

**APPROVED JUDGMENT
NO REDACTION NEEDED**



THE COURT OF APPEAL

Record No: 12/2024

Neutral Citation: [2025] IECA 28

Edwards J.

McCarthy J.

Burns J.

Between/

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

V

VASAL KRAVTSOV

Respondent

JUDGMENT delivered by Mr. Justice Edwards on the 11th day of February, 2025.

Introduction

1. The present appeal has been brought by The Director of Public Prosecutions (i.e., “the appellant” or “the DPP” or “the Director”) against a judgment of the High Court (Phelan J. [2023] IEHC 615) delivered on the 8th of November 2023, and reflected in a High Court Order of the 15th of November 2023 (perfected on the 8th of January 2024) refusing to grant to the appellant certain reliefs sought by her in an application for judicial review (including, *inter alia*, an Order of Certiorari quashing an Order of the District Court returning the respondent for trial to the Dublin Circuit Criminal Court in respect of various offences, and

ancillary relief), on the basis that the said application was not brought within the time specified in Order 84, Rule 21(1) of the Rules of the Superior Courts (“RSC”), and further refusing an application to extend the time for the bringing of such an application pursuant to Order 84, Rule 21(3) RSC. The costs of the unsuccessful application were awarded to the respondent, and the appeal now before us includes an appeal against the award of such costs.

Background to the Proceedings

2. The respondent was charged with 105 offences which are alleged to have arisen as a result of a “Ghost brokering” scheme from the 9th of November 2017 to the 14th of February 2018. Offences charged include offences of deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 (57 counts) and money laundering contrary to s. 7(1)(a), s. 7(1)(b) and s. 7(3) of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010 (48 counts).

3. The respondent, a resident of Co. Kildare, was arrested in Leixlip, Co. Kildare. Under s. 79 of the Courts of Justice Act 1924 (“the Act of 1924”), Leixlip is (for court area purposes) part of the Dublin Metropolitan District, albeit that it is in Co. Kildare. Accordingly, upon arrest he was brought before Blanchardstown District Court which had jurisdiction to hear evidence of arrest, charge and caution and, in circumstances where the matter was not to be dealt with summarily, to return the respondent for trial to whatever Circuit Court would have jurisdiction to try him.

4. Section 53 of the Act of 1924 provides that, in criminal matters, a court has jurisdiction where either:

- a. The offences were committed;
- b. The accused resides, or
- c. The accused was arrested.

5. On the 16th of June 2020 the respondent was sent forward for trial by Blanchardstown District Court to the Dublin Circuit Criminal Court. It is now common case that none of the three criteria specified in s. 53 of the Act of 1924 were satisfied so as to confer jurisdiction on the Dublin Circuit Criminal Court to try the respondent. He should instead have been returned for trial to the next criminal sittings of the Circuit Court for Eastern Circuit and County of Kildare although, seemingly, nobody adverted to this at the time. The difficulty now having been belatedly adverted to; the appellant seeks an order quashing the Return for Trial to the Dublin Circuit Criminal Court together with an order remitting the matter back to Blanchardstown District Court to be further dealt with in accordance with law. It is accepted by the respondent that if the application for Judicial Review had been made in time, it undoubtedly would have resulted in the quashing of the Return for Trial.

6. Order 84, Rule 21(1) RSC requires that an application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose. Further, Order 84, Rule 21(2) RSC provides that 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. Accordingly, to be within time, the appellant needed to seek leave to apply for judicial review within three months of the date of the return for trial, which was the 16th of June 2020, i.e., she needed to bring her application on or before the 15th of September 2020.

7. Leave to apply for judicial review was not in fact sought until the 14th of November 2022, based on a Statement of Grounds and Grounding Affidavit filed on the 10th of November 2022, and accordingly the appellant was in excess of two years out of time.

8. Order 84, Rule 21 RSC goes on to provide in subrules (3), (4) and (5), respectively, for the possibility of time being extended by the High Court in certain circumstances. These subrules provide:

“(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.

(5) An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant’s failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons.”

