

**THE HIGH COURT
JUDICIAL REVIEW**

**[2024] IEHC 200
RECORD NO. 2023/468 JR**

BETWEEN:

ANNE McDONAGH

APPLICANT

AND

GARDA SÍOCHÁNA OMBUDSMAN COMMISSION

RESPONDENT

RULING of Ms. Justice Siobhán Phelan, delivered on the 11th of April, 2024

INTRODUCTION

1. The Applicant is a lay litigant appearing in these proceedings without the benefit of legal representation. She seeks to quash a decision of the Respondent communicated by letter dated the 28th of February, 2023 which letter reiterated (in similar but not identical terms to correspondence dated the 8th of March, 2022 and 29th of September, 2022) that no further action would be taken in relation to a complaint made by the Applicant of alleged misconduct of members of An Garda Síochána with regard to the handling of an assault allegedly perpetrated by a third party in 2009.

2. The Applicant's complaint had previously been found inadmissible as not having been made within twelve months of the events giving rise to the complaint in accordance with s. 84(1) of the Garda Síochána Act, 2005 (as amended) (hereinafter "the 2005 Act"), there being

no “*good reasons*” to extend time pursuant to s. 84(2) of the 2005 Act. This inadmissibility decision was communicated by letter dated the 26th of July, 2021.

3. The matter came before me on the 9th of April, 2024 as an application for leave to proceed by way of judicial review on notice to the Respondent.

BACKGROUND

4. The Applicant is the single mother of two children. She claims to have been assaulted by an employee of a local hotel (hereinafter “the third party”) in a rural town in Galway in December, 2008, sustaining what is claimed to be traumatic injury in the assault resulting in significant difficulties for the Applicant. It is claimed the assault was captured on CCTV.

5. On complaint by the Applicant to the Gardaí and the referral of a file to the DPP, directions were given that the matter be dealt with by offering both parties the benefit of an Adult Caution for an offence contrary to s. 6 of the Criminal Justice (Public Order) Act, 1994. This decision was communicated by letter dated the 11th of March, 2009 from An Garda Síochána to the Applicant’s then solicitor. It was stated that should either party refuse/decline the Adult Caution which “*does not amount to a criminal conviction*” the matter “*will then proceed and be prosecuted in the District Court*”.

6. The Applicant did not accept the proposed Adult Caution but the third party did. No prosecution ever ensued and the Adult Caution administered to the third party was withdrawn sometime in 2009.

7. The Applicant engaged in correspondence in 2011 and again in 2020-2021 with the DPP seeking a review and/or an explanation in respect of decision making on the file, to little avail. The DPP has refused to give reasons for its decision to direct the administration of an Adult Caution or the subsequent non-prosecution of either party.

8. Some twelve years after the events in question, on the 29th of April, 2021, the Applicant made a complaint to the Respondent about the behaviour of An Garda Síochána arising from events in 2009 in relation to the investigation and prosecution of the alleged assault. At the heart of the complaint to the Respondent was the failure to prosecute the third party in circumstances where the DPP had directed that the Adult Caution be administered to both parties and An Garda Síochána had stated that a prosecution would proceed in the District Court if the Adult Caution was not accepted.

9. In her complaint, the Applicant contended, *inter alia*, that members of An Garda Síochána made her feel like she deserved to be assaulted. She further said:

“there needs to be an investigation as to how my case was handled by the DPP”.

She also pointed out that she was never asked for medical reports on her injuries.

10. Addressing her failure to refer a complaint to the Respondent within twelve months of the events in question, she said it was not easy to make a complaint about members of the Gardaí living in a small town. She suggested that the fact that the then superintendent and sergeant made her feel like she deserved to be assaulted were no longer in the town was a factor in the timing of her complaint. She did not at that point suggest that she had previously made a complaint.

11. Receipt of the Complaint was acknowledged by the Respondent by letter dated the 30th of April, 2021. Following some correspondence (notably a letter dated the 4th of May, 2021) in which further information was sought and in which the requirement to demonstrate “*good reasons*” for an extension of time within which to bring the complaint was identified, the Applicant provided additional information by email dated the 21st of May, 2021 in relation to her correspondence with the Office of the DPP during the course of 2011 and 2020-2021. She reiterated that which had, in essence, already been stated in her complaint in relation to the reasons for delay in making a complaint, namely that it was daunting and she felt nervous about making a complaint whilst living in a small town, a single mother with two young children. She said it was not easy to report members of An Garda Síochána and she was deeply traumatised and trying to cope. She stated her belief that the superintendent in question was no longer in the town. By email dated the 21st of May, 2021, receipt of this correspondence was acknowledged.

