

APPROVED

[2020] IEHC 341

THE HIGH COURT
JUDICIAL REVIEW

2020 No. 173 J.R.
2020 No. 174 J.R.

BETWEEN

JESSIE CONNELL
TOMMY CONNELL

APPLICANTS

AND

GOVERNOR OF DÓCHAS CENTRE
GOVERNOR OF THE MIDLANDS PRISON
THE IRISH PRISON SERVICE
THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered electronically on 27 July 2020

INTRODUCTION

1. This judgment sets out my ruling on an application for an extension of time within which to issue and serve the originating notice of motion in two sets of judicial review proceedings. As explained presently, this is, in fact, the second occasion upon which an extension of time has been sought in the proceedings.

PROCEDURAL HISTORY

2. The Applicants, who are brother and sister, had applied for temporary release from prison to allow them to attend their mother's funeral on 29 February 2020. The judicial review proceedings seek to challenge the decisions, of the respective prison authorities, to refuse to entertain this application for temporary release on compassionate grounds. It appears that the prison authorities took the view that an application should instead have been

NO REDACTION NECESSARY

made to court for bail. The Applicants' case, as pleaded, is that this approach was erroneous in that there is a statutory power vested in the Minister for Justice and Equality to absent a prisoner from prison on compassionate grounds provided for under section 39 of the Prisons Act 2007.

3. Leave to apply for judicial review had been granted by the High Court (Gearty J.) on 28 February 2020. Such applications are normally made *ex parte*. However, in the present proceedings, the respondents were, very sensibly, put on notice of the leave application. This resulted in an accommodation being reached whereby the Applicants would be released on temporary bail so as to allow them to attend the funeral. The Applicants were also granted leave to apply for judicial review, and were directed to serve an originating notice of motion returnable for 20 March 2020.
4. This notice of motion should have been issued out of the Central Office and served on the respondents within seven days after perfection of the order granting leave. See Order 84, rule 22(3) as follows.
 - (3) A notice of motion or summons, as the case may be, must be served within seven days after perfection of the order granting leave, or within such other period as the Court may direct. In default of service within the said time any stay of proceedings granted in accordance with rule 20(8) shall lapse. In the case of a motion on notice it shall be returnable for the first available motion day after the expiry of seven weeks from the grant of leave, unless the Court otherwise directs.
5. The order granting leave had been perfected on 28 February 2020, and, accordingly, the notice of motion should have been issued and served by Friday, 7 March 2020.
6. In the event, however, this time-limit was not observed. Thereafter, on 8 June 2020, an application was made *ex parte* to the High Court (Meenan J.) for an extension of time within which to issue and serve the originating notice of motion. Time was extended for a period of fourteen days from the date of perfection of the order. The order was drawn

up the next day, 9 June 2020. Accordingly, the motion should have been issued and served by Tuesday, 23 June 2020. This deadline was also missed.

7. An application for a *second* extension of time was made before me on Monday, 20 July 2020. The explanation offered on affidavit for the need for this further extension of time is as follows.

“7. I say that the originating Notice of Motion was not issued and served on the Respondent’s (*sic*), as directed by this Honourable Court. I say that unfortunately when attempting to file the originating Notice of Motion I was not aware that stamp duty was required as I believed it to be a criminal matter and we had not had to stamp any of the documents up to this point. The stamping office was then closed when I attempted to stamp the documents.”

8. Although not expressly stated in the affidavit, it seems reasonable to infer that the solicitor must not have attempted to issue the originating notice of motion until the very last day of the fourteen day period. No explanation is given as to why this task had been left to the eleventh hour, with the consequence that there was no margin for error. Had the motion been presented to the Central Office at an earlier point within the fourteen days, then there would have been time to arrange for the stamping of the document, and for the solicitor to return to the Central Office the next day.
9. The affidavit also explains that the respondents have indicated their consent for a further extension of time to issue and serve the originating notice of motion should the High Court deem it appropriate.

APPLICATION TO EXTEND TIME

10. Order 84 of the Rules of the Superior Courts had been subject to significant amendment with effect from January 2012 (S.I. No. 691 of 2011). It is evident from the terms of the amended Order that the objective of the amendments was to ensure that judicial review proceedings will be progressed with greater expedition. Relevantly, the time period for

issuing and serving an originating notice of motion has been reduced from fourteen days to seven days.