9. At the time at which the jurisdictional difficulty in this case was first adverted to, the status of the proceedings before the Dublin Circuit Criminal Court was that the respondent’s trial was scheduled to take place in the sittings commencing in January 2023. The respondent, who was on bail, had been arraigned and had pleaded “*not guilty*”. The matter had a trial date of the 9th of January 2023 and had been called on for six to eight weeks. At a pre-trial listing on the 3rd of November 2022, at which it was proposed to move the start date of the trial by

two days to the 11th of January 2023 for administrative reasons, the court was notified by counsel for the prosecution that an unspecified “*issue*” had arisen, and that in consequence the DPP was seeking a short adjournment to enable counsel to address the matter further. The court put the pre-trial listing back to the 8th of November 2023, on which date counsel for the DPP informed the court of the jurisdictional issue that had lately been adverted to, and of the DPP’s intention to seek leave to apply for judicial review to quash the Return for Trial, and further to then have the matter remitted to Blanchardstown District Court where a *nolle prosequi* would be entered in respect of the existing charges with a view to the respondent being then and there immediately re-arrested (Blanchardstown District Court being a place within the Dublin Circuit Criminal Court jurisdictional area) and recharged so that he could be again returned for trial to the Dublin Circuit Criminal Court. With that in mind, (and the DPP perhaps believing, or hoping, that the respondent would consent to the quashing of the Return for Trial, and the other proposed measures) the court was asked to preserve the existing trial date, as the DPP was hopeful that by proceeding as had been indicated, there might be a speedy regularisation of the position such as would permit the allocated trial slot to still be availed of. As matters transpired, that proved to be an over optimistic aspiration.

10. An application for leave to apply for judicial review was duly made to the High Court on the 14th of November 2022. The presiding judge, Meenan J., directed that the respondent be put on notice of the application. That was done, with an initial return date of the 8th of December 2022. On that date the respondent did not consent to orders being made but indicated an intention to oppose the granting of relief on the basis that the applicant was significantly out of time in bringing the application. The applicant in turn asserted an intention to seek an extension of time pursuant to Order 84, Rule 21(3) RSC. Leave to apply for judicial review was ultimately granted on the 27th of March 2023 by Meenan J. However, the granting of such leave could not prevent the issue of the applicant being out of time being

reventilated at the substantive hearing. A Notice of Opposition was filed by the respondent indicating an intention to oppose the granting of the application for substantive relief by way of judicial review, on the grounds that the application was out of time. The matter came on for hearing before Phelan J. on the 6th of November 2023, and whether or not time should be extended was litigated as the only issue at that hearing. Judgment was briefly reserved, and a written judgment refusing an extension of time was delivered on the 8th of November 2023.

11. By a Notice of Appeal lodged the 15th of January 2024, the appellant now appeals to this Court against the entire decision of the High Court. In support of this application the appellant has advanced four grounds which are as follows:

- (1) *“The learned High Court judge erred in law and fact and in the exercise of her discretion in holding that the appellant had not satisfied the requirement under Order 84 Rule 21(3)(a) to show a good and sufficient reason for the delay in making the applicant for leave to seek Judicial Review;*
- (2) *The learned High Court judge erred in law by holding that human error or inadvertence could not constitute a circumstance outside the control or reasonable anticipation of the appellant particularly in circumstances where the error was not identifiable on the face of the impugned Return for Trial;*
- (3) *The learned High Court judge erred in law by holding that the lack of prejudice to the respondent was not a relevant factor to be weighed in the balance, particularly in circumstance where the only ground of opposition was one of delay and where the reason for the delay was accepted (even if not found to be sufficient);*
- (4) *The learned High Court judge erred in law in holding that in the absence of putting before the Court evidence of a system out in place by the Office of the DPP to identify errors such as that as occurred here, the applicant could not satisfy the requirements of Order 84 Rule 21.”*

Judgment of the High Court

12. In the first place, Phelan J. noted the factual background of the case. She considered the jurisdiction of the Circuit Court in criminal matters setting out s. 53 of the Act of 1924. She stated that it was commonplace that none of the conditions of s. 53 of the Act of 1924 had been met in this case and thus, Dublin Circuit Criminal Court had no jurisdiction in the matter. She then considered the procedural history of the case, noting the relevant dates.