12. Following a conversation with the agent of the Respondent dealing with the complaint on or about the 16th of June, 2021, the Applicant submitted further correspondence by email dated the 22nd of June, 2021 in which she sought to expand on the manner in which she believed the Adult Caution Scheme had been misused in her case. Receipt of this email was acknowledged by email of the same date.

13. Having considered the documentation submitted by the Applicant, the Respondent determined that the complaint was inadmissible as having been made outside the prescribed twelve-month period there being no “*good reasons*” to extend time on the 23rd of July, 2021.

This decision was communicated by letter dated the 26th of July, 2021 in which the Applicant was informed of the Respondent's decision to treat her complaint as inadmissible as not made within the statutory twelve-month period prescribed under s. 84(1) of the 2005 Act, no good reasons being shown for extending time. The Applicant was further advised that:

“in accordance with s. 88(1)(c) of the Act, GSOC will take no further action in relation to this complaint. The Garda Commissioner will be notified of this decision. Inadmissible complaints are not reviewed by the Ombudsman Commission unless new information, which was not previously available, comes to light and is submitted in writing.”

14. In the Memorandum of Decision exhibited on behalf of the Respondent in response to these proceedings it is further recited as part of the Respondent's reasoning that the direction not to prosecute and to withdraw the Adult Cautions had come from the DPP. It was noted that *“GSOC has no remit over the office of the DPP”*. In its terms, the Memorandum of Decision suggests that there had been no response from the Applicant in respect of the delay issue which had been notified to her, notwithstanding that the Applicant had in fact corresponded in this regard. Having considered *“all the aspects and information of this case and note possible discourtesy by one garda member”*, the Memorandum of Decision records that *“the matter is out of time”* and inadmissible for this reason.

15. Although the Applicant has continued to engage with the Respondent (most notably by letters dated the 12th of November, 2021 and the 21st of February, 2022) the Respondent's position has been that the information relied upon as *“new”* information does not warrant an extension of time. In this correspondence the Applicant asserted for the first time that she had made a complaint within six months at the local Garda Station, contending that An Garda Síochána had failed to lodge the complaint with the Respondent. She acknowledges, however, that in making her complaint no mention at all of the Respondent was made. It appears from this that while the Applicant complains that An Garda Síochána did not mention a complaint to the Respondent to her, it is nonetheless clear that she did not herself initiate a complaint which she intended for transmission to the Respondent. The Applicant also reiterates the impact of the alleged assault and the effect of the Garda handling of the complaint on her to excuse her failure to pursue a complaint with the Respondent before the 29th of April, 2021.

16. The Respondent responded by letter dated the 8th of March, 2022 explaining in some detail its process. It was stated:

“With regards to your complaint, GSOC does not consider the response provided by you as a good reason to extend the time limit under s. 84(2) of the Act for making a complaint.”

It was stated that the decision on admissibility remained unchanged pointing out that the Applicant had corresponded with the DPP in 2011 and 2020. The Applicant was advised with regard to matters involving the DPP, that the Respondent has no power to investigate the Office of the DPP. The letter concluded stating:

“I understand that you will be unhappy with the decision to determine your complaint as inadmissible but I wish to assure you that the decision was made after careful consideration. As GSOC has brought these matters as far as it can, no further action will be taken by this office in relation to this complaint.”

The Applicant was further expressly advised:

“There is no appeal mechanism available within the Garda Síochána Act 2005 and complaints are not reviewed by the Ombudsman Commission unless new information, which was not previously available, comes to light and is submitted in writing by the complainant.”

17. The Applicant again corresponded by email dated the 16th of March, 2022 querying whether the level of medical trauma and psychological impact she had outlined was not a good reason and whether it was suggested that she had lied in relation to the fact that a complaint had been made at her local garda station in relation to the Garda handling of the matter during 2009.

