



**THE HIGH COURT
JUDICIAL REVIEW**

[2024] IEHC 744

[Record No. 2023 1188 JR]

BETWEEN

DARREN WINTERS

APPLICANT

AND

THE LEGAL AID BOARD, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Bolger delivered on the 31st day of December 2024

1. This is the applicant’s judicial review of a decision of the first named respondent, the Legal Aid Board, to refuse his application for payment of legal costs from the Legal Aid Custody Issues Scheme (hereinafter referred to as “the scheme”), which payment was recommended by the High Court before whom earlier proceedings were struck out by consent.

Background

2. On 15 June 2022 while the applicant was incarcerated in prison, he was traveling back to prison from a court appearance when the prison vehicle in which he was traveling was involved in a collision as a result of which he sustained injuries to his head, neck and back. He was not taken to hospital, and on the following day he attended with a prison nurse. He sought a consultation with the prison GP, but they could not see him. On 28 July 2022, the applicant was given leave to seek an order of mandamus compelling the provision of medical treatment to him. On 25 October 2022, those proceedings were struck out by consent and the court recommended payment of the applicant’s costs in accordance with the scheme. The applicant’s solicitors sought payment on foot of that recommendation, but this was

refused by the Legal Aid Board by letter dated 18 July 2023 on the basis that the proceedings related to the manner of the applicant's detention and, therefore, pertained to administrative and statutory functions of the prison and did not come within the scheme. The applicant's solicitors wrote to the Legal Aid Board again by letter dated 21 August 2023 asking that their application be reconsidered. That letter did not receive a reply. The applicant's solicitor wrote again on 28 September 2023, asking for a review of the decision. The Legal Aid Board responded by letter dated 3 October 2023 setting out, in similar terms to its decision of 18 July 2023, that the litigation was not covered by the scheme. That letter went into further detail about what the Board said was its right to decide whether proceedings are eligible for the scheme and the relevance of the court's recommendation in the Board's consideration of an application.

3. The applicant issued these proceedings on 19 October 2023.

Time

4. The respondent contends that the applicant is out of time pursuant to O. 84, r. 21(1) and that no application to extend the time "*for good and sufficient reason*" pursuant to O. 84, r. 21(3) has been made. Order 84, rule 21(1) provides:-

"(1) 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."

The three-month time limit runs from when grounds for the application first arose. The Court of Appeal have unequivocally confirmed that this is "*when a decision having legal effect is made*" (*Arthroparm (Europe) Ltd v. HPRA* [2022] IECA 109 at para. 68(i)).

5. The applicant relied on the decision of Simons J. in *Gilligan v. CAB* [2024] IEHC 601 in contending that the pre-litigation correspondence of August and September affects the date from which time should be calculated. That was a challenge by way of judicial review to a decision made within the statutory framework of social welfare legislation which provides for what the Court of Appeal has described as "*extensive rights to seek to revise the decisions*" (at para. 42, *F.D. v. Chief Appeals Officer* [2023] IECA 123). Simons J. held that:

"If the potential ground of judicial review is one which is capable of being corrected during the course of the decision-making process, then the applicant should seek to have it corrected" (at para. 32).

A decision about social welfare entitlements, such as was at issue in *Gilligan*, is capable of being corrected within the revision and appeal process prescribed under Part 10 of the Social

Welfare Consolidation Act 2005. No such revision or appeal process exists under the scheme the subject matter of the within proceedings. Engaging in pre-litigation correspondence is to be commended as is an applicant who sets out in such correspondence why a decision is wrong and the basis on which they may seek to challenge it by way of judicial review or otherwise and the existence or non-existence of such correspondence could be relevant to matters such as costs. However the existence of such correspondence cannot affect the calculation of the three-month time limit with which an applicant must comply in order to ensure that the court has jurisdiction to deal with a judicial review.

