent could properly be heard to say that the High Court ought not grant an extension of time for which a good and sufficient reason had not been shown. If what is behind this argument is a proposition that the absence of litigation prejudice to the respondent in meeting the substance of the case is a factor that should be afforded such weight as to generally justify an extension of time, it is wrong.

42. As to the reasons offered in support of the application for an extension of time, it is clear that the judge considered each of them. In my view, the argument that the judge gave insufficient consideration to *"the context being the third Covid-19 lockdown"* is meaningless. The mere existence of restrictions which had no effect on the appellant's ability to have brought her appeal in time cannot sensibly be material to the question of whether the time should be extended. On the evidence, the fact that the appellant, her daughter and Mr. Cojanu were self-isolating was no impediment to what the judge referred to as the flurry of

activity – by telephone calls, e-mails and internet searches – to identify a solicitor which began on the very day that the respondent's decision was received and ended a week later on 19th January, 2021.

43. On the appeal to this court, as she had in the High Court, the appellant relied upon – to the point of putting all of her eggs in the one basket of – the judgment of the High Court in *XS and JT v. The International Protection Appeals Tribunal* [2022] IEHC 100. That was a case in which the Ferriter J. granted an extension of time for a statutory appeal against a decision made during the third COVID-19 lockdown. The argument was that since the decision in this case had also been made during the third COVID-19 lockdown, the appellant should have an extension of time as well.

44. *XS and JT* was, as the appellant's written submissions to the High Court correctly summarised, a case in which the High Court accepted that difficulties relating to the COVID-19 restrictions, specifically, technical difficulties in taking instructions remotely and in convening consultations remotely with counsel prior to the institution of proceedings, afforded a justifiable excuse for a five week delay beyond a twenty-eight day time limit. Leaving to one side the fact that in this case the time limit was shorter and the delay nominally and proportionately a good deal longer, there was simply no evidence that technical difficulties in taking or giving instructions or convening consultations – remotely or otherwise.

45. The evidence was that on the very day on which the decision which she would now impugn was delivered to her, the appellant, by Mr. Cojanu, telephoned an unspecified number of – bar one – unidentified solicitors. He did not say how he selected the solicitors who he telephoned but inferentially – since those who responded said that they did not deal with pensions – they cannot have been identified as solicitors who had advertised that expertise. Besides the randomly chosen solicitors, Mr. Cojanu identified a named solicitor in

a named firm who might be in a position to assist. He did that, he said, by means of an internet search. If Mr. Cojanu's internet search for a solicitor with a particular speciality did not identify a number of such specialist solicitors, Mr. Cojanu did not say so. If the identified specialist solicitor did not respond to Mr. Cojanu's voicemail message on 12th January, 2021, Mr. Cojanu did not say that he later followed up on his enquiry. No less to the point, he did not say that he tried to identify any other specialist solicitor or tried to contact any of the other specialist solicitors which his internet search may have identified.

46. As far as the evidence went, nothing was done between 19th January, 2021 and mid-February, and after Sinnott solicitors were identified by the unidentified family friend as solicitors who dealt with EU migrants' issues and whose offices were open, it appears to have been left to the unidentified friend of the family to arrange the appointment. Unlike *XS and JT* there was no suggestion whatsoever of technical – or for that matter, any – difficulties in connection with the giving of instructions or the convening of meetings.

47. As to the appellant's inability to speak English, the High Court judge acknowledged that, in principle, finding legal representation can be difficult, particularly for non-English speakers, but the height of the evidence was a general statement that the appellant's daughter and son-in-law – who, at least inferentially are fluent English speakers – had to balance the appellant's need for support and assistance with the need for support for their own household – which included the appellant – and their family and work commitments at the time. There was simply no evidence that the appellant's language difficulty could have accounted for the fact that nothing was done between 19th January, 2021 and mid-February, 2021 to try to identify a solicitor, or for the fact that thereafter the meeting with Sinnott did not take place until 19th March, 2021.

48. I add for completeness that the appellant in her written submissions made reference to the judgment of Heslin J. in *L.K. v. International Protection Appeals Tribunal* [2022] IEHC

441. That was a case in which the appellant appears to have moved *ex parte* on 26th April, 2021 on foot of papers prepared on 19th April, 2021 for leave to apply by way of judicial review for an order of *certiorari* in respect of a decision of the International Protection Appeals Tribunal made on 3rd March, 2021 refusing him a labour market access permit. The judgment shows that the applicant applied for an order, if necessary, extending the time for the application but the fact that the application to the High Court may have been out of time did not feature at all in the judgment. Rather the focus was on the impact of the COVID-19 restrictions on the availability of a translator required to allow the applicant's solicitor to take instructions and on the ability of the International Protection Office to progress the application. It is clearly distinguishable on the ground that the appellant in this case had two Romanian translators more or less permanently available to her albeit family members and not official translators.

49. In my view the conclusion of the High Court judge that no substantive excuse had been offered for the very significant delay was abundantly justified.

50. I do not see the relevance of the fact that at the time the originating notice of motion issued the time for an application by way of judicial review had not expired. Section 327 of the Social Welfare Consolidation Act, 2005 provides for an appeal to the High Court from a decision of an appeals officer on a question of law. The decision which the appellant would impugn turned on a question of law. While it is asserted that the statutory appeal was *"more appropriate"* than an application by way of judicial review, it is not suggested that a judicial review would have had any prospect of success. In my view, the proposition that the time limit prescribed by O. 84C, r. 2(5) could be circumvented by the simple expedient of packaging the point of law as an application for judicial review need only be stated to be seen to be wrong.