18. While replying in these terms and requesting a response, the Applicant did not then proceed by way of judicial review to challenge the unchanged position of the Respondent in the face of the additional submissions she had made, despite the fact that no substantive response issued until the 29th of September, 2022, some six months later. The Applicant sent more than ten emails between March, 2022 and September, 2022 by way of follow up and continued to press to have her complaint investigated and the inadmissibility decision revisited on the basis that “good reasons” for an extension of time existed, despite the length of time which has passed since the underlying events.

19. In its letter of the 29th of September, 2022, the Respondent advised:

“...the decision on the admissibility of your complaint remains unchanged as your complaint is out of time, not having been made within a period of 12 months beginning on the date of the conduct giving rise to your complaint.....GSOC must have an exceptionally good reason to admit a complaint about conduct which took place in the period you have complained of. The information you have provided in your email dated 16th of March, 2022, would not be considered as “new information” for the purpose of an admissibility decision. GSOC does not consider that you have provided sufficient good reason to extend the 12-month time limit for making a complaint to GSOC.....As GSOC has brought these matters as far as it can, no further action will be taken by this office in relation to this complaint. Any further correspondence may not receive a response.”

20. Despite the definitive terms of this response from the Respondent and notwithstanding the passage of time since the admissibility decision was initially communicated in July, 2021, the Applicant did not even then proceed by way of judicial review to challenge the unchanged position of the Respondent. Instead, following a further delay (almost three months after the last correspondence from the Respondent), she wrote by email dated the 20th of December, 2022, purporting to provide *“new information which was not previously available to GSOC”* regarding her complaint.

21. In the email dated the 20th of December, 2022, the Applicant asserted that she only became aware of *“the nature of the Gardai’s misuse of the Adult Caution Scheme in June, 2021”*. From her submissions before me, I understand the Applicant’s position to be that while she was aware of what happened with regard to the Adult Caution in her case in 2009, she conducted further research in relation to the Adult Caution Scheme in June, 2021 and from this research identified what she claims to be a departure from the terms of the Scheme in her case. Of note, it is not contended by the Applicant that the information she accessed in June, 2021 was not previously available, rather that she had not researched the position. It was further pointed out by the Applicant in her email of the 20th of December, 2023 that the Respondent had not addressed the claim she had made that she first made complaint in respect of Garda handling of matters in her local garda station during the course of 2009. The Applicant contended in this letter that she had ample grounds to proceed by way of judicial review but, this notwithstanding, she did not proceed by way of judicial review at that time.

22. Even though the Respondent had stated that further correspondence might not receive a response, another letter issued from the Respondent dated the 28th of February, 2023. This letter does not refer the Applicant's claim to have made a complaint within time at her local Garda Station. Instead, it reiterates in short order:

"I wrote to you on 29 September 2022, informing you that no further action would be taken in relation to your complaint, and that any further correspondence may not receive a response. These matters you complain of occurred in 2009. Having again reviewed your emails, GSOC does not consider the content of your emails regarding the administration of the adult caution scheme further information which would make the original decision incorrect. GSOC cannot continue to [sic] correspond with you over this complaint, and will take no further action."

23. The correspondence rests with this letter in circumstances where the Applicant now seeks to challenge as a fresh decision the position communicated in this letter in the within application by way of judicial review.

PROCEEDINGS

24. In proceedings commenced by way of judicial review in May, 2023 and grounded on an initial affidavit sworn on the 5th of May, 2023, the Applicant challenges the Respondent's decision that she did not have good reason to extend time on grounds of unreasonableness. She complains that her right to have her complaint investigated has been breached by the treatment of her complaint by the Respondent and that the refusal to admit the complaint for investigation is unlawful.

25. While seemingly opened for the purposes of time in May, 2023, it appears that the leave application was only eventually moved before Hyland J. on the 9th of October, 2023, whereupon she directed that the Respondent be placed on notice of the application. The Order drawn on the 9th of October, 2023, refers to a motion *ex parte* on the 22nd of May, 2023 "*adjourned to this day for leave to apply by way of an application for judicial review.*"

26. In a replying affidavit filed to oppose leave being granted, the Respondent refers to the fact that proceedings were not commenced within three months of the decision sought to be challenged and are out of time. In adopting this position, the Respondent treats the decision to refuse to admit the complaint as having been made on the 23rd of July, 2021 and the Applicant's challenge to a confirmation of this earlier decision on the 28th of February, 2023 as a collateral

attack on the earlier decision which was by then immune from challenge in judicial review proceedings on time grounds.