6. The Legal Aid Board made a decision to refuse the applicant's application for consideration under the scheme in their letter to the applicant's solicitors of 18 July 2023. The applicant's solicitors referred to that "*decision*" in both of their subsequent letters of 21 August 2023 and 28 September 2023, in which they requested the Legal Aid Board to review their decision. The fact that those letters were not replied to until 3 October 2023 does not affect the statutory time limits. Nor does it render the repetition of the 18 July decision in the 3 October letter a new decision or allow time to run from 3 October.

7. Time runs from the date of the letter containing the decision, i.e. 18 July 2023. The proceedings did not issue until 19 October 2023 and were, therefore, out of time.

Extension of time

8. No application for an extension time has been made pursuant to or in compliance with O. 84, r. 21(3). The applicant instead sought to rely on the reference in his amended statement of grounds at d(6) where he seeks "*[i]f necessary, an Order extending time for the making of this application.*" In his oral submissions, counsel for the applicant confirmed he was seeking an extension of time pursuant to the court's inherent jurisdiction in the absence of having made such an application pursuant to or in accordance with the rules. He referred to the pre-litigation correspondence and the *Gilligan* decision in support of his application. For the same reasons as set out above, I do not consider *Gilligan* to be an authority for an extension of time outside the statutory framework of the social welfare decision that was being challenged therein.

9. The court has been asked to exercise its inherent jurisdiction to extend the time in the absence of any clearly identified reason to do so, and where intervening pre-litigation correspondence did not present or identify any such reason. I do not consider it appropriate

to accede to such an application where the basis for doing so, as per O. 84, r. 21(3), has not been established.

10. A further matter of relevance to whether a court should extend time is the strength of the underlying judicial review, particularly where the proceedings are only one day out as occurred here. For the reasons I have set out below, I do not consider the substantive judicial review proceedings here to be especially strong or compelling and I take that into account in refusing to exercise the court's inherent jurisdiction to allow an extension of time.

The substantive judicial review claim

11. The applicant seeks to quash the decision of the Legal Aid Board to refuse his application for payment of his legal costs pursuant to the scheme. He says the decision that his litigation fell outside the scope of the scheme was irrational, unreasonable and constituted an error of law. Alternatively, he says the scheme is underpinned by the Constitution which requires that his proceedings be read as coming within the scheme, and the exclusion of his proceedings constitutes an improper and unlawful interference with his constitutional and Convention rights to access to the courts and bodily integrity. He had pleaded an unlawful interference with his constitutional rights to equality, but chose, in the course of the hearing, not to pursue that claim.

12. The scheme is clearly limited to specified forms of litigation, including judicial review "*concerning criminal matters or matters where the liberty of the applicant is at issue*". The applicant contends that his litigation did relate to his criminal matter as he was injured while traveling back to prison from his court appearance and relies on *H v. DPP* [2021] IEHC 308.

13. A claim challenging the failure to bring a prisoner to hospital after a road traffic accident is not a matter concerning criminal matters simply because they were being transported from court to prison at the time. It is not an unreasonably narrow or technical interpretation of the scheme to find that the manner of the applicant's medical treatment (or non-treatment) did not concern criminal matters. However it did concern his incarceration as, were he not so incarcerated, he would have been free to make his own decision to attend at hospital. Unfortunately for the applicant, the scheme is not one designed to cover matters relating to a person's incarceration. It would constitute an inappropriate type of judicial law-making for the court to interfere with the clear terms of the scheme by interpreting "*criminal matters*" as including the manner of his incarceration

such as something that occurred to a prisoner whilst traveling from court to prison. I therefore conclude that the proceedings did not relate to criminal matters.

14. Neither did the proceedings relate to the applicant's liberty. Whether he had been brought to hospital or not, he would still have been in detention and the fact of any hospital attendance or medical treatment would not have changed that. The applicant argues that the deprivation of his liberty meant he was not free to attend hospital without the permission and support of the prison service. That may be so but it is not the same as putting his liberty at issue.