11. The contingency of an applicant failing to comply with the seven-day time-limit is partially addressed by Order 84, rule 22(3) (set out in full earlier). As appears, one consequence is that any stay on proceedings, which had been imposed as part of the order granting leave to apply for judicial review, automatically lapses. The fact that a *stay* is addressed separately indicates that the proceedings themselves are not automatically terminated by the failure to issue and serve within time. See, by analogy, *Director of Public Prosecutions v. Hamill* [2000] 1 I.L.R.M. 150.
12. It is, nevertheless, necessary for there to be a further court order before the judicial review proceedings can be progressed. The High Court has a general discretion under Order 122 of the Rules of the Superior Courts to enlarge the time for doing any act or taking any proceeding, upon such terms (if any) as the court may direct. This discretion allows for an extension of time in judicial review proceedings. (*Kavanagh v. Healy* [2015] IESC 37).
13. The paramount consideration in the exercise of this discretion must be to do justice between the parties. Factors to be considered in this regard include the length of the delay, the explanation for the delay, and the prejudice, if any, caused to the other side by the delay. In the case of delay by an applicant, weight must be given to the consequences for the applicant were an extension of time to be refused and his or her proceedings thereby terminated.
14. Some weight must also be given to the consequences for litigation generally of an unduly lax approach to compliance with procedural requirements. As observed by Clarke J. (as he then was) 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.”

15. On the facts of the present case, I have concluded that the balance of justice lies against granting a further extension of time, for the following reasons.
16. First, judicial review proceedings should be progressed with expedition. Proceedings of this type must be instituted within much shorter time-limits than apply to other forms of civil proceedings. An application for judicial review should, generally, be made within three months from the date when grounds for the application first arose. Thereafter, the proceedings should be pursued with diligence. Regrettably, this did not happen on the facts of the present case: a notice of motion which should have been issued and served by 7 March 2020 has still not been served by July 2020.
17. Secondly, the Applicants have already had the benefit of an extension of time. Time had been extended until 23 June 2020. In circumstances where the Applicants were already in default in issuing and serving the originating notice of motion, it behoved their solicitor to ensure that this extended deadline was met. In the event, the deadline was missed. The explanation offered is not a reasonable one: the solicitor should have known that stamp duty would be payable. Moreover, the attempt to issue the originating notice of motion out of the Central Office of the High Court should not have been left until the eleventh hour. It is also a concern that the application seeking the second extension of time was not moved before the court until Monday, 20 July 2020. This entailed a further delay of some five weeks.
18. Thirdly, the balance between (i) ensuring compliance with the Rules of the Superior Courts and discipline in legal proceedings, and (ii) the substantive rights of the parties,

also favours the refusal of the application for a further extension of time. As is fairly conceded by the solicitor in her affidavit grounding this application, the judicial review proceedings are largely moot in circumstances where the Applicants had been granted temporary bail by the High Court in order to attend their mother's funeral. It seems that the only issue outstanding is in relation to the costs of the judicial review proceedings. The dismissal of the proceedings will not, therefore, cause any prejudice to the Applicants. (I address the position in respect of costs at paragraph 21 below).

19. Finally, the fact that the respondents have indicated their consent to the granting of a further extension of time, should the High Court deem it appropriate, is not determinative of the application. Whereas the fact that a respondent is objecting to an extension of time on the grounds that it has been prejudiced by delay would certainly be a factor in favour of refusing an extension of time, it does not follow as a corollary that, in the absence of any objection, an extension of time should automatically be granted. The question of delay cannot be considered solely from the perspective of the parties. The time-limits prescribed under Order 84 are intended to ensure that judicial review proceedings are progressed expeditiously. This is an important objective, and would be undermined were dilatory litigants to be allowed an extension of time too readily.

CONCLUSION AND PROPOSED FORM OF ORDER

20. For the reasons set out herein, the application for the second extension of time within which to issue and serve the originating notice of motion in these two sets of judicial review proceedings is refused. It follows that the judicial review proceedings must be dismissed.
21. Insofar as costs are concerned, I propose to make no order. The failure on the part of the Applicants to issue the originating notice of motion had the consequence that the

proceedings never progressed beyond the application for leave to apply for judicial review. The leave application is normally made on an *ex parte* basis, and thus an applicant will not have any liability for the costs of the other side. Whereas the leave application in the present case was, for very sensible reasons, made on notice to the respondents, it would not be appropriate to require the Applicants to pay the costs incurred. The application was an urgent one, and the Applicants did obtain some relief, i.e. their release on temporary bail.

22. If either party disagrees with the proposed costs order, then they are to file short written submissions within fourteen days of the date of this judgment. A copy of the submission should also be emailed to the Registrar assigned to this case.

Approved
Garnett S. MANS