13. The High Court judge noted that counsel for the DPP had submitted in written submissions that three issues required to be determined by her. These issues were as follows:

1. *Should the return for trial be quashed?*
2. *Should the matter be remitted to the District Court? and*
3. *Should an extension of time be ordered?*

I feel obliged to observe that in identifying the issues as arising in that order counsel for the DPP was putting the proverbial cart before the horse. In circumstances where the DPP was substantially out of time, there could be no question of any substantive relief being granted, or consequential order for remittal being made, unless the High Court was satisfied that it was an appropriate case in which to grant an extension of time. At any rate, this appears to have been ultimately appreciated, in that the matter eventually proceeded on the basis that the arguments before Phelan J. would focus on whether the applicant was entitled to an extension of time to seek relief by way of an application for judicial review, and that Phelan J. should treat this as the net issue to be decided by her.

14. Phelan J. then identified Order 84, Rule 21 RSC, 1986 as setting out the applicable court rules, and she referenced subrules (3) and (4) of Rule 21 as conferring discretion on the High Court to extend time. When considering whether the applicant met the threshold therein set out, the High Court judge referred to the appellant's Statement of Grounds and the Affidavit sworn in verification thereof by Jonathan Antoniotti, a solicitor in the DPP's office.

She accepted the authority of *Corrigan v. The District Court for the County of Dublin & Anor* [2023] IEHC 550 whereby it was stated that facts recited in the Statement of Grounds which are verified by affidavit are sufficient to establish the facts relied upon unless they are disputed.

15. As the High Court judge observed at paragraphs 22 and 23 of her judgment:

“22. The facts relied upon in the Statement of Grounds relevant to the time issue are shortly stated and are contained at paragraph 5(xix) where it is stated:

“the issue with the return for trial was only identified in recent weeks. It was initially thought that the matter could be rectified before the trial court, but there is no legal mechanism to do so.”

23. Neither the actual date the issue was discovered nor the circumstances in which the discovery was made at that stage are stated either in the Statement of Grounds or on affidavit. The verifying affidavit goes a little further than the Statement of Grounds in terms of establishing the facts because it also exhibits a letter dated the 3rd of November, 2022, advising the Respondent’s solicitors as follows:

“Having notified your Office last week of the issue in respect of the Return for Trial we are now putting you on notice that we will be instituting judicial review proceedings seeking to quash the Return for Trial and your client will be named as a notice party in those proceedings. Please note that in those circumstances we will be asking the Circuit Court on the 8th inst. To make no further order in respect of Mr. Kravstov. In due course, and further to the

Return for Trial being quashed, it is our intention to re-charge our client with the relevant offences and tried with his co-accused.”

16. The High Court judge was satisfied that once the mistake was discovered, steps were taken relatively quickly to rectify the position by advising the applicant and the Circuit Criminal Court judge of the existence and nature of the jurisdictional difficulty that had been lately adverted to, and by commencing proceedings before the High Court seeking relief by way of judicial review.

17. The High Court judge distinguished the present case from *M. O’S v. The Residential Institutional Redress Board* [2018] IESC 61 (a case relied on by both parties) to the extent that in *M. O’S* a clear explanation for delay was advanced on affidavit in a manner which sought to justify the failure to move the application sooner. There was nothing comparable in the present case. The “*sparse*” affidavit filed on behalf of the applicant in this case verifying the facts relied upon in the Statement of Grounds stood in stark contrast to the affidavit evidence available to the Court in *M. O’S*. The High Court judge accepted that while the circumstances of the instant case might not have allowed for much more extensive explanation beyond the assertion made by the appellant that the jurisdictional difficulty “*was only identified in recent weeks*”, she nonetheless felt that the precise date the issue was discovered could have been specified, as could the circumstances in which it was discovered; and, moreover, that an attempt could have been made to justify the delay by outlining the systems and safeguards in place to prevent mistakes of this kind and explain how they had failed on this occasion, assuming that such systems and safeguards in fact existed.