51. In my view there is simply no warrant for the suggestion that in deciding whether the time for an appeal should be extended, the judge was unduly guided by her judgment on the merits of the substantive case. The judge first carefully considered whether the time should be extended. In doing so she – correctly – identified one of the relevant factors as being whether the point was arguable, and she found that it was. There is simply no basis for the suggestion that the judge either made or took into account any further assessment of the prospects of success of an appeal on the substance.

52. That apart, it seems to me that the appellant's argument that the High Court judge, in refusing to extend the time, erroneously took into account her view of the weakness of the substance of the appellant's argument, sits very uneasily with the thrust of the appeal – which is, more or less, that the appeal on the point of law would surely succeed, if only the time were extended.

53. In the course of the hearing, there was some discussion on the relevance, if any, of the judgment of the Supreme Court in *O'S. v. Residential Institutions Redress Board* [2018] IESC 61, [2019] 1 I.L.R.M. 149.

54. *O'S.* was a case in which a majority of the Supreme Court (MacMenamin, O'Malley and Finlay Geoghegan JJ.) – on a direct appeal from the High Court – was persuaded to extend the time for a judicial review of a decision of the Residential Institutions Redress Board.

55. On 9th January, 2012 the RIRB had refused an application by Mr. O'S. pursuant to s. 8(2) of the Residential Institutions Redress Act, 2002 for an extension of time to apply for redress on the grounds of *"exceptional circumstances".* At that time, the law in relation to the test to be applied by the RIRB in determining whether there were *"exceptional circumstances"* had been the subject of two High Court judgments – *J.O'B. v. Residential Institutions Redress Board* [2009] IEHC 284 and *A. O'G. v. . Residential Institutions Redress*

Board [2011] IEHC 332 – and Mr. O'S. had decided not to challenge the decision by way of judicial review. On 3rd February, 2016 in a case of *J. McE. v. . Residential Institutions Redress Board* [2016] IECA 17, the Court of Appeal – as Finlay Geoghegan J. in *O'S.* put it – changed the law or – as O'Donnell J., if he had entered the deep jurisprudential water as to the nature of judge made law, might have put it – discovered that the law was not as had been previously stated by the High Court. On 18th March, 2016 Mr. O'S. made an application *ex parte* for leave to apply for an order of *certiorari* by way of an application for judicial review of the RIRB decision of 9th January, 2012.

56. The central issue in *O'S.* was whether Mr. O'S. had established *"good and sufficient reason"* for an extension of time. The judgments – of Finlay Geoghegan J. for the majority and O'Donnell J. for the minority – are complicated but as I understand the judgment of Finlay Geoghegan J., the critical fact was that it was accepted by the Board that its decision was not consistent with the meaning of *"exceptional circumstances"* in s. 8(2) of the Act of 2002, as determined by the Court of Appeal in *J. McE.* It had been confirmed in the replying affidavit filed on behalf of the Board that it had revisited other decisions in light of the change in the law. In the very exceptional circumstances of the case, the Court was persuaded that Mr. O'S. had put forward reasons which both explained the delay and which objectively justified delaying the commencement of judicial review proceedings until after the judgment of the Court of Appeal.

57. The case at hand is immediately distinguishable on the ground that the appellant has not explained the delay.

58. As to the substance of the intended challenge to the impugned decision, if, on one view, Finlay Geoghegan J. might be said to have taken into account the strength of the challenge which the appellant would mount, it seems to me that in truth that was not based on an assessment by the court of the appellant's prospects of success but on the concession of

the Board that the impugned decision had been arrived at otherwise than in accordance with law. This is not such a case.

59. Moreover, as was pointed out by counsel for the respondent in this case, the effect of the decision in *O'S.,* if it had been allowed to stand, would have been to shut Mr. O'S. out forever. By contrast, in this case there would be no impediment to an application to the Chief Appeals Officer pursuant to s. 318 of the Act of 2005 for a revision of the decision if the appellant could later show that it was erroneous by reason of a mistake in relation to the law.

60. The argument that the judge overestimated the extension of time necessary by counting time up to the date of service as opposed to the date of filing appears to be founded on the judge's observation, at para. 22, that the period of delay was almost four times longer than the time allowed. Earlier, at para. 14, the judge recorded the respondent's submission that the proceedings had not been served until some 82 days after the time expired. In my view, the judge, in determining whether the appellant had established good and sufficient reason for an extension, was perfectly entitled to take into account the fact that the proceedings were not served promptly. In any event, I do not see that it could have made any difference if the period of delay had been measured at substantially upwards of three times longer rather than almost four times longer than the time allowed.

Conclusion

61. I respectfully agree with the reasoning and conclusion of the trial judge that the appellant has not provided any justifiable excuse for the very significant delay and that it would undermine the policy of the limitation period if notwithstanding the lack of any substantive excuse the time were to be extended.

62. I would dismiss the appeal and affirm the judgment and order of the High Court.

63. In circumstances in which the appeal to this court against the refusal by the High Court to extend the time for an appeal from the decision of the respondent fails, it is neither necessary nor appropriate that consideration be given to the substance of the intended appeal. It also disposes of the appellant's suggestion that this court should consider a reference to the CJEU. If – as is the case – it is not necessary for this court to decide the substance of the appeal which the appellant would have brought, it follows that there can be no question of EU law that needs to be decided to enable this court to give judgment.

64. As to the costs of the appeal, my provisional view is that the respondent, having been entirely successful on the appeal, is entitled to an order for costs but I would afford to the appellant the opportunity, within fourteen days of the delivery of this judgment, to file and serve a short written submission – not to exceed 1,000 words – as to why, is she would so contend, any other order should be made. In the event of any such submission by the appellant, the respondent will have fourteen days to file a similarly brief and focussed response.

65. As this judgment is being delivered electronically, Donnelly and Ní Raifeartaigh JJ. have authorised me to say that they agree with it, and with the orders I have proposed.