15. The Legal Aid Board was correct in their interpretation of the scheme that the applicant's litigation did not come within its scope. The recommendation of the learned High Court judge that the applicant's costs should be paid from the scheme does not alter that as the court's recommendation is (and was here) always subject to the application coming within the scope of what is an administrative and not a statutory scheme. It is a matter for the Legal Aid Board to determine what comes within the scope of the scheme, by reference to the wording of the scheme. The court's recommendation is, as found by Baker J. in *O'Shea v. Legal Aid Board* [2020] IESC 51 "*a weighty and valuable matter*", but it is still subject to the Board's consideration of the application which, as pointed out by Baker J., must be "*considered in a rational and lawful manner*".

16. The applicant's application was considered in a rational and lawful manner. The Legal Aid Board was correct in law in deciding that the applicant's proceedings relating to the Prison Service's failure to comply with standard medical practice to bring a person with a head injury to hospital, did not come within the scope of the scheme.

Constitutional/Convention rights

17. In arguing that the scheme breached and or interfered with his constitutional or Convention rights, the applicant invokes his rights of access to the courts and to bodily integrity. During oral submissions a right to fair procedures was also raised, but as this was not pleaded and the applicant did not have leave to pursue it, I have not focused on that in my decision.

18. The right of access to the courts does not, in itself, include a right to legal aid (*Magee v. Farrell* [2009] 4 IR 703). This applicant has not been denied access to the courts, as evidenced by the fact that notwithstanding his incarceration in prison, he was able to bring his proceedings and was accommodated in attending with both his solicitor and his doctor.

The fact that he may have to take on responsibility for the cost of those proceedings is not a denial of his right to access the courts. Many poorly resourced litigants have to take on responsibility for the discharge of their legal costs of proceedings for which the State does not provide legal aid, of which there are many. If they succeed in their legal proceedings (or even in special circumstances where they do not succeed) they are entitled to ask the court to direct the other party to pay their legal costs. The applicant does not enjoy rights superior to other litigants by virtue of his status as a prisoner, even where the proceedings related to his status as a prisoner.

19. The applicant asserted that the Prison Service's failure to adhere to standard practice by bringing him to hospital after he sustained a head injury, engaged his constitutional and Convention rights to bodily integrity. He did not go into any detail about the extent of that right or how it had been infringed. The applicant's doctor opined that the Prison Service did not comply with standard practice, but did not suggest that the applicant had medical symptoms that had been caused or exacerbated by that non-compliance. The applicant was seen by a prison nurse on the day after the collision and there is no evidence that they advised further medical treatment or that the applicant was denied treatment that was recommended for him by the prison medical staff following his attendance with them. The applicant's right to bodily integrity may entitle him to essential medical treatment but it does not entitle him to medical treatment of his choice.

20. If I am wrong on that and the failure of the Prison Service to facilitate a hospital attendance for the applicant did engage his right to bodily integrity, I am satisfied that it was at a very low level with no claim or evidence of medical damage arising therefrom. At most the failure to bring the applicant to hospital caused him to be upset, frustrated and worried, none of which are medical symptoms or injuries.

21. The exclusion of this applicant's previous proceedings from the scheme did not constitute an unlawful interference with his constitutional and Convention rights to bodily integrity.

Conclusion

22. These proceedings were lodged out of time. The pre-litigation correspondence does not permit or validate an extension of time. The substantial judicial review challenge is neither strong nor compelling, which militates against the exercise of my discretion to extend

the time. I refuse the applicant's application to extend time pursuant to the court's inherent jurisdiction.

Indicative view on costs

23. As the applicant has failed in his pleadings and in accordance with s. 169 of the Legal Services Regulation Act 2015, my indicative view on costs is that the respondents are entitled to their costs to be adjudicated upon in default of agreement. I will put the matter in before me at 10.30am on 30 January 2025 for whatever further submissions the parties wish to make in relation to costs and final orders.

Counsel for the applicant: Niall Flynn BL, Derek Shortall SC

Counsel for the respondents: James Cross BL, Darren Lehane SC