18. The High Court judge was ultimately prepared to accept, despite the paucity of affidavit evidence, that the reasons being advanced to justify an extension of time were that “*through inadvertence a mistake was made and not detected*”. While that explained what had occurred, it did not explain why it had occurred, i.e., how the ability to discover the true

position in time could be said to have been, in the words of Order 84, Rule 21(3) RSC “*outside the control of*” the appellant, or how the possibility of a mistake being made, and not being adverted to within time, such as occurred, “*could not reasonably have been anticipated by*” the appellant (and addressed by the putting in place of systematic checks and safeguards). The High Court judge was therefore not satisfied that a “*good and sufficient reason*” had been shown for the granting of an extension of time in this case. She noted that the requirement within Order 84, Rule 21(5) RSC to justify the delay on affidavit, goes beyond simply setting out the reasons for the failure. In her belief there is a concurrent burden on an applicant for an extension of time to explain on affidavit why what happened had happened, i.e., in her words “*to explain the lapse*”. She agreed with the sentiments expressed by Simons J. in *DPP v. Tyndall* [2021] IEHC 283 when he observed (para. 54):

“Some weight must also be given to the consequences for judicial review proceedings generally of an unduly lax approach to compliance with procedural requirements. As observed by Clarke J. (then sitting in the High Court) in Moorview Developments v. First Active plc [2008] IEHC 274; [2009] 2 I.R. 788, [14]

Where parties come to expect almost endless indulgence then such parties are likely to act on the not unreasonable assumption that they will be indulged again to the considerable detriment of the proper functioning of the timely administration of justice and with consequent significant potential injustice across a whole range of cases. That consequence is a matter which needs to be given all due weight in any consideration.

Were this court to allow an extension of time to the Director, in the absence of an objective justification for the delay, merely on the basis that the period of default is

- 3rd of November 2022 Circuit Court appraised of a possible difficulty
- 10th of November 2022 JR Pleadings filed
- 14th of November 2022 Application for leave moved

22. The appellant submits that in this case, the public interest to prosecute crime was not given sufficient weight in circumstances where a “*simple*” human error occurred and where the underlying substantive law was not in dispute. The appellant maintains that there is no evidence that the respondent has suffered any anxiety or other harm or detriment by virtue of the error or the subsequent delay. In response, the respondent contends that the appellant’s assertion that the respondent will not suffer prejudice would not be sufficient to meet this test even if it were correct which it is submitted it is not.

23. The appellant states that the effect of the refusal of the extension of time in this case is that human error, even in circumstances where the impugned order appeared good on its face could never comply with the condition’s precedent in Order 84.

24. In reply, the respondent submits that the appellant has failed to adduce in evidence any facts capable of constituting good and sufficient reason as to why the High Court should have extended time. The respondent maintains that if the contents of the Statement of Grounds (admittedly verified on affidavit) can be relied upon as evidence (which the respondent submits they cannot), then the only explanation proffered for the failure is “*It was always the intention of the Applicant that the Respondent and his co-accused would be tried together before Dublin Circuit Criminal Court*”.

25. The respondent contends that the appellant knew where the respondent had been arrested, where he resided and where the alleged offences were allegedly committed, which are all of the facts necessary to determine the correct jurisdiction for the purposes of s. 53 of the Act of 1924. The respondent submits that the High Court judge was correct in not accepting the appellant’s contention that it was a sufficient explanation to point out that the

error was not apparent on the face of the Return for Trial. It was submitted by the respondent that the High Court judge had not accepted this argument as the appellant had all the necessary facts to allow for detection of such an error and ought to have taken greater care to ensure that if an error was made, it would be detected and rectified within the required timeframe.

26. It was submitted that the High Court judge had placed emphasis on the absence of evidence of any system within the office of the Director of Public Prosecutions to identify errors. In reply, the appellant has submitted that this is not something that should have been relied on by the Court. The appellant states that the respondent did not challenge the genuineness nor truthfulness of the explanation that a mistake had been made and that this had only been adverted to in "*recent weeks*". The appellant submits to this Court that there should have been a balancing exercise carried out between the right to prosecute crime and the windfall benefit to the respondent by the refusal of the extension of time.