27. It is further contended that the decision to treat the complaint as inadmissible because the complaint was not referred within twelve months and good reasons for an extension of time had not been established to its satisfaction is one the Respondent was entitled to make. It is pointed out that the Applicant was aware of all material elements of her complaint long before she made complaint and indeed engaged with the office of the DPP in relation to the failure to prosecute as long ago as 2011.

28. As for the claim that a complaint had been made in a timely manner at the local Garda Station which ought to have been referred to the Respondent, the Respondent maintains that no record of this complaint has been provided and no complaint was referred to it. In circumstances where the Applicant herself accepts that GSOC was never mentioned either by her or to her when she purportedly made complaint about the handling of the matter at her local Garda Station in 2009, the Respondent contends that a complaint within the meaning of s. 85 of the 2005 Act was not made.

29. Following receipt of the Affidavit filed on behalf of the Respondent, the Applicant submitted a further lengthy Affidavit in which she castigated the Affidavit filed as containing false and misleading statements. This is a position she maintained during the hearing before me in polemical, strident and emotive terms. In view of her status as a lay litigant and noting that she characterises the correspondence which passed between the parties differently to the Respondent, I do not propose to address the Applicant's assertions in this regard any further save to assure her that as the correspondence between the parties referred to on Affidavit on behalf of the Respondent has been exhibited in these proceedings, I am quite satisfied that I have not in fact been misled by the Respondent in relation to any matter material to my decision on this application notwithstanding that each side contends for a different interpretation of this correspondence.

APPLICABLE TEST

30. The relevant rule to be applied on an application for leave (save for special statutory exceptions) to proceed by way of judicial review is that set out in O.84, r.20 of the Rules of the Superior Courts, 1986. The application of the test was considered by the Supreme Court in its decision in *G v. Director of Public Prosecutions* [1994] 1 I.R. 374. Unlike here, the Supreme Court in *G v. DPP* was dealing with an unopposed application where leave had been refused

in the High Court. Finlay C.J., with whom the other two judges agreed, set down the test in the following terms at pp. 377 to 378:

“An applicant must satisfy the court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:- (a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20(4). (b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review. (c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks. (d) That the application has been made promptly and... within the ... [relevant] time limits... (e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure.”

31. In *Gordon v. Director of Public Prosecutions* [2002] 2 I.R. 369 this test was described as a “*low threshold*”, per Fennelly J. at p. 372. The test does not change by virtue of the fact that the application is directed to be made on notice to the Respondent. As recently reiterated by the Supreme Court (O’Donnell C.J.) in *O’Doherty v. Minister for Health & Ors.* [2022] 1 ILRM 421 (at para. 40):

“It is also well established, and now provided for by the terms of O. 84, r. 24(1), that a court may direct that an application for leave to seek judicial review be heard on notice to the respondent. This permits a respondent to put evidence before the Court and to advance argument. However, it must also be taken as established that this procedure does not alter the threshold test, and which remains that set out in G. v. DPP. (See the observations of Denham J. in D.C. v. DPP [2005] IESC 77, [2005] 4 I.R. 281). The question remains, therefore, whether an arguable case has been established. But moreover, and importantly, that decision must now be made in the light of the evidence submitted by a respondent, and the arguments adduced.”

32. The aim of the leave application is to effect a screening process of litigation against public authorities and officers so as to prevent an abuse of the process or trivial or un-stateable cases proceeding, thus impeding public authorities unnecessarily. It is now well settled law that for a *prima facie* case to be established, it must be arguable. A point of law is only arguable if

it could, by the standards of a rational preliminary analysis, ultimately have a prospect of success (see *O.O. v. Minister for Justice* [2015] IESC 26) and this is the threshold which an applicant for leave must meet. To borrow from the language of O'Donnell C.J. in *O'Doherty v. Minister for Health & Ors.* (para. 39) the threshold is a familiar one in the law. In essence, it is the same test which arises when proceedings are sought to be struck out on the grounds that they are bound to fail, or the test that is normally required in order to seek an interlocutory injunction.

33. For an applicant to commence judicial review proceedings with the leave of the Court he or she must demonstrate that an argument can be made which indicates that the argument is not empty. It must be a case that has a prospect of success, no more than that. In terms of evidence, the requirement for to establish a *prima facie* case is regarded as that which “*if not balanced or outweighed by other evidence, will suffice to establish a particular contention*”; *Halsbury's Laws of England* (5th ed.) volume 11, paragraph 767, as quoted by Charleton J. in *O.O. v Minister for Justice* [2015] IESC 26.

