

No. 2

O. 58, r. 18(1)



SUPREME COURT

Record No:

73/2023

Respondent's Notice

Part I

The information contained in this part will be published. It is the respondent's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court

1. **Title of the Proceedings:** *[As in the Court of first instance]*

ALAN HARTE

-v-

THE SUPERIOR COURT RULES COMMITTEE

THE MINISTER FOR JUSTICE

IRELAND AND THE ATTORNEY GENERAL

2. **Name of Respondent:**

The Superior Court Rules Committee, the Minister for Justice, Ireland and the Attorney General

3. **Application to extend time:**

Yes

No

If an application is being made to extend time for the filing of this Notice, please set out concisely the grounds upon which it is contended time should be extended.

The Notice is one day out of time. This occurred due to an administrative error in the calculation of the period within which the Notice was required to be filed, which was drawn to the Respondents' attention by the Supreme Court Office. The Respondents apologise for this error and seek an extension of time for the filing of this Notice.

4. Do you oppose the applicant's application to extend time:

Yes No

If an application by the applicant to extend time is being opposed please set out concisely the grounds on which it is being opposed.

The Appellant has sought additional time on the basis that extra time was required to obtain an attested / certified copy of the High Court Order. However, the Notice of Appeal was filed within time in the Court of Appeal. Furthermore, the Order is dated 2 May 2023 and was perfected on 23 May 2023.

5. Do you oppose the applicant's application for leave to appeal:

Yes No

6. Matter of general public importance:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is contended, that the matter does not involve a matter of general public importance. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that the matter involves a matter of general public importance.

This section should contain no more than 500 words and the word count should appear at the end of the text.

1. This case concerns a challenge to S.I. 691/2011, which inserted the current version of Order 84, rule 21 into the Rules of the Superior Courts. As such, the Applicants challenge is limited to the amendments to Order 84, rule 21(3) brought about by S.I. 691/2011.

2. The Applicant was refused an extension of time on the basis that there was no good and sufficient reason for doing so. This finding did not turn on the additional requirements provided for in sub-rule 21(3)(b). Accordingly, the Applicant only has standing to challenge sub-rule (a).
3. The changes to Order 84, rule 21(3)(a) brought about by S.I. 691/2011 were limited to the addition of the word “and sufficient”, so that the test under sub-rule (a) is whether there is “good and sufficient reason” to extend time, rather than the prior requirement of “good” reason.
4. Order 84, rule 21(3)(a) was the subject of consideration in *O’S v Residential Institutions Redress Board* [2018] IESC 61, where Finlay Geoghegan J observed at paragraph 59 that she did not consider that the addition of the words “and sufficient” adds any particular additional requirement to the provision of good reasons.
5. As was correctly noted by the High Court, the Applicant failed to engage with the history of judicial review time limits or to explain why the minor policy element inherent in Order 84, rule 21(3), as amended, meant that it was no longer a matter of practice and procedure, such that it could not be the subject of a Rule of Court. The Rules of Court have provided for a time limit within which judicial review proceedings must be commenced since 1905.
6. The Applicant failed to identify any authority for the proposition that rules affecting rights of access to the courts must be made by the Oireachtas.
7. Order 84, rule 21(3) confers a discretion on the Court to extend time. The entitlement to apply for an extension of time ensures that an applicant is provided with access to justice.
8. It is well established that time limits concerning the initiation of judicial review proceedings, outside of which an applicant must seek an extension of time, are not limitation periods (*de Roiste v Minister for Defence* [2001] 1 IR 190, 221; *Sfar v. Revenue Commissioners* [2016] IESC 15, [19]; (*Arthroparm (Europe) Limited v HPRA* [2022] IECA 109, [87])).
9. The nature of the rule making authority conferred on the Rules Committee by section 36 of the Courts of Justice Act 1924 was the subject of detailed consideration by this Court in *DPP v McGrath* [2021] IESC 66.
10. The High Court determined the proceedings by reference to well settled principles in respect of Article 15.2.1 of the Constitution derived from the decisions of this Court in *DPP v McGrath* [2021] IESC 66 and *NECI v The Labour Court* [2021] 2 ILRM 1. It is submitted, therefore, that these proceedings do not concern a matter of general public importance.

7. Interests of Justice:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is alleged, that the interests of justice do not require an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended, that the interests of justice require an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

The Respondents note that the Applicant does not contend that an appeal should be permitted on the basis of the interests of justice.

Word count – 23 words.

8. Exceptional Circumstances Article 34.5.4.:

Where it is sought to apply for leave to appeal direct from a decision of the High Court pursuant to Article 34.5.4, please set out concisely, in numbered paragraphs, the grounds upon which it is contended that there are no exceptional circumstances justifying such an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that there are exceptional circumstances justifying such an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

1. The Respondents do not accept that an intermediate appeal to the Court of Appeal is unlikely to be of benefit to the narrowing or definitively determining the issues in this case, for either the Applicant or the Respondents. While the parties rely on Supreme Court jurisprudence, the case which the Applicant has standing to make was determined by the trial judge by the application of well establishing principles in respect of Article 15.2.1 of the Constitution to the particular facts of this case.
2. Insofar as it is suggested that this is a matter of general public importance, the Notice of Appeal merely repeats the contention that the case affects access to the Courts. As is noted above, however, the three month time limit imposed by Order 84, rule 21(1) is subject to the discretion of the courts to extend time in accordance with Order 84, rule 21(3) and does not operate as a limitation period.
3. It is submitted, therefore, that the Applicant has failed to identify grounds for contending that there are exceptional circumstances justifying an appeal to the Supreme Court.

Word count – 185 words

9. Respondent's grounds for opposing an appeal if leave to appeal is granted:

Please set out in the Appendix attached hereto the Respondent's grounds of opposition to the Grounds of Appeal set out in the Appellant's Notice of Appeal.

10. Cross Application for Leave:

If it is intended to make a cross application for leave to appeal please set out here precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance or the interests of justice justifying a cross appeal to the Supreme Court.

If it is sought to make a cross application for leave to appeal direct from a decision of the High Court, please also set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.

This section should contain no more than 500 words and the word count should appear at the end of the text.

N/A

Word count –

11. Additional Grounds on which the decision should be affirmed and Grounds of Cross Appeal

Please set out in the Appendix attached hereto any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court and / or the grounds of cross appeal that would be relied upon if leave to appeal were to be granted.

12. Priority Hearing:

Yes No

If a priority hearing is sought please set out concisely the grounds upon which it is alleged that such a hearing is necessary.

This section should contain no more than 100 words and the word count should appear at the end of the text.

N/A

Word count:

13. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union, please identify the matter, and set out the question or questions which it is alleged it is necessary to refer.

This section should contain no more than 100 words and the word count should appear at the end of the text.

N/A

Word count:

Appendix
Grounds of Opposition (and Cross Appeal)

1. Title of the Proceedings: [As in the Court of first instance]

ALAN HARTE

-v-

THE SUPERIOR COURT RULES COMMITTEE

THE MINISTER FOR JUSTICE

IRELAND AND THE ATTORNEY GENERAL

2. Respondent's grounds for opposing an appeal if leave to appeal is granted:

Please list concisely in numbered paragraphs, the Respondent's ground(s) of opposition to the grounds of appeal set out in the Appellant's Notice of Appeal.

1. The High Court did not err in determining that the provisions of Order 84, rule 21(3), as inserted by S.I. 691/2011, do not intrude in the area of decision making reserved to the Oireachtas. In a carefully reasoned judgment, the High Court applied the principles articulated by this Court in *NECI v The Labour Court* [2021] 2 ILRM 1 and *DPP v McGrath* [2021] IESC 66 and correctly identified that Order 84, rule 21(3) is a rule of procedure, which the Rules Committee is competent to make in accordance with section 26 of the Courts of Justice Act 1924, as amended.
2. The High Court did not err in concluding that the Applicant only enjoyed standing to challenge sub-rule (a) of Order 84, rule 21(3), and not sub-rule (b). In *H v DPP* [2021] IEHC 215, Barr J found that the Applicant's application for leave to bring judicial review proceedings was out of time and refused to extend time on the basis that the Applicant had failed to establish good and sufficient reason for doing so. This finding did not turn in any way on the additional requirements provided for in Order 84, rule 21(3)(b). The High Court correctly determined in these circumstances that the Applicant only enjoys standing to challenge sub-rule (a).
3. The High Court did not place excessive emphasis on obiter comments in the High Court and the Supreme Court in *O'S v Residential Institutions Redress Board* [2015] IESC 41 in respect of the power of the Rules Committee to fix time limits for the initiation of judicial review proceedings. The High Court also considered and applied the principles articulated in *NECI v The Labour Court* [2021] 2 ILRM 1 and *DPP v McGrath* [2021] IESC 66.

4. The High Court did not err in determining that the Rules Committee, in determining the period in which proceedings could be initiated is only a matter of practice and procedure. The Notice of Appeal does not identify any basis for the assertion that this constitutes an error. As was correctly observed by the High Court, a time limit within which judicial review proceedings must be commenced has been a feature of the Rules of Court since 1905.
5. The High Court did not err in determining that the discretion to extend time takes Order 84, rule 21 out of the realm of a limitation period and that the conferral of that discretion justifies a finding that the Rule is *intra vires* the Rules Committee. This Court has consistently held that Order 84, rule 21 does not constitute a limitation period (*de Roiste v Minister for Defence* [2001] 1 IR 190, 221; *Sfar v. Revenue Commissioners* [2016] IESC 15, [19]). This has also been confirmed by the Court of Appeal (*Arthroparm (Europe) Limited v HPRA* [2022] IECA 109, [87]).
6. The ground of appeal articulated in paragraph 6 is formulated by reference to an incorrect proposition. The application of Order 84, rule 21(3) does not negate a citizen's access to the courts. An applicant has an entitlement to seek an extension of time under Order 84, rule 21(3) and the High Court correctly identified that the courts have a broad discretion on such an application.
7. The ground of appeal in paragraph 7 is not understood. The High Court correctly found that many Rules of Court regulate a person's right of access to the courts. The Applicant failed to identify any authority for the proposition that rules affecting rights of access to the courts must be made by the Oireachtas.
8. The ground of appeal articulated in paragraph 8 is not understood. As has been noted above, this Court has repeatedly confirmed that the time limit within which an application is required to seek leave to bring judicial review proceedings is not a limitation period.
9. The High Court did not err in determining that the test to be met when considering an application for an extension of time, i.e. whether good and sufficient reason to do so has been established, is enormously flexible. In making this finding, the High Court noted that the judgments of Denham J in *de Roiste* and Finlay Geoghegan J in *O'S* establish that: "*The breadth of the matters that must be considered when applying that test effectively encompass all the circumstances of the case.*"
10. The High Court did not err in finding that the provisions of Order 84, rules 21(1) and (3) represent a permissible policy type decision that does not overstep the bounds of the discretion of the Rules Committee. In making this finding, the High Court notes that these rules contain neither a hard limitation period nor an inflexible extension provision. The High Court correctly found that this, allied with the fact that setting a time limit and providing for the discretion to extend same is clearly a matter of practice and procedure, means that Order 84, rule 21 is *intra vires*.
11. The High Court did not err in finding that the mere fact that a rule involving a policy decision cannot be treated as rendering it necessarily unsuitable for a Rules Committee. This is consistent with the principles articulated by this court in

Bederev v Ireland [2016] 3 IR 1, *O'Sullivan v Sea Fisheries Protection Authority* [2017] 3 IR 751, *NECI v The Labour Court* [2021] 2 ILRM 1, and *DPP v McGrath* [2021] IESC 66.

12. The High Court did not err in having regard to the history of judicial review time limits. It is appropriate to have regard to the historical frame of reference in ascertaining whether delegated legislation is contrary to Article 15.2.1 (*Bederev v Ireland* [2016] 3 IR 1; *NECI v The Labour Court* [2021] IESC 36).
13. The High Court did not err in determining that there were very limited policy type decisions reflected in Order 84, rules 21(1) and (3). This is clearly correct.
14. It is denied that the High Court erred in law or in fact in refusing the reliefs sought in the proceedings.

Emily Egan McGrath BL

Declan McGrath SC

3. Additional grounds on which the decision should be affirmed:

Please set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court.

N/A

4. Cross Appeal

Please set out in numbered paragraphs the Grounds of Cross Appeal relied upon if leave to cross appeal were to be granted.

N/A

5. Order(s) sought

Please set out in numbered paragraphs the order(s) sought if the Cross Appeal were to be successful.

N/A