27. In response to this, the respondent submits that this is overstated by the appellant. It is submitted that even if human error is the reason why the application was not brought in time, this merely describes what happened but does not actually explain why it happened let alone justify an extension of time. In reply, the respondent has contended that by definition the reason why anybody needs to seek an extension of time to bring a Judicial Review, unless they have deliberately decided not to comply with the rules of the Superior Courts, is because of human error.

28. In addition, the respondent has submitted that even if there was a good and sufficient reason to extend time, which he contends there is not, the appellant is required to additionally satisfy the Court that the circumstances that led to the failure to bring the application for leave within time were outside of the applicant's control or that such circumstances could not have reasonably been anticipated by them. The respondent has contended that the appellant

did in fact notice the issue, albeit out of time, and offers no explanation, nor evidence, as to why then and not earlier.

29. The respondent submitted that the appellant could have reasonably anticipated the possibility of such an issue arising, in that production of a valid Return for Trial establishing the jurisdiction of the Court is an essential proof in a prosecution on indictment before the Circuit Court. The jurisdictional validity of any order returning the respondent for trial to the Dublin Circuit Criminal Court ought therefore to have been carefully considered at an early stage.

Analysis & Decision

30. Order 84, Rule 21 RSC and superior courts jurisprudence in which it has been considered, were most recently comprehensively reviewed and analysed by Murray J. in this Court in *Arthroparm (Europe) Ltd v. The Health Products Regulatory Authority* [2022] IECA 109 (at paras 86 and 87, the latter quoted by Phelan J. in her judgment in this case). Murray J. said:

“86. While there is a substantial body of case law addressing the application of the power conferred by the 1986 version of Order 84 Rule 21(1), the judgment of Finlay Geoghegan J. (with whom MacMenamin and O’Malley JJ agreed: O’Donnell and Irvine JJ diss.) in MO’S v. The Residential Institutions Redress Board [2018] IESC 61, [2019] 1 ILRM 149 (‘MO’S’) was the first occasion on which the Supreme Court addressed the new rule. In her judgment Finlay Geoghegan J. iterated the changes introduced in 2011 (at para. 35): (a) the addition of the requirement that the reason given be ‘sufficient’ as well as ‘good’, (b) the specific requirements of Order 84 Rule 21 (3)(b)(i) and (ii), (c), the power of the court to take account of the effect an extension of time may have on the respondent or a third party, and (d) the obligation now imposed upon an applicant where seeking an extension of time to specifically

aver as to the reason for its failure to make the application for leave within the specified period. The new rule had earlier been considered by this court in Heaphy v. Governor of Cork Prison [2018] IECA 125, and was subsequently addressed in in AB v. XY [2019] IECA 326 and Nugent v. PSRA [2021] IECA 250. It was also considered in some detail by Barniville J. in SC SYM Fotovoltaic Energy SRL v. Mayo County Council [2018] IEHC 20.

87. The text of the rule when viewed in the light of those decisions and the law as it developed around the original form of Order 84 Rule 21(1) suggests that the following are now clear:

(i) The period fixed by Order 84 Rule 21(1) is not a limitation period properly so called (Sfar v. Revenue Commissioners [2016] IESC 15 at para. 19 (per McKechnie J.)). The requirement to proceed within that time instead derives from a rule of court which, while having the force of law, is subject to the possibility of an extension if the court is satisfied, in accordance with the relevant law, that time should be extended (MO'S at para. 69 per Finlay Geoghegan J.).

(ii) The effect of the rule is clearly to place an obligation on the party seeking an extension of time to identify on oath the reasons the application was not brought during the period fixed by Order 84 Rule 21(1) and during the time between the expiry of that point and the date on which the application was eventually brought (MO'S at para. 60). It is the obligation of the court when presented with such reasons to assess them 'carefully and critically' (SC

SYM Fotovoltaic Energy SRL v. Mayo County Council (at para. 72(7)). It should undertake this exercise conscious of the purpose underlying the rule in its present form: the present version of Order 84 Rule 21 'is framed in terms which indicate a clear intent to reduce delay and to further limit time periods which previously existed for applications for judicial review' (Heaphy v. Governor of Cork Prison at para. 99 per Whelan J.).