34. While the screening function performed by the Court on a leave application imposes a light burden on the Applicant because the threshold of arguability is a low one, it is not a “*non-existent threshold*” (per Birmingham P. in Court of Appeal in *O'Doherty v. Minister for Health and Ors.* at para. 5) and the Court's function on a leave application is an important one. In deciding on a leave application, I must balance rights of access to the Court with broader administration of justice considerations including improper intrusion on the scarce resource of Court time to the overall detriment of the justice system and costs incurred in defending unmeritorious actions which I am satisfied are bound to fail.

STATUTORY FRAMEWORK

35. It is appropriate that the questions which I must determine on this leave application be placed in its proper context. During the course of legal argument, I was referred to several provisions of the 2005 Act, specifically ss. 83, 84, 85, 87 and 88. As these statutory provisions frame my consideration of whether the test for leave established in *G v. DPP* [1994] 1 I.R. 374 and applied since then are met, I will refer to them in summary terms but without reproducing them here.

36. Under s. 83 a complaint may be made for the purpose of Part 4 of the 2005 Act either by a member of the public making the complaint directly to the Respondent or by stating, giving or sending it to (a) to the Garda Commissioner or (b) to any member of the Garda

Síochána at a Garda Síochána station, or (c) to a member at or above the rank of chief superintendent at a place other than a Garda Síochána station, for forwarding under s. 85 to the Respondent.

37. Section 84 prescribes a time limit for making a complaint by a member of the public of 12 months and further provides that this may be extended where the Respondent is of the opinion that there are good reasons for doing so.

38. Section 85 prescribes the procedure which applies where complaint is made in a garda station.

39. Section 87 provides for an admissibility decision which includes consideration under s. 87(2)(c) of whether the complaint is made within the time limits prescribed under s. 84.

40. Section 88 provides that on determining under s. 87 that a complaint is inadmissible, the Respondent shall— (a) notify, in writing, the complainant, the member of the Garda Síochána whose conduct is the subject of the complaint and the Garda Commissioner of its determination, (b) include in the notification the reason for the determination, and (c) take no further action in relation to the complaint.

DISCUSSION AND DECISION

41. I must now determine whether the Applicant meets the requirements for leave identified in *G v. DPP* [1994] 1 I.R. 374 in the particular statutory context in which the impugned decision was made.

42. While I am readily satisfied that the Applicant has a sufficient interest in the matter for which leave is sought (at (a) of the test), a clear preliminary issue arises in relation to (d) regarding the failure to comply with time limits prescribed under the Rules of the Superior Courts which is potentially determinative.

43. As my decision on the time question may obviate the necessity to consider whether (b) and (c) are met, namely, whether the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review and on these facts an arguable case in law can be made that the applicant is entitled to the relief which she seeks, I propose to consider the time issue first before embarking, to the extent necessary, on a consideration of whether the low threshold of arguability has been reached in respect of the grounds identified and supported in evidence.

44. Although the decision challenged was communicated on the 23rd of July, 2021 and confirmed by further correspondence dated the 8th of March, 2022, the 29th of September, 2022 and again on the 28th of February, 2023, the application to proceed by way of judicial review was only opened before the Court in May, 2023. It is plain that the Applicant did not move by to seek leave for judicial review within three months of the inadmissibility decision made in July, 2021, nor within three months of correspondence from the Respondent confirming that the decision remained unchanged by additional submissions communicated in March, 2022 nor even within three months of correspondence in September, 2022 asserting that any further correspondence might not receive a response. She has, however, moved within three months of correspondence confirming in February, 2023 that the Respondent could not continue to correspond with her over her complaint and would take no further action. An issue arises as to whether correspondence in these terms in February, 2023 operates as a fresh decision for time purposes.

45. In this regard it seems to me that the Respondent is undoubtedly correct in its contention that by operation of s. 88(1)(c) of the 2005 Act, as interpreted by the Supreme Court in *Keegan v. GSOC* [2015] IESC 68, it was precluded from taking any further action on the April, 2021 complaint having determined that it was inadmissible. The most it could conceivably do by way of investigation of the s. 83 complaint, subject to third party rights in such a process (a question I am not required to offer any view on), was to entertain a fresh complaint from the Applicant advanced on the basis of further evidence and to consider in the context of the fresh complaint and all the circumstances of the case including the new evidence whether good reasons existed to grant an extension of time in respect of that fresh complaint.

46. The Respondent is a creature of statute and has not been vested with a review power. No appeal process is provided for under the statutory code. Had the Respondent clearly communicated to the Applicant that her April, 2021 complaint was finally determined either by the terms of its correspondence in July, 2021 then it seems to me that it would be unarguable on the facts and circumstances of this case but that these proceedings would be impermissible on time grounds. However, this is not what happened. Instead, the terms of the Respondent's correspondence suggested that the decision might be reviewed in the light of new evidence.

47. The language of the Respondent's correspondence is unfortunate because it created an ambiguity in relation to the Respondent's powers and processes in circumstances where the Respondent properly accepts in its response to this application for leave, as established by the

decision of the Supreme Court in *Keegan*, that it in fact had no competence to review its earlier determination of the April, 2021 complaint as inadmissible.

48. In view of the ambiguity created by the language used in the Respondent's correspondence it seems to me that some grounds exist upon which it might be argued that the Applicant should be entitled to an extension of time to challenge the decision to treat her April, 2021 complaint as inadmissible, notwithstanding the lapse in time between the making of this decision in July, 2021 and correspondence in September, 2022 when the Respondent confirmed in clear terms that it would take no further steps and any further correspondence might not be responded to. It is noteworthy that in response to this letter the Applicant asserted that she had ample grounds to proceed by way of judicial review but she did not do so.

49. Given that nothing that might plausibly be characterised as new was presented by the Applicant after the September, 2022 letter, it is very difficult to see on what basis the Applicant could contend for an extension of time in relation to delay in proceeding by way of judicial review from September, 2022. The happenstance of a further letter from the Respondent in February, 2023 is not capable in my view of excusing this further delay and any ambiguity created by the terms of the earlier correspondence suggesting a review power was addressed. It seems to me that the Applicant has no prospect of persuading a Court that she should be entitled to an extension of the three-month time limit in order to reconstitute her proceedings to challenge the decision in July, 2021 in proceedings which were not commenced until May, 2023 in all the circumstances of this case most particularly when the underlying events date to 2009. In arriving at this conclusion it is recalled that she must demonstrate not only good and sufficient reason for extending time but also that the circumstances that resulted in the failure to make the application for leave promptly and within three months were either outside the control of, or could not reasonably have been anticipated by her.

50. Although the Applicant brings this challenge by way of judicial review as a challenge to a purported decision in February, 2023 rather than July, 2021 (which is the decision which is really in issue), I am concerned that it may be unsafe to refuse the Applicant leave to proceed by way of judicial review on this application on time grounds only where arguable grounds for seeking an extension of time to challenge the July, 2021 decision are demonstrated at least in respect of some (but in my view not all) of the delay and where the proceedings are capable of being reconstituted through appropriate amendment to ensure that the real issues in the case are properly pleaded.

51. In case I am wrong in my conclusion that the Applicant could not successfully secure an order extending time in accordance with established principles guiding the exercise of a discretion under O.84, r.21(3) of the Rules of the Superior Courts, 1986, I propose to also now consider whether the Applicant meets the test at (c) and (d) of *G v. DPP*, namely, whether the facts averred on affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review and on these facts an arguable case in law can be made that the applicant is entitled to the relief which she seeks in respect of the decision made that her complaint is inadmissible on time grounds.

52. It is common case that the complaint made by the Applicant in April, 2021 was not made within the period of twelve months beginning on the date of the conduct giving rise to the complaint as specified in s. 84(1) of the 2005 Act. Accordingly, the net issue for me is whether it is arguable that the Respondent's opinion that "*good reasons*" within the meaning of s. 84(2) of the 2005 Act had not been demonstrated to warrant an extension of time is unsustainable in law on any ground identifiable in the Applicant's papers and supported by the evidence.

53. Although the power to extend time under s. 84(2) of the 2005 Act is a discretionary power to be exercised where the Respondent considers that there are "*good reasons*" for doing so which is framed in s. 84(2) of the 2005 Act in a manner which gives "*wide latitude*" to the Respondent (see *Moran v. Garda Síochána Ombudsman Commission* