

THE HIGH COURT

[2023] IEHC 192

Record No. 2021/569JR

BETWEEN

ALAN HARTE

APPLICANT

and

**THE SUPERIOR COURT RULES COMMITTEE, THE MINISTER FOR
JUSTICE AND EQUALITY, IRELAND, and THE ATTORNEY GENERAL**

RESPONDENTS

JUDGMENT of Ms. Justice Niamh Hyland delivered on 17 April 2023

Summary of Judgment

1. This case concerns a challenge to the legality of S.I. 691/2011, the statutory instrument that inserted the current version of Order 84, rule 21 into the Rules of the Superior Courts governing leave to apply for judicial review, specifically the requirement that a person bring their application for leave within 3 months from the date when grounds for the application first arise and the conditions governing any extension of time by the Court.
2. The applicant argues that S.I. 691/2011 is *ultra vires* the rule making power of the Superior Court Rules Committee under s.36 of the Courts of Justice Act 1924 as amended (the “1924 Act”); that s.36 itself is in breach of Article 15.2.1 of the Constitution; and that the applicant’s constitutional right of access to the courts is impermissibly restricted by S.I. 691/2011.

3. Although the questions raised by the applicant have not been adjudicated upon in a binding fashion by the Superior Courts, there has been considerable judicial consideration of the issues raised by the applicant, including in two recent Supreme Court judgments.
4. The following principles may be derived from the extensive case law in this area:
 - The Oireachtas may regulate by law, including by way of secondary legislation, procedural remedies before the courts provided constitutional rights are not infringed;
 - (In the context of a challenge to primary legislation), a leave requirement for judicial review, with a time limit and an entitlement to seek an extension of time for good and sufficient reason, enhances access to the Court;
 - The 1924 Act required that the procedure of the courts be regulated by a set of rules but left to the defined rule-making body the obligation of setting out those detailed rules to achieve the objective of permitting justice to be administered;
 - Broad ranging policy decisions are likely to lie within the function of the Oireachtas under Article 15.1.2;
 - Section 36 permits the regulation of an existing power or jurisdiction of the Court in relation to practice and procedure;
 - It does not exceed the power of the Rules Committee nor is, *per se*, an unconstitutional restriction on access to Court to set out general grounds for an extension of a time limit itself fixed by the rules;
 - The provisions of Order 84, rule 21(3) are within the general powers of the Superior Court Rules Committee to regulate matters of practice and procedure;
 - The Rules Committee does not have the power to adopt an absolute limitation period for the initiation of a leave application;

- Time limits concerning the initiation of judicial review applications outside of which an applicant must seek an extension of time are not limitation periods but Rules of Court;
 - The jurisdiction to extend time is a discretionary one which must be exercised in accordance with the relevant principles in the interests of justice.
5. I have taken the view that those pronouncements are, if not strictly speaking binding upon me, nonetheless so persuasive such that I ought not to depart from them without very good reason. None of the arguments raised by the applicant provide the basis for such a departure. The existence of a discretion to extend time takes Order 84, rule 21 out of the realm of a limitation period. The ambit of the discretion allowed to the Court in relation to the extension of time means that, although there are policy considerations in the selection of the three month time limit, that policy choice is limited in nature. This is because of the breadth of the first part of the test in relation to an extension of time i.e. that the applicant must show good and sufficient reason (Order 84, rule 21 (3) (a)) . In this case, the applicant only enjoys standing to challenge sub rule (a) and not sub rule (b) which identifies additional conditions necessary to obtain an extension of time.
6. Insofar as the three month time limit is concerned, it is relevant to consider what preceded S.I.691/11, as this is relevant in discerning the intention of the Oireachtas when enacting s.36 of the 1924 Act, which authorises the Rules Committee to adopt rules of pleading, practice and procedure. The previous version of Order 84 of the RSC, inserted by Rules made in 1986, provided for a three-month time limit for most judicial review reliefs, with a six-month time limit for an application for *certiorari*. The 2011 Rules streamlined the applicable time limit, imposing a three-month time limit for all applications including *certiorari* and added the word “*and sufficient*”, so that the test under sub rule (3)(a) is “*good and sufficient reason*” rather than the previous requirement of “*good*” reason. It is

difficult to treat this as a radical change or one involving such a significant policy choice that it was necessarily required to be made by the representatives of the people i.e. the Oireachtas rather than a Rules Committee with significant expertise in the area. The applicant failed to engage at all with the history of judicial review time limits and explain why the (minor) policy element inherent in sub-rule 21(1) and (3) meant it was no longer a matter of practice and procedure such that it could not be the subject of Rules of Court.

7. Finally, the applicant failed to establish that because the impugned Rules involve the right of access to the Court, they must be left to the Oireachtas. The simple fact of adoption by the Rules Committee of a rule that may operate so as to restrict access to Court cannot, without more, establish impermissible delegation. Many Rules of Court regulate a person's right of access to the Court. The applicant has identified no case law in support of the argument that rules affecting rights of access to the Court must be made by the Oireachtas. Moreover, the substance of the rule does not impermissibly trespass upon the right of access to the courts given the role of judicial discretion in an application to extend time. By having the objection as to time adjudicated upon by a court, where the applicant is entitled to be heard, the applicant is provided with access to justice. The fact that the outcome of that exercise may be that an applicant is refused permission to advance the substantive proceedings does not alter the nature of the exercise, whether because he or she is deemed to be out of time or refused an extension of time.

Facts and Background

8. The applicant is currently serving a 30-year sentence following his conviction for falsely imprisoning and causing serious harm to Mr. Kevin Lunny at Drumbrade, Ballinagh, Co. Cavan on 17 September 2019 contrary to s.15 and s.4 of the Non-Fatal Offences Against the Person Act 1997. Mr. Lunny was abducted by a group of men and was assaulted while being falsely imprisoned. The applicant was charged on 26 November 2019 and the DPP

determined that the ordinary courts were inadequate to secure the effective administration of justice and the preservation of public peace.

9. In those circumstances, in accordance with Part V of the Offences Against the State Act 1939 (“the 1939 Act”), the applicant was tried before the Special Criminal Court (“the SCC”). The applicant sought to judicially review the decision of the DPP to do so, *inter alia*, on the basis that Part V of the 1939 Act was a temporary measure and the SCC’s continued existence some 49 years after the initial Proclamation under Part V was *ultra vires*.
10. That case was heard by Barr J. In his decision (*H v DPP & Ors* [2021] IEHC 215) he held that the applicant had brought his application outside the three-month time limit identified in Order 84, rule 21 of the Rules of the Superior Courts (“the RSC”) and refused an application for an extension of time under Order 84, rule 21(3) of the RSC. Barr J. identified that the decision which triggered the application was conveyed to the applicant on 26 March 2020 and that the applicant’s *ex parte* application was not brought until 14 August 2020, meaning that the applicant had brought his application outside the 3 month time limit and was required to seek an extension of time pursuant to rule 21(3). He identified that the principles applicable to granting such an extension were those outlined by Finlay-Geoghegan J. in *O’S v Residential Institutions Redress Board* [2018] IESC 61 i.e. that the jurisdiction to extend time was discretionary and as such required the balancing of factors; that it required to be exercised in the interests of justice; and that the Court must have regard to all the relevant facts and circumstances, which include the decision sought to be challenged, the nature of the claim made that it is invalid or unlawful and any relevant facts and circumstances pertaining to the parties.
11. In applying these principles Barr J. reviewed the evidence available to him in respect of the contact between the applicant and his legal advisors between 26 March and 14 August,

noting that “*the mounting of the challenge the subject matter of these proceedings, did not depend on any specific factual instructions, or information that could only have been furnished by the applicant*”. As such, in that context he determined at paragraph 53 that;

“[I]t cannot be argued that the existence of whatever restrictions on consultations that may have been in place during 2020 due to COVID-19, of which no actual evidence of such restrictions has been placed before the court, other than the fact that they had to be by video call, and in the absence of any evidence that either the applicant had tried to contact his solicitor, or that his solicitor had tried to contact him, within the three months after the decision communicated on 26th March, 2020, but could not do so due to the COVID-19 restrictions, the court cannot find that there is good and sufficient reason why the application was not made within the relevant three-month period.”

12. Accordingly, Barr J. refused leave to apply for judicial review.

Nature of applicant’s case

13. It is in these circumstances that the applicant seeks to challenge in these proceedings the legality of the Rules of the Superior Courts (Judicial Review) 2011 (“S.I. 691/2011” or “the S.I.”), the statutory instrument that inserted the current version of Order 84, rule 21 into the RSC. As I discuss below, the applicant has failed to specify precisely the ambit of his challenge. However, insofar as it may be ascertained, it appears that the applicant focuses his challenge upon Order 84, rule 21(1) and (3), which respectively provide that an application for leave to apply for judicial shall be made within three months from the date when grounds for the application first arose and provide for an extension of time in certain circumstances.

14. In his Amended Statement of Grounds, the applicant seeks a declaration that S.I. 691/2011 is *ultra vires* the powers of the Superior Courts Rules Committee, a declaration that the provisions of S.I. 691/2011 are repugnant to Article 15.2.1 of the Constitution, and a

declaration that the legislation providing for the constituting of the Superior Court Rules Committee does not contain sufficient principles and policies to satisfy Article 15.2.1. Paragraph E of the Statement of Grounds identifies that the introduction of time limits by statutory instrument impermissibly limits access to the Court by way of delegated legislation. There are three main themes running throughout the applicant's case: that S.I. 691/2011 is *ultra vires* the rule making power of the Superior Court Rules Committee under s.36 of the Courts of Justice Act 1924 as amended; that s.36 itself is in breach of Article 15.2.1; and that the applicant's constitutional right of access to the courts is impermissibly restricted by S.I. 691/2011. Those arguments are inextricably linked and accordingly I will deal with them all together.

15. In his legal submissions, the applicant accepts that it may be necessary for the government to delegate to subordinate agencies such as the Rules Committee owing to the scale and complexity that inheres in Court business, but points out that specific allowance for the prescription of time limits or restriction of access to judicial review remedies are conspicuously absent from the primary legislation . The applicant argues that the impugned rules are a free-standing regime which have a far greater effect than mere principles and policies as enshrined within s.36 of the 1924 Act. The applicant identifies that in certain cases there will be either no application for an extension of time or no obvious grounds for granting such an extension and in such circumstances no discretion to extend the three month time limit arises. In relation to the extension of time, the applicant argues that Order 84 rule 21(3) and (4) are impermissibly restrictive and that the conditions are extremely narrow, disproportionate and have no provision for when an extension would satisfy the interests of justice. He argues that the test for extending time is an unconstitutional interference with the legislative role of the Oireachtas and contends that the narrow time limit, accompanied by the restrictive extension of time requirements, renders the delegated

legislation substantive law that significantly reduces a citizen's right of access to courts, which right is constitutionally protected.

16. Next, the applicant identifies that judicial review time limits have been enshrined in primary legislation and argues that this means that a time limit cannot be deemed to be practice and procedure and/or the implementation of principles and or policies but is substantive law with wide ranging implications for access to justice. The prescription of time limits to initiate legal proceedings is a substantive legislative function of the Oireachtas that cannot be delegated.
17. At the hearing, counsel for the applicant made some additional arguments. In particular he argued that practice and procedure may encompass how a claim is treated once it is lodged in Court, but that the position is different in respect of claims that have not yet "come through the door" i.e. that rules regulating the point of entry must be treated differently. It is contended that such rules are not procedural as they potentially limit access to the Court. He submits that even where allowance is made for the possibility of time being extended, the time period in Order 84, rule 21(1) is a limitation period and argues that the very fact that it can exclude a person from a hearing means that it must be treated as a limitation period. He points out that the Statute of Limitations provides for extensions of time in cases of disability and says the principle is the same whether under Order 84 or the Statute. He identifies that even the Statute does not bar access to the Court but rather provides a potential defence should a defendant decide to invoke the Statute. He focuses on the significance of the right of access to the courts, characterising it as one of the "top five" constitutional rights.
18. Finally, it is argued said that the setting of time limits constitutes a policy decision that must be made by the Oireachtas, and that the Superior Court Rules Committee is narrowly constituted and does not represent the will of the people. As such, it is inappropriate that

it should make Rules of Court governing time limits rather than the body elected by the people and that there is a denial of democratic oversight with the usurping of the legislative function.

19. In reply to the respondent, referring to the judgment in *DPP v McGrath* [2021] IESC 66, counsel for the applicant notes that, similar to the observation made by O'Donnell J. in that case (paragraph 78), there were any number of choices that could have been made by the Rules Committee in this case and that an intricate scheme was developed by them with many different aspects to it. He argues that, given the rule in relation to costs was deemed to be *ultra vires* the Rules Committee in *McGrath*, it is difficult to see how Order 84, rule 21 can survive. He points out that the protection of laying the Rules before the Oireachtas as originally provided for by s.101 in the 1924 Act (which protection was stressed by Charleton J. in *NECI v The Labour Court & Ors* [2021] IESC 36) has been removed.

Respondents' arguments

20. The respondents describe Order 84, rule 21 as a rule of procedure and as such within the scope of the powers delegated to the Rules Committee to regulate matters of practice and procedure. The respondents point out that the applicant has failed to refer to two seminal Supreme Court authorities in this area, i.e. *O'S v Residential Institutions* (2018) and *DPP v McGrath* (2021). Extensive reliance is placed upon those decisions. Counsel identifies that the Court of Appeal and the Supreme Court have in other decisions held that Order 84 rule 21 does not prescribe a strict time limit or operate as a limitation period and in this respect cites *de Roiste v Minister for Defence* [2001] 1 IR 190, *Sfar v Revenue Commissioners* [2016] IESC 15 and *Arthroparm (Europe) Ltd. v HPRA* [2022] IECA 109. The respondents also cite the statement of Keane C.J. in the *Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 where he confirmed that it was within the competence of the Oireachtas to regulate by law, including by way of secondary

legislation, procedural matters including procedural remedies provided constitutional rights relating to the courts are not infringed. The *dicta* of McDermott J. in *O'S v Residential Institutions Redress Board* [2017] IEHC 251 in the High Court is also relied upon, where he held that judicial review proceedings are civil proceedings, the pleadings and procedure of which may be regulated, and that applies to the setting of times within which steps must be taken in the proceedings, including time limits for seeking leave to apply for judicial review.

21. In oral submissions, counsel relied on the cases identified above as well as *Shell E & P Ireland Ltd. v McGrath* [2013] 1 IR 247, and identifies that in none of those cases were judicial review time limits treated as being limitation periods. He notes the case of *White v Dublin City Council* [2004] 1 IR 545, invoked by the applicant, was concerned with the constitutionality of a statutory time period and says nothing about Order 84. He observes that when considering what the legislature viewed as matters of practice and procedure when enacting the 1924 Act, existing Rules of Court are relevant, notably the 1905 Rules that regulated the time within which stateside remedies could be sought. He argued that the 1924 Act demonstrates that the Oireachtas were content to delegate the details of such rules to an expert body and that the complexity of the modern State necessitates such delegation. He characterised the test as being not whether a rule involves a policy element but rather whether it goes beyond a normal rule of practice and procedure and veers into law making. He identified the characteristics of Order 84, rule 21 that meant it fell on the “right side of the line” as opposed to the rule in *McGrath* as follows: (a) it regulated the exercise of an existing jurisdiction as opposed to removing an existing jurisdiction; (b) time limits in judicial review have historically been dealt with in the RSC rather than by primary legislation; (c) the inherent character of the provision i.e. it is not an absolute limit and the Court retains a discretion, whereby the Court may apply the law to the particular

facts of the case; (d) the mere fact that its application may have a decisive impact on the outcome of the case cannot bring the rule outside practice and procedure, as many procedural rules will have such an impact; (e) it is incorrect to say the rule does not prevent an application getting to Court – an applicant is able to make an application to extend time and the Court will decide upon that application.

Applicant’s standing to challenge O. 84, rule 21(3)(b)(i) and (ii)

22. Before considering the substance of the applicant’s complaints, it is necessary to identify precisely which provisions of Order 84, rule 21 are in fact being challenged by the applicant and whether he has the necessary standing. The respondents have pleaded at paragraph 10 of the Statement of Opposition that, in his judgment, Barr J. found that the date that grounds for the challenge first arose was 26 March 2020 and there was no good and sufficient reason why the application for leave to bring judicial review proceedings was not made within three months of that date. It is further pleaded that the finding did not turn in any way on the amendments made to Order 84, rule 21 (being largely the addition of 21(3)(b)). Accordingly, it is pleaded that the applicant is a litigant who has been the subject of an un-appealed and binding finding to the effect that there was no good and sufficient reason not to bring the judicial review proceedings within three months, and it is not open to him to invoke the position of a notional litigant in respect of whom such a finding has not been made i.e. one who satisfied the good and sufficient test under sub rule 21(3)(a) but not the additional test under sub rule 21(3)(b).

23. In my view, the respondents are correct in this respect. I have already quoted from the judgment of Barr J. above, which recites his finding that the applicant had not established a good and sufficient reason for an extension of time. Order 84 rule 21(3) (described in some detail below) provides for an extension of time for leave to apply for judicial review where there is good and sufficient reason for doing so (sub paragraph 3(a)) and where

specific conditions are met in respect of the circumstances that resulted in the failure to make the application for leave within the three-month time period (sub paragraph 3(b)). Because Barr J. concluded that the applicant did not demonstrate good and sufficient reason within the meaning of sub paragraph 3(a). As such, the applicant was precluded from obtaining an extension of time. It is true that Barr J. additionally indicated that he did not consider the conditions identified at (b) had been met by the applicant. Nonetheless, in circumstances where the applicant had failed to show good and sufficient reason, that alone precluded him from an extension of time. Therefore, the requirements in sub paragraph 3(b) have not operated to bar him from bringing his proceedings.

24. In those circumstances I do not consider the applicant has standing to challenge those provisions and I will refrain from adjudicating on the legality of sub paragraph 3(b) insofar as the applicant is seeking to challenge those provisions. In this respect I am adopting the approach taken by O'Donnell J. in *O'S*, where a challenge was made to Order 84, rule 21(3)(b)(i) and (ii) on the ground that sub rule (b) was *ultra vires* the provisions of s.36 of the 1924 Act. O'Donnell J. found that because no good and sufficient reason had been made out for extending the time, it was not necessary to proceed further and consider whether the restriction under Order 84, rule 21(3)(b) applied in that case (see paragraph 26).
25. This means that what I am considering in these proceedings is the legality of a three-month time limit within which to bring judicial review proceedings, extendable for good and sufficient reason. A curiosity of these proceedings is that certain of the issues requiring resolution have already been extensively considered, albeit on an *obiter* basis, in the judgments of the High Court and Supreme Court in *O'S v Residential Institutions Redress Board* and the Supreme Court decision in *McGrath*. Because of their importance to the resolution of these proceedings, I will describe both cases in some detail and identify

passages relevant to the determination of these proceedings. Neither of those cases were identified in the written submissions of the applicant but at the oral hearing, following the submissions of the respondent, the applicant had an opportunity to respond to the points arising out of the various judgments. However, before considering these cases, it is necessary to consider the provisions of Order 84, rule 21 and s.36 of the 1924 Act in some detail.

Order 84, rule 21 of the RSC

26. As identified above, Order 84, rule 21 of the RSC governs the time limit within which leave may be sought to bring judicial review proceedings and the rules governing an extension of that time limit. The relevant iteration of Order 84, rule 21 for the purposes of these proceedings was inserted by the Superior Court Rules Committee by way of S.I. 691/2011. The S.I. identifies the basis for the amendment of the rules as being s.36 of the 1924 Act, and s.68 of the Courts of Justice Act 1936. It inserts a new Part V of Order 84, entitled “Judicial Review”. As I have already identified, there is a lack of precision in the applicant’s pleadings insofar as no specific provision of Part V of Order 84 is identified as the subject of challenge. Rather, the first relief is a declaration that the provisions of the S.I. “*imposing time limits for the initiation of proceedings to seek leave to make an application for judicial review*” are *ultra vires* the powers of the Superior Court Rules Committee. However, it is clear from the legal submissions made by the applicant, both written and oral, that his focus is sub-rule 21(1) and (3). Rule 21 provides in relevant part as follows:

“(1) An application for leave to apply for judicial shall be made within three months from the date when grounds for the application first arose.

(2)...

(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that: -

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either –

(i) were outside the control of, or

(ii) could not reasonably have been anticipated by the applicant for such extension.

(4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.”

27. The history of the time limits applicable to the bringing of judicial review proceedings has been carefully described in a recent decision of Murray J. in the Court of Appeal, *Arthroparm*. At paragraph 50 he observed:

“The first generally applicable requirement that proceedings by way of judicial review be commenced within specific time periods was introduced by the 1986 Rules of the Superior Courts. Prior to the overhaul of the procedure for obtaining relief by way of judicial review effected by Order 84 of those Rules, the only such requirement applicable to the old state side orders arose in relation to applications for orders of certiorari of certain decisions of the District and Circuit Court, with Order 84 Rule 10 of the 1962 Rules of the Superior Courts imposing a period of six months for the bringing of such applications, and the court having a general power in an appropriate case to extend that time. Delay in the bringing of other state side applications was addressed under the umbrella of the court’s power to withhold relief on discretionary

grounds (see, in particular, State (Furey) v. Minister for Defence [1988] ILRM 89 at p. 93 to 94 (per Griffin J.).”

28. The rule introduced in 1986 provided as follows:

“(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made.

(2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.

(3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.”

29. Insofar as time limits are concerned, the important changes introduced by S.I. 691/2011 were (a) that judicial review is now required to be applied for within three months from the date when grounds for the application first arose irrespective of the relief sought, with the longer period for *certiorari* being removed; (b) the previous requirement that the application be made “promptly” is gone; (c) the Court should only extend where there is good and sufficient reason for doing so (as opposed to the previous requirement of “good reason”; and (d) additional requirements for the extension of time were introduced by sub-rule (3)(b).

30. The change in wording from “good reason” to “good and sufficient reason” has not been treated as significant. In *O’S, McDermott J.* noted that it is accepted that the requirement

of “good reason” and “good and sufficient reason” are the same. A similar approach was taken in the Supreme Court where Finlay-Geoghegan J. observed at paragraph 59 as follows:

“I do not consider that the addition “and sufficient” adds any particular additional requirement to the provision of good reasons as explained in the judgments cited. Rather, the additional words emphasise or expressly provide for what follows from the judgments that the reasons offered must be sufficient to justify the court exercising its discretion on all the relevant facts and circumstances to grant the extension sought.”

Section 36 of Courts of Justice Act 1924

31. To put s.36 in context, it is worth recalling the purpose of the 1924 Act. It was described in the following terms by O’Donnell J. in *McGrath*:

“The task of the 1924 Act in relation to the creation of the courts system, and in the District Court in particular, was, therefore, considerable. It was not only necessary to establish a new and independent court as a decisive break with the old system, but it was necessary to locate that court within a new constitutional order which proclaimed a new source for the law, set up new institutions, and which generally sought to establish as significant a rupture as possible with the old order. However, the ideological desire to establish a new system had to operate in tandem with the practical requirement to have a body of law capable of being enforced within that court system. This involved the continuation under Article 73 of the Irish Free State Constitution of the law in force prior to the creation of Saorstát Éireann and the coming into force of the Constitution with the significant qualification that such continuation was “[s]ubject to this Constitution and to the extent that they are not inconsistent therewith”.”

32. Section 36 originally provided for the making of Rules of Court by the Minister for Home Affairs. Under s.68 of the Courts of Justice Act 1936 (“the 1936 Act”), as amended, the power to make, amend or annul Rules of Court previously exercised by the Minister under s.36 is made exercisable by the Superior Court Rules Committee with the concurrence of the Minister for Justice. Given that the constitutionality of this section is being challenged for exceeding the permissible scope of delegation under Article 15.2.1, it merits being quoted *in extenso*:

“36(1).The [Superior Court Rules Committee] may at any time and from time to time after the passing and before or after the commencement of this Act, but with the concurrence of the Minister for [Justice] in respect of any matter affecting public revenue or expenditure make rules to be styled “Rules of Court” for carrying Part I . of this Act into effect (including the hearing of appeals from the Circuit Court and cases stated by the District Court) and may annul or alter the said rules and make new rules. In particular rules may be made for all or any of the following matters:—

(i) pleading, practice and procedure generally (including the entering-up of judgment and the granting of summary judgment in appropriate cases) in all civil cases, including revenue cases and proceedings as to the validity of any law having regard to the provisions of the Constitution and proceedings in the nature of a petition of right;

(ii) pleading, practice and procedure generally in all criminal cases before the Central Criminal Court or any court of the High Court Circuit or the Court of Criminal Appeal;

...

(v) the use of the national language of Saorstát Eireann in the said courts;

(vi) the mode of address to be adopted to the judges and the robes and official dress to be worn by the Bench and the Bar;

(vii) the commencement and duration of the sittings and the vacations;

(viii) the fixing and collection of fees;

(ix) the adaptation or modification of any statute that may be requisite for any of the purposes of this Act and all subsidiary matters.”

In making S.I. 691/2011, the Rules Committee were exercising their powers under s. 36(1)(i) i.e. making a rule as to pleading, practice and procedure in civil cases.

Relevant case law

33. I turn now to the two recent decisions identified above that have a very significant bearing on the outcome of this case. *O'S* concerned a challenge to a decision by the Redress Board that an applicant was out of time to bring his claim for compensation. The applicant had been sentenced to 2 years detention in St. Joseph's industrial school in County Tipperary in November 1962. He contended that while detained in the industrial school, he was subject to severe physical and sexual abuse by various brothers and suffered from neglect and emotional abuse. Following the passing of the Residential Institutions Redress Act 2002 ("the 2002 Act"), as amended, he made an application to the Board received on 23 January 2008. The period for the making of the application expired on 15 December 2005 under the provisions of the 2002 Act. On 28 May 2008 the Board refused the application for an extension of time. Following an oral hearing, the Board again refused an extension of time notified to the applicant on 11 January 2012. In 2014 and 2015 the appellant's solicitor asked that the Board reconsider the matter, *inter alia*, in the light of the Supreme Court decision in *A. OG v Residential Institutions Redress Board* [2015] IESC 41. The Board refused. On 18 March 2016, the appellant brought judicial review proceedings

seeking to quash the determination of the Board of 11 January 2012. In the same proceedings, the applicant sought a declaration that Order 84 rule 21(3)(b)(i) and (ii) were *ultra vires* the Rules Committee and the Minister for Justice because they substantively and impermissibly restricted the right of access to the Court.

34. That question was the subject of detailed review by both the High Court and the Supreme Court. Nonetheless, the views of both courts on this point were *obiter*. In the High Court, McDermott J. came to the view that the applicant had not identified good and sufficient reason, thus obviating the necessity to decide upon the legality of sub-rule 3(b). In the Supreme Court, Finlay-Geoghegan J., giving the majority judgment, held that the applicant had identified good and sufficient reason and had met the criteria under sub-rule 3(b), so the challenge to it did not require to be decided. In his dissenting judgment, O'Donnell J. held that the applicant had not established good and sufficient reason, yet again rendering a consideration of the legality of sub-rule (3) unnecessary.
35. Despite this, the provisions of sub-rule 3(b) were the subject of extensive consideration by each of the three judges. I have already indicated that the applicant lacks standing to challenge sub-rule 3(b). Nonetheless, in the course of considering the legality of sub-rule (3), both the High Court and Supreme Court touched on the issue that is before me, i.e. whether the Rules Committee may permissibly provide for an extendable time limit within which to bring judicial review proceedings. Because of the careful and detailed consideration of the issue by all the judges, I take the view that I should give very considerable weight to their observations, despite their *obiter* nature. I have sought to avoid reproducing large passages from the relevant judgments. Nonetheless, given their central application to the issues in this case, it is necessary to quote *in extenso* from them.
36. In the High Court McDermott J. commented as follows on sub-rule 3(b):

Judicial review proceedings are clearly civil proceedings the pleadings and procedure of which may be regulated by rules of court. This applies to the setting of times within which steps must be taken in the proceedings including time limits for seeking leave to apply for judicial review and an extension of such time limits.

...

53. Article 36 of the Constitution provides *inter alia* that:-

'Subject to the foregoing provisions of this Constitution relating to the Courts, the following matters shall be regulated in accordance with law, that is to say:-

(iii) the Constitution and organisation of the said courts, ... and all matters of procedure.'

54. Keane C.J. in delivering the judgment of the court in *The Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 I.R. 360 at p. 387* stated:-

'It is within the competence of the Oireachtas to regulate by law, by primary legislation or, in the due exercise of its powers, by way of secondary legislation, such as Statutory Instruments, procedural matters, including procedural remedies before the courts provided constitutional rights and other provisions of the Constitution relating to the courts are not infringed....

More fundamental, however, is the fact that a person seeking judicial review pursuant to s. 5 must in the first instance apply to the High Court for leave to apply for judicial review irrespective of any time limit for doing so. If such a person has also to apply for an extension of the time within which to make the application on the grounds that there is good and sufficient reason for such an extension, that cannot be said to undermine access to the courts. Indeed by giving that very discretion to the court to extend the time, access to the court is enhanced.'

37. Of some considerable importance in my view is the quote identified by McDermott J. from Fennelly J. in *de Roiste v Minister for Defence* [2001] 1 IR 190 where he observed that the time limits concerning the initiation of judicial review applications under the 1986 rules were not a limitation period but a period within which *prima facie* an applicant must apply for relief and outside of which they must seek an extension of time based upon an explanation of the delay and demonstration that it was justifiable. The applicant has characterised the three-month time limit as a limitation period; but in *de Roiste*, that characterisation was expressly rejected.
38. Insofar as a claim was made that the Rules Committee had imposed an impermissible burden on the right of access to the courts, McDermott J. noted at paragraph 65 that sub-rule (b) did not alter the nature or scope of the remedies available by way of judicial review in any substantive way. This view was subsequently echoed by O'Donnell J. in the Supreme Court, where he concluded that he did not read Order 84, rule 21(3) as a significant constraint or limitation on rule 21(3)(a) and did not think it could be said to unreasonably or unduly restrict the right of access to Court (see paragraph 30). McDermott J. observed that Order 84, rule 21(3)(b) is an important provision which regulates the procedure and time for the bringing of an application, which has been appropriately regulated by Rules of Court for many years. He concluded that the power of the Rules Committee to make Rules of Court for pleading, practice and procedure generally in all civil cases includes the power to make rules as to the time within which an application for leave to apply for judicial review must be brought and the circumstances in which an extension of that period may be granted.
39. The decision of McDermott J. was appealed to the Supreme Court. Delivering the judgment of the majority, from paragraph 39 onwards, Finlay-Geoghegan J. considers what the Supreme Court has determined to be the role and function of the Court in

determining an application for extension of time for leave to issue judicial review proceedings and reviews the case law including *O'Flynn v Mid-Western Health Board* [1991] 2 I.R. 223, *de Roiste* and *Dekra Eireann Teo v The Minister for the Environment* [2003] 2 I.R. 270.

40. At paragraph 55 she points out the decisions require an applicant who does not apply for leave within the time specified to furnish good reasons to justify the delay and also emphasise the discretionary nature of the jurisdiction being exercised by the Court in determining any such application, including the Court's duty to protect the right of access to the courts. At paragraph 60 she notes the jurisdiction to extend time is a discretionary one which must be exercised in accordance with the relevant principles in the interests of justice. At paragraph 69 she observes that Order 84 rule 21 is not an absolute limitation period but a Rule of Court, echoing what was said in *de Roiste*. At paragraph 86 she indicates her agreement with Barron J. in *Holloway v Belenos Publications Ltd. (No. 2)* [1988] IJR 494 to the extent he interprets the principles of s.36 as permitting regulation of an existing power or jurisdiction of the Court in relation to practice and procedure.
41. At paragraph 88 she refers to Collins and O'Reilly, *Civil Proceedings and the State* (2nd ed., Round Hall, 2004) noting that time limits which are not regarded as limitation periods have always been a feature of remedies by way of judicial review. She notes at paragraph 89 that the Rules of Court have long regulated the time within which applications for stateside remedies including *certiorari* or judicial review are required to be brought. Such time limits have however always been subject to the power of the Court to enlarge or indeed abridge same. At paragraph 91 she observes that time limits subject to enlargement have been a feature of the rules relating to judicial review at least since the rules of the Supreme Court (Ireland) 1905 (Order LXXXIV, rule 13 and rule 244).

42. At paragraph 90, she distinguishes between the general judicial review time limit and a limitation period, and she notes that this is not a judicial review application subject to a limitation period fixed by statute. At paragraph 94 she acknowledges the limits on the powers of the Rules Committee:

“94. Hence, it appears to me that the statutory remit of the Rules Committee to regulate the procedure, including in relation to time, in accordance with which the court exercises its long standing jurisdiction to grant orders of certiorari and other reliefs by way of judicial review, does not include a power to make rules which are, in truth and substance, an absolute limitation period for the initiation of a leave application. Any such limitation period would be ultra vires the Rules Committee, as it would be the exercise of a law-making function in respect of which the Oireachtas has exclusive jurisdiction. I recognise that in practice, the line between regulating, in relation to time, the power of the Court to grant leave and imposing what is, in truth, a limitation period may not always be obvious. Nevertheless, the distinction does exist in principle and I now next seek to apply that principle in interpretation of O. 84 r. 21(3) and insofar as necessary, the vires of sub-rule (3)(b) as properly interpreted.”

43. O’Donnell J. dissented from the majority in concluding that no good and sufficient reason had been provided to justify an extension of time. Nonetheless, he went on to consider sub-rule (3)(b). In response to an argument that the sub-rule restricted the right of access to the Court, he observed that:

“I have no doubt that, at least in general, the provisions of O.84, r. 21(3) are within the general powers of the Superior Court Rules Committee to regulate matters of practice and procedure. In simple terms, the time limit for commencement of judicial review proceedings has been contained in the rules since 1986, when the new judicial review procedure was established. Indeed, a time limit for seeking the prerogative writ of

certiorari can be found in O. 84, r. 13 of the Rules of the Supreme Court (Ireland) 1905. If this is so, and it is permissible to include a time limit in rules regulating the procedure for seeking relief, it follows that it must be permissible to provide for an extension of time, and at least in principle to set out the circumstances in which such an extension of time may be permitted. It may not be particularly wise or successful to seek to provide for all the circumstances in which it may be necessary to extend time, but the subject matter of the exercise appears to me to be within the rule-making power.”

44. Importantly, he concludes by observing:

“I think it is important to emphasise that, in my view at least, it would be within the power of the Superior Court Rules Committee to enumerate the grounds for an extension of time, and to decide, for example, to provide that certain matters, such as a mistake by a lawyer, might not provide such a ground. Any such restriction would, however, be subject to an overall consideration as to whether they effected an unjust constraint upon the right of access to a court. Of course, it may be wiser not to seek to prescribe in advance all possible contingencies, and to leave the matter to be determined by developing case law. In principle, I do not consider that it exceeds the power of the Rules Committee or is per se an unconstitutional restriction on access to court to set out general grounds for an extension of a time limit itself fixed by the rules. The validity of any such rule would fall to be determined by the nature rather than the fact of the limitation.”

45. The other case that is particularly relevant to the determination of these proceedings is *McGrath*, addressing as it does the nature of the rule making authority under the 1924 Act, albeit in the context of a challenge to Order 36, rule 1 of the District Court Rules of 1997, a costs rule adopted by the District Court Rules Committee under s.91 of the 1924 Act which provided for rules to be made *inter alia* for the practice and procedure of the

District Court including the question of costs. The rule in question provided that where the District Court made an Order in any case of summary jurisdiction, it had power to order any party to the proceedings other than the DPP or a member of An Garda Síochána acting in discharge of his or her duties as a police officer to pay to the other party such costs and witnesses' expenses as it thought fit.

46. This case is important both because it describes in some detail a revised approach to Article 15.2.1 but also because it describes in some considerable detail the history and purpose of the 1924 Act and the manner in which it provided for the adoption of subordinate legislation. Further, it makes reference (albeit in passing) to Rules of Court in respect of time limits. In respect of the approach of a court to a challenge to legislation on the basis of an alleged breach of Article 15.2.1, O'Donnell J identifies at paragraph 70 that:

“In any particular case it may be useful, therefore, to ask whether what is permitted by primary legislation is an abdication of the power or the duty of the Oireachtas, or whether what is done under the power is an impermissible encroachment on an area consigned by the Constitution to the Oireachtas. The scope of the area of delegation may, therefore, be a relevant and important consideration. If the area is narrowly defined and confined, it may be concluded that the Oireachtas was content to permit decisions to be made within that confined area without seeking to control the specific decision.”

47. In relation to the power given by the 1924 Act to the relevant rule making authority to adopt Rules of Court, O'Donnell J. notes there is little in the 1924 Act to indicate what the detail of those rules should be. He refers to the possibility of obtaining guidance from the specific provisions of the statute identifying the matters to be covered by the rules and from the reference back to the practice and procedure adopted under the pre-existing body of rules but observes that it is not helpful to analyse the provisions by seeking to deduce

principles and policies in the 1924 Act. Instead, the following passage gives guidance as to the approach to be adopted.

“The detailed provisions of the Rules of the Superior Courts, the Rules of the Circuit Court, and the Rules of the District Court, respectively, which have been made — and amended — in the century since 1924 contain many detailed provisions which may be critical in the determination of particular cases. There is little in the terms of the 1924 Act (or any subsequent legislation) to indicate what the detail of those rules should be. It is, no doubt, possible to deduce some guidance from the specific provisions of the statute identifying those matters to be covered by the Rules, and from the reference back to the practice and procedure adopted under the pre-existing body of rules, but it does not seem helpful to analyse these provisions by seeking to deduce principles and policies in the 1924 Act and describing the Rules so adopted as the mere filling in of details in accordance with those principles or policies. Nor would the position be markedly better if the legislation recited a menu of principles and policies such as efficiency, fairness, cost effectiveness, and promotion of the administration of justice. It is more helpful to consider the Act as a whole as a very substantial undertaking which established an entire new court structure, and either declared what was within the jurisdiction of those courts, or transferred jurisdiction to them, and required that procedure be regulated by a set of rules but left to the defined rule-making body the obligation of setting out those detailed rules to achieve the objective of permitting justice to be administered in respect of the matters within the courts’ jurisdiction. It is not, therefore, that the Oireachtas had a general view about the content of the Rules which it set out in the legislation, leaving only details to be filled in; it is, rather, that the Oireachtas considered that once it had established that there should be rules and identified what was to be covered by them,

the content of those rules was a matter better decided by a body with expertise — content, as it were, that the decisions to be made were not matters which were within the exclusive jurisdiction of the Oireachtas.”(para. 71)

48. O’Donnell J. observed that the rule the subject of challenge in that case singled out a group of litigants i.e. those who defended successfully a prosecution brought by the DPP or An Garda Síochána and deprived them (uniquely) of the possibility of obtaining a costs Order. He treated the question of liability of the State, State bodies or officials to rules which apply to members of the public more generally as a very significant one. This blanket exclusion of a whole category of persons from a potential exposure to costs was found to be *ultra vires* the provisions of s.91. O’Donnell J. observed that the underlying choice went “*beyond any question properly consigned to the rule-making authority as to practice and procedure including costs, and involves a broad ranging policy decision which lies within the function of the Oireachtas under article 15.1.2*”. Counsel for the applicant laid particular emphasis on the next sentence in that paragraph as follows:

“It might be said that the reason why law-making for the State is reserved to the Oireachtas is that there are decisions which must be made by the representatives of the people, and this decision, to exempt one class of prosecutor from the possibility of an award of costs in summary prosecutions is one that requires democratic justification rather than technocratic expertise”

Summary of case law

49. In summary, the following principles may be derived from the extensive case law in this area:

- The Oireachtas may regulate by law, including by way of secondary legislation, procedural remedies before the courts provided constitutional rights are not infringed;

- (In the context of a challenge to primary legislation), a leave requirement for judicial review, with a time limit and an entitlement to seek an extension of time for good and sufficient reason, enhances access to the Court;
- The 1924 Act required that the procedure of the courts be regulated by a set of rules but left to the defined rule-making body the obligation of setting out those detailed rules to achieve the objective of permitting justice to be administered;
- Broad ranging policy decisions are likely to lie within the function of the Oireachtas under Article 15.1.2;
- Section 36 permits the regulation of an existing power or jurisdiction of the Court in relation to practice and procedure;
- It does not exceed the power of the Rules Committee nor is, *per se*, an unconstitutional restriction on access to Court to set out general grounds for an extension of a time limit itself fixed by the rules;
- The provisions of Order 84, rule 21(3) are within the general powers of the Superior Court Rules Committee to regulate matters of practice and procedure;
- The Rules Committee does not have the power to adopt an absolute limitation period for the initiation of a leave application;
- Time limits concerning the initiation of judicial review applications outside of which an applicant must seek an extension of time are not limitation periods but Rules of Court;
- The jurisdiction to extend time is a discretionary one which must be exercised in accordance with the relevant principles in the interests of justice.

It may be seen from this summary that many of the questions identified by the applicant have in fact already been answered by the Supreme Court in previous cases. My analysis

of the applicant's arguments must therefore take place within the confines of what has already been decided or expressed in those cases.

The Constitution and relevant primary legislation

50. Article 15.2.1 of the Constitution prescribes that the sole law-making power of the State lies in the Oireachtas, as follows:

“The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.”

51. The task of the Court where parent legislation is challenged as being contrary to Article 15.2.1 was identified by Charleton J. in *NECI* as follows;

“Thus, the central question in a challenge to the proper use of a delegated legislative power is what is or is not authorised. Those affected by subsidiary legislation are entitled to query whether such instruments were made within jurisdiction. What the Oireachtas intends to delegate should be clear from the text of legislation” (para. 18).

The Court will be required to undertake the following analysis: *“the informed interpretation of a statute, what the enactment means and the extent of the delegation, the precision of the task, its nature and the guidance afforded by the entire text as to what is to happen” (para. 30).*

52. The applicant has pleaded that the provisions of the legislation providing for the constituting of the Superior Court Rules Committee and of all other powers enabling it to make Rules of Court do not contain sufficient principles and policies to satisfy the requirements of Article 15.2.1. As with the plea in respect of the *ultra vires* argument, this plea suffers from a lack of specificity. The precise provision of the Act that is allegedly unconstitutional has not been identified. Assuming it is s.36, it is a long and detailed section, and no attempt was made in submissions to identify what parts of it are unconstitutional. However, given the focus on S.I. 691/2011, I will assume that what is

being challenged is s.36(1)(i) i.e. the power of the Rules Committee to make rules in civil cases in respect of pleading, practice and procedure generally.

DISCUSSION AND DECISION

Is SI 619/2011 intra vires s.36 of the Courts of Justice Act?

53. For the applicant to succeed in these proceedings, he must persuade me that Order 84, rule 21(1) and (3) exceeds any permissible area of rule-making authority permitted by Article 15.2.1 having regard to the terms of s.36. Echoing the approach of O'Donnell J. in *McGrath*, the following question presents itself: can the provisions of Order 84, rule 21(1) and (3)(a) be said to come within the terms of what was contemplated by the statutory delegation under s.36 of the 1924 Act, namely, to make rules for pleading, practice and procedure generally in civil cases?
54. Commencing the analysis identified above, I must give very considerable weight to the view of O'Donnell J in *O'S* discussed above, i.e. that the provisions of Order 84, rule 21(3) are within the general powers of the Superior Court Rules Committee to regulate matters of practice and procedure and the view of Finlay-Geoghegan J. in the same case, i.e. that the time within which a person is bound *prima facie* to apply for leave to issue an application for judicial review may properly be considered as concerning "practice and procedure" and may be regulated by the Rules Committee (para. 93).
55. These conclusions are unsurprising. Time limits within which leave must be sought, and the extension of same, are manifestly rules of practice and procedure. Contrary to the submission of the applicant, the fact that time limits in judicial review proceedings may also be regulated by primary legislation does not mean Court rules regulating same must be treated as being outside the realm of practice and procedure. Undoubtedly, were the time limits in Order 84, rule 21(1) and (3) to be characterised as limitation periods, they

could not be regulated by Rules of Court. But contrary to the submissions of the applicant, the regime established by sub rule 21(1) and (3) does not establish limitation periods. If sub-rule 21(3) did not exist, and rule 21 provided for a “hard” time limit of 3 months without the possibility of extension, then, having regard to the comments of Finlay-Geoghegan J. in *O’S*, this would constitute a limitation period and as such, it could not be authorised by s.36 as it would no longer be a rule of practice and procedure. A critical distinction between a hard limitation period and a “soft” time limit is the availability, in the latter case, of a discretionary extension of time depending on the particular circumstances of the case. The existence of a discretion to extend time takes rule 21 out of the realm of a limitation period. The conferral of that discretion on the Court justifies a finding that the rule is *intra vires* the Rules Committee. It is true that the Committee has set an initial limitation period – or rather shortened an existing period in respect of one remedy – but in relation to the extension of time, it has turned that question over to the courts with minimal guidance as to how that discretion should be exercised, given the identification of “good and sufficient” reason as the test.

56. Indeed, a stark contrast between this rule and that struck down in *McGrath* is the question of discretion. The rule in *McGrath* allowed no discretion to the Court to make an Order for costs against the DPP or a member of An Garda Síochána. The Court was therefore precluded from considering the particular facts of any given case and exercising discretion in relation to the costs. By removing any role for judicial discretion, the Rules Committee had made the rule an immutable one, applicable irrespective of the circumstances. The rule in question here on the other hand ensures the discretion to extend time remains with the Court, as has always been the case in relation to stateside remedies.
57. In this respect I cannot agree with the oral submission of counsel for the applicant that the Statute of Limitations, allowing as it does certain exceptions to limitation periods on the

basis of age or lack of capacity, has a similar flexibility to sub rule 21(3) and that the existence of such flexibility does not prevent the Statute from being characterised as a limitation period. The corollary of this, according to the applicant, is that despite the existence of a discretionary extension of time, sub-rule 21(3) is in essence a limitation period. But the applicant did not identify any provision of the Statute of Limitations providing for a discretionary extension by a court of a prescribed limitation period, having regard to the particular facts of the case. On the other hand, the essence of the time limit identified in Order 84, rule 21 is that it must be applied in a discretionary fashion, as identified by Denham J. in *de Roiste* where she described the Rules of the Superior Courts, 1986, as setting “*out a scheme which indicates a specific, short, time span within which to bring an application, whilst also retaining a discretion in the court to allow an application if there is good reason*”. She identified the factors that a court may take into account in deciding whether to extend time or to allow judicial review, including the public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished and stressed that it is clear from precedent that the discretion of the Court has “*ever been to protect justice*”. Further, the test that must be met when considering an extension of time i.e. whether good and sufficient reason has been provided, is enormously flexible. The breadth of the matters that must be considered when applying that test effectively encompass all the circumstances of the case (see Denham J. in *de Roiste* and Finlay-Geoghegan J. in *O’S*). As such, in enacting sub-rule 21(1) and (3), the Rules Committee have not imposed a hard and fast rule reflecting a policy that must be applied irrespective of the circumstances of the case. Rather, rule 21 identifies a time limit within which proceedings must be brought and then gives a court an extremely wide discretion in deciding whether that time limit should be extended and the factors that may be taken into account when doing so.

58. For the sake of completeness, and despite the lack of the applicant's standing to challenge sub-rule 21(3)(b), it is relevant that the requirements imposed by sub-rule 21(3)(b) have not been treated as a significant constraint on the good and sufficient reason test. I have already referred to O'Donnell J.'s comments in this regard. Finlay-Geoghegan J. shared that view, observing that in most instances where a court has been satisfied of good and sufficient reason to extend time, it will also be in a position to make a positive finding under sub rule (21)(3)(b) in relation to the circumstances which resulted in the failure to apply within the 3 month period, while stressing that the question of whether sub-rule (3)(b) is *intra vires* the Rules Committee should be left for determination when and if it arises on the facts of the appeal.
59. The applicant has made the point that in certain cases there will be either no application for an extension of time or no obvious grounds for granting such an extension and in such circumstances no discretion arises. However, the discretion is there for the benefit of an applicant. If an applicant chooses not to avail of it, that choice cannot be used to negate the existence of the discretion, such that the rule must be treated as an absolute time period akin to a limitation period. The rule remains one consisting of a time limit with the possibility of an application for an extension of time at the election of the applicant. Moreover, the principle of the Rules of Court identifying a specified time limit within which an application should be brought goes back to 1905, as identified elsewhere in this judgment and the history of such time limits is relevant when considering the *vires* of the rule.
60. Separately, the applicant has put forward no reason as to why the creation of a time limit subject to a discretionary extension may not be considered part of the administration of justice, being one of the explicit purposes of the 1924 Act, as identified in the description of the Act i.e. "*an Act for the establishment of Courts of Justice pursuant to the*

Constitution of Saorstát Éireann and for purposes relating to the better administration of justice". Time limits serve an obvious function in the administration of justice, such as the interest in finality and the orderly and timely resolution of disputes, and the entitlement of a recipient of an administrative law decision to know within a relatively limited time period that it can rely upon the legal effect of an administrative decision without fear of it being stayed or set aside.

61. In summary, the provisions of Order 84, rule 21(1) and (3) appear to me to represent a permissible policy type decision that does not overstep the bounds of the discretion of the Rules Committee. They contain neither a hard limitation period nor an inflexible extension provision. Those characteristics of the rule, allied with the fact that setting a time limit and an extension is clearly a matter of practice and procedure as it regulates access to the Court, means that in my view the provision is *intra vires* and does not impermissibly encroach upon the administration of justice.
62. I turn now to three discrete issues that were heavily relied upon by counsel for the applicant - whether the decision is one involving questions of policy; whether the rule is better decided by a body with expertise or whether, as contended by the applicant, the decision is one that must be made by the representatives of the people, and whether the rule prevents access to justice.

Policy

63. It is clear from *McGrath* that the mere fact that a rule involves a policy decision cannot be treated as rendering it necessarily unsuitable for a rules committee. In a passage that is important in the context of this challenge, O'Donnell J. observes as follows:

"73. Rules of Court have always covered a wide range of matters and go beyond the merely mechanical. There is no clear line between issues of simple process and some

consideration of policy which is implicit in decisions, for example, to shorten time periods. The purpose of any rule change is to make a process better and that, itself, involves some conception of what is desirable in litigation and therefore involve some consideration of policy. Thus, the Rules of the Superior Courts have introduced novel procedures and concepts which have significant effects on litigation, such as third party discovery or the revision of the procedure for judicial review, including the alteration of time limits. The fact that the terms of the Rule embody some conception of policy in relation to the fair and efficient processing of the myriad claims that come before a court does not, itself, mean that the relevant decision is one for the Oireachtas alone.”

64. I must acknowledge that the choice of a time limit and the conditions in which it may be extended necessarily involve some issues of policy, in particular the choice of three months as the appropriate time limit. But the fact of Rules of Court identifying a time limit is not new. The Rules of the Supreme Court (Ireland) Order 1905 required an application for the writ of *certiorari* to be made within six months, with power to enlarge or abridge the time. As noted above, the 1986 Rules provided for a three-month time limit for most reliefs, with a six-month time limit for an application for *certiorari*. The 2011 Rules streamlined the applicable time limit, imposing a three-month time limit for all applications including *certiorari*. It may be seen from this potted history of relevant time limits in judicial review in Ireland that there is nothing radical or indeed particularly new in the choice of a three-month time limit for an application for judicial review as identified in sub-rule 21(1). It is difficult to characterise the move from the (previously applicable) six-month time limit to a three-month time limit for applications for *certiorari* as a radical policy choice requiring the intervention of the Oireachtas. In summary, the 2011 amendments were not regulating an area that had previously been within the exclusive purview of the legislature. Rather, time limits for judicial review have been long regulated by Rules of Court, which in turn

were first enacted (over a century ago) in a context where the Court had an inherent jurisdiction to regulate matters of time and the extension of same (see for example the comment of Murray J. in *Arthroparm* referred to above that delay in the bringing of other stateside applications was addressed under the umbrella of the Court's power to withhold relief on discretionary grounds).

65. In short, there are in my view very limited policy type decisions reflected in sub-rule 21 (1) and (3), namely the change from six months to three months for *certiorari* to bring it into line with the existing time limit for other reliefs, and the addition of "sufficient" to the "good reason" test. Given the long history of the Rules Committee playing a role in questions of timing of judicial review applications by regulating the time within which applications for judicial review should be brought, it seems to me that the applicant faces a very significant hurdle in arguing that in 2023 this is a matter so policy driven that it can only be regulated by the Oireachtas. In his arguments, the applicant did not engage at all with the history of judicial review time limits and explain why the (minor) policy element inherent in sub-rule 21(1) and (3) meant it was no longer a matter of practice and procedure such that it could not be the subject of Rules of Court.
66. In the circumstances, I consider that, contrary to the situation in *McGrath*, this is not a broad ranging policy decision lying within the function of the Oireachtas under Article 15.2.1. Again, the question of discretion remains relevant here. As I identify above, the rule in *McGrath* did not allow for the exercise of discretion. A court was wholly precluded from making a costs Order against a certain class of persons, solely on the basis of their status, with the result that the individual circumstances of a case could not be taken into account. Here, the exercise of discretion in the context of the extension of time means that the time limit does not have the same broad range of application as an immutable rule, thus minimising the extent of the policy choice.

67. In all those circumstances, I conclude the policy aspects to the sub-rule do not bring it outside the area of permitted delegation.

Democratic Oversight

68. A further argument was made by the applicant's counsel to the effect that the sub-rule in question could only be decided upon by the representatives of the people i.e. the Oireachtas, because of what he described as the very limited "gene pool" of the Rules and because of the substantive character of rule 21. (The nominated members of the Committee are two ordinary judges of the Supreme Court, two ordinary judges of the Court of Appeal, two ordinary judges of the High Court, two practising barristers (one Senior Counsel and one Junior Counsel) and two practising solicitors nominated by the Council of the Law Society of Ireland).

69. Counsel argued that the composition of the Committee meant it was not representative of the public at large and therefore should not be entrusted with a decision as to time limits, given the impact of such a decision upon a person's right of access to the Court. Counsel for the respondents took the opposite view, emphasising the expertise of the Rules Committee and its membership, and its particular suitability to decide upon an appropriate time limit and the conditions governing the extension of same.

70. An argument is often made in cases where delegation of power is at issue that the body to whom the power to make regulations has been delegated is better equipped to make the decision because of its technical expertise than the Oireachtas (see the decision of the Supreme Court in *NECI* for a discussion of this approach). There may well be cases where that reasoning justifies the use of delegated legislation. The matters governed by sub-rule 21(3) are certainly suitable for decision by an expert committee. The so-called "limited gene pool" referred to by the applicant's counsel has the effect that the persons entrusted with the making of rules have both expertise and experience in the way in which justice is

administered on a daily basis in the courts. That cannot be a basis for criticising the involvement of the Rules Committee. Nonetheless, this is not a case where technical expertise can be invoked to justify the conferral of exclusive competence on the Rules Committee, despite their undoubted expertise and their suitability to make rules of this type. This is because, as already averted to in this judgment, there are a number of instances where the Oireachtas has enacted primary legislation providing for a time limit subject to extension in the judicial review context, for example in the asylum and planning fields.

71. However, the fact that both the Oireachtas and the Rules Committee may both adopt rules relevant to time limits does not advance the applicant's argument that the Rules Committee is precluded from doing so. The applicant continually returns to the theme that this is a substantive rule and as such must be made by the Oireachtas. But he has entirely failed to engage with the fact that similar rules have long been made by Rules Committees and that this is a relevant factor in considering the *vires* of the rule. He has failed to demonstrate why this is an area that can, on his argument, only be regulated by the Oireachtas despite that not having been the case for over 100 years. He has failed to engage with the role of the Court's discretion and how this minimises the policy decision of the Rules Committee. In focusing on the limited "gene pool", he has not addressed the necessity under s.68 of the 1936 Act for any rules to be made with the concurrence of the Minister for Justice, thus taking any give rule out of the realm of the purely technocratic.

72. In all the circumstances, the applicant has failed to establish that the rule is one that must be made by the Oireachtas and cannot be made by the Rules Committee. It is true that the oversight originally exercised by the Oireachtas under s.101 of the 1924 Act i.e. that the Rules be laid before the Oireachtas and approved, no longer exists due to the removal of that requirement by the 1936 Act. But the level of oversight is itself a matter for the Oireachtas and here a principled decision was taken in 1936 to remove that level of

oversight. The absence of such oversight does not mean s.36 breaches Article 15.2.1 or that rule 21 is *ultra vires* the power of the Rules Committee. Rather, it is one of a number of factors to be considered in weighing the question of the constitutionality of a statutory provision. Here, given all of the other factors that support the constitutionality of s.36, the absence of a requirement for confirmation by the Oireachtas does not render s.36 incompatible with Article. 15.2.1.

Right of access to the Court

73. The essence of the applicant's argument appears to be that, because time limits involve the right of access to the Court, they must be left to the Oireachtas. No authority has been cited by the applicant in support of what is a very wide ranging proposition i.e. that measures capable of affecting a right of access to the Court must be enacted solely by the use of primary legislation, irrespective of the scope of delegation in the parent Act. Whenever legislation governs access to the Court, whether primary or delegated, it may be challenged on the basis that it is an impermissible restriction of access. If the restriction is imposed by delegated legislation, that scrutiny is likely to include a consideration of whether the legislation is within the permissible area of delegation (although it is important to note, as per O'Donnell J. in *McGrath*, a rule which arguably came within the scope of permissible delegation under the statute could nevertheless be impugned as an impermissible interference with the administration of justice). Here the applicant's focus is the allegedly impermissible involvement of the Rules Committee.

74. It is not suggested that, had sub-rule 21(1) and (3) been adopted by way of primary legislation, it would have constituted an impermissible restriction of access to the Court. This is unsurprising given that in the *Illegal Immigrants Trafficking Bill* it was held that legislation providing for a 14-day time limit within which judicial review proceedings had to be brought, subject to a discretion to extend time, did not interfere with the right of

access to the courts. But the simple fact of adoption by the Rules Committee of a rule that may operate so as to restrict access cannot, without more, establish impermissible delegation. Many Rules of Court regulate a person's right of access to the Court. The applicant has identified no case law in support of the argument that rules affecting rights of access to the Court must be made by the Oireachtas. As identified above, there are many judicial pronouncements accepting that time limits in judicial review may be regulated by Rules of Court.

75. Moreover, the substance of the rule does not impermissibly trespass upon the right of access to the courts. Having regard to the role of judicial discretion in an application to extend time discussed above, a decision that a person is out of time and should not have time extended will have been the subject of judicial consideration, where an applicant is entitled to pray in aid all the relevant facts and circumstances of the case, and as such is an exercise of the administration of justice in respect of a person's access to Court. The mere fact that a person wishes to have a case adjudicated upon by a court and is precluded from doing so cannot be treated *ipso facto* as a denial of access to justice. Persons are in many instances excluded from having their cases substantively adjudicated upon, whether that is for reasons of failure to observe time limits or because the case is struck out for various reasons. Rather, by having the objection as to time adjudicated upon by a court, where the applicant is entitled to be heard, the applicant is provided with access to justice. The fact that the outcome of that exercise may be that an applicant is refused permission to advance the substantive proceedings does not alter the nature of the exercise.

76. For these reasons I cannot accept the argument of the applicant that the fact that these rules regulate claims that have not yet "come through the door" means they cannot be treated as matters of practice and procedure. An applicant seeking to extend time has access to the Court to argue their case in this respect. Moreover, I do not accept any distinction in

principle between procedural rules that are capable of preventing an applicant from litigating the substance of their claim and other types of procedural rules regulating litigants. Some procedural rules may end a claim before it is substantively determined, for example rules governing applications to strike out proceedings for inexcusable and inordinate delay, or applications to set aside an extension of time in respect of service of a summons. Rules that govern a litigant's relationship with other parties and with the Court are in principle rules of practice and procedure, whether these regulate the initial access to the Court or the conduct of proceedings once initiated.

77. Indeed, the decision of Barr J. in *H v DPP* demonstrates that, contrary to the applicant's argument, a litigant refused an extension of time cannot be characterised as a litigant who has not been the subject of the administration of justice. In a careful and detailed analysis of the applicant's case, Barr J. considered all of the different factors relevant both to deciding whether the time limit had been exceeded and whether the time limit should be extended and summarised his findings as follows:

"In summary, where there is no evidence that the applicant, or his solicitor had even considered challenging the Special Criminal Court on the grounds put forward in these proceedings within the relevant period; where there is no evidence before the court that the applicant, or his solicitor were prevented from consulting with each other during the relevant three month period and where it was not appropriate to defer taking the appropriate steps to seek leave to bring judicial review proceedings, while the applicant considered whether he would pursue a separate set of judicial review proceedings in respect of the first respondent's decision to send him for trial before the Special Criminal Court; the court is not satisfied that there are good and sufficient reasons for extending the period within which the present application may be brought. Nor is it satisfied that the circumstances that resulted in a failure to make the application for

leave within the relevant period were outside the control of the applicant, or could not reasonably have been anticipated by the applicant for such extension. Accordingly, the court refuses the reliefs sought by the applicant in his notice of motion, as this application has been brought out of time and it is not appropriate in the circumstances to grant an extension of time to permit same to be brought.”

78. Having weighed and measured them and given full weight to the applicant’s arguments, he concluded that the applicant had not shown good and sufficient reason. The applicant had full access to justice. The fact that the conclusion was adverse to him does not undermine his access.

Article 15.2.1

79. In the course of the above analysis, I have explained why Order 84, rule 21(1) and (3) is *intra vires* s.36 and in the course of doing so, have identified why it is permissible to enact primary legislation permitting the Rules Committee to make rules for pleading, practice and procedure in civil cases. If s.36(1)(i) is interpreted in a constitutional fashion, it will only permit the making of rules that do not intrude upon an area of decision making reserved to the Oireachtas. For the reasons I set out above, sub rule 21 does not intrude in an area of decision making reserved to the Oireachtas. Therefore the existence of sub rule 21 cannot be invoked to argue for the incompatibility of s.36 with Article 15.2.1.

Conclusion

80. For all of the reasons set out above, I refuse the applicant the relief sought.