(iii) *Before it can extend time, the court must be satisfied that the reasons so given explain and objectively justify the delay in bringing the application and are sufficient to justify the court in exercising its discretion in favour of the applicant (O'Donnell v. Dun Laoghaire Corporation [1991] ILRM 301, at p. 315 to 316; MO'S at para. 60). In this regard the addition of the word 'sufficient' to the 'good reason' previously required by the rule will not in most cases add to the preexisting test (MO'S at para. 60), although it may be relevant in situations where the explanation given is in theory a good one, but the evidence adduced in support of it is insufficient to sustain it (AB v. XY at para. 44).*

(iv) *In conducting that exercise the court must take account of all relevant circumstances, including the decision that is sought to be challenged, the nature of the claim that it is invalid and 'any relevant facts and circumstances pertaining to the parties' (MO'S at para. 60). In applying the factors so found, the essential function of the court is to engage in a 'balancing exercise' (AB v. XY at para. 46).*

(v) *In this regard, factors of which account may be taken will include the nature of the order or actions the subject of the application, the conduct of the applicant, the conduct of the respondent, the effect of the decision it is sought to challenge, any steps taken by the parties subsequent to that decision, and the public policy that proceedings relating to the domain of public law take place promptly except where good reason is furnished (De Róiste v. Minister for Defence [2001] 1 IR 190, at p. 208 per Denham J.). The ‘blameworthiness’ of the applicant is relevant, albeit as only one such factor to be weighed in the balance (Kelly v. Leitrim County Council [2005] IEHC 11, [2005] 2 IR 404 at para. 19(d)).*

(vi) *It follows that the court may be required to balance the rights of an applicant with those of a respondent or notice party, taking into account also the prejudice to either consequent upon the failure of the applicant to proceed to make its application within the time fixed by the rules. This, in particular, requires the court to take account of the effect of the extension of time upon a third party affected by the decision in question (see AB v. XY at para. 47).*

(vii) *It is ‘probable 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 (3)(b) in relation to the circumstances which resulted in the failure to apply within the three month period’ (MO’S at para. 100).*

(viii) *That said, the rule clearly positions an inquiry as to whether the applicant had within its 'control' the effluxion of time: it is clear from the rule that in addition to being satisfied that good and sufficient reasons exist for an extension of time, the court must be satisfied as a matter of fact that the circumstances which resulted in the delay were outside the control of the applicant (per Baker J. Irish Skydiving Club Ltd. v. Kilkenny County Council at para. 9). Where a delay arises from circumstances which were within the control of the applicant, the court may not extend (id. at para. 10).*

(ix) *The court is also free to take account of the interests underlying the proposed proceedings. Commercial cases – in which the requirements of certainty may be particularly pressing and in which it is reasonable to assume that the parties are well resourced and in a position to readily obtain access to legal advice – may justify a stricter approach than in other types of challenge (MO'S at para. 62; Hogan and Morgan 'Administrative Law' (5th ed. 2019) at para. 18-179)."*

31. It requires to be acknowledged that the objections being raised by the respondent are entirely technical ones, although for all that, important ones, and it might be said in respect of the jurisdictional problem a fundamental one, which he is within his rights to raise and seek to rely upon. He can point to a constitutional entitlement in the case of the jurisdictional problem, and an entitlement under court rules in terms of his time-based objections, being an objection on the one hand that the appellant is out of time, and on the other hand his further objection to any extension of time.

32. Under Article 38 of the Constitution no person, whether citizen or otherwise, may be tried other than in due course of law. Any person who is purportedly tried by a court which

lacks jurisdiction to try him will not have received a trial in due course of law. It is accepted by the appellant that due to an inadvertent mistake the respondent has been returned for trial to a court that does not have jurisdiction to try him. The respondent, who is presumed innocent, did not create the present jurisdictional difficulty, and owes no obligation to the appellant to co-operate in any respect of any proposed efforts by the appellant to regularise the position. Thus, while the respondent might not present as a sympathetic figure in circumstances where the jurisdictional point he relies upon would not afford him a substantive defence were he to be tried by a court enjoying valid jurisdiction to try him, he is entitled to stand on his rights and offer no assistance to the appellant. While if the respondent had in some way contributed to the creation of the problem or had in some inappropriate way sought to obstruct the DPP's efforts to regularise the position, his conduct in those respects could be taken into account, the fact is he has done nothing other than stand on his rights.

33. In so far as the respondent's time-based objections are concerned, he again presents as an unsympathetic figure in some respects in circumstances where his objections are not merit based or based on concrete identifiable prejudice. However, once again he has simply stood on his rights, to the extent that he invokes Order 84, Rule 21 RSC, which, of course, as Murray J. observed in the *Arthroparm (Europe) Ltd* case, has the force of law, subject to the possibility of a court granted extension of time in an appropriate case. Against that background, the appellant's point that there is a substantial public interest in ensuring that those who are charged with serious crimes should be tried in due course of law, would seem to be a strong one in the circumstances of the case, albeit that the delay in the present case was a sizeable one. There is clearly a substantial public interest at stake.

34. However, it is not the only public interest at stake. As was recognised in *Tyndall*, there is also a public interest in insistence on compliance with procedural requirements, and non-indulgence of their breach in the absence of an objective justification for it. I agree with

the High Court's criticisms concerning the economy with which the appellant's explanation for what occurred was presented. There was no direct explanation on affidavit of what occurred. The explanation (i.e., the description of what happened) was to be found in the two sentences at para 5(xix) of the Statement of Grounds stating:

“the issue with the return for trial was only identified in recent weeks. It was initially thought that the matter could be rectified before the trial court, but there is no legal mechanism to do so.”

It is true that the Statement of Grounds was in turn verified on affidavit. However, the affidavit of verification does not fulfil the requirements of Order 84, Rule 21(5) RSC which requires that an application for an extension of time should *“set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons.”* The affidavit evidence such as it was, is silent as to (i) when exactly the error was discovered (*“recent weeks”* being insufficiently precise), (ii) by whom it was discovered, (iii) in what circumstances it was discovered, (iv) in what circumstances had such an error been possible, and (v) what were the precise circumstances in which it had in fact occurred. As blameworthiness (if any) on the applicant's part could potentially be relevant, the court could reasonably have expected, given the duty of candour owed by an applicant for discretionary relief, to be told with some specificity whether the error was attributable to a systems failure, or due to some default or neglect (whether culpable or otherwise) on someone's part, or some other factor. Moreover, the issues as to why the error was not in fact, and moreover could not have been (if that were indeed the case), discovered within three months are not addressed. Nothing specific was put forward to suggest that the circumstances that led to the failure to bring the application for leave within time were outside of the appellant's control or that such circumstances could not have reasonably been anticipated by her.

35. It is a point of some importance that in a real sense the parties do not enjoy equality of arms. The respondent is an individual litigant, whereas the appellant is a State office holder with a substantial staff, a substantial budget and other resources at her disposal, and may be inferred to have had the ability to create and operate systems, and put in place safeguards, to ensure that the persons she seeks to prosecute on behalf of the people of Ireland are only sent forward to courts that validly have jurisdiction to try them. Given the resources available to the appellant, it behoves her all the more to adequately justify her substantial delay and explain why notwithstanding that delay indulgence should nonetheless be shown to her.

36. Also relevant is the fact that, even if time is not extended and the appellant is unable to procure a quashing of the existing Return for Trial, the appellant may not automatically be precluded from entering a *nolle prosequi* in the existing proceedings and then seeking to further prosecute the respondent before either the same court or another court in circumstances where it would validly have jurisdiction to try him. The High Court judge acknowledged having a concern that refusal of relief could have some consequences for the further prosecution of the respondent but assessed this as being more possible than probable. I agree with that assessment and characterisation.

37. In conclusion, I agree with the High Court judge that there has not been adequate or sufficient engagement by the appellant with the dual requirements (i) to provide good and sufficient reasons why the Court should now extend time, and (ii) to justify, supported by evidence, the failure to initiate judicial review proceedings in time either on the basis that the circumstances that resulted in such failure were outside the control of the appellant or could not reasonably have been anticipated by her. I find no error of principle in the High Court judge's approach.

38. Accordingly, I consider that the appeal should be dismissed.

McCarthy J: I concur in the judgment just delivered.

Burns J: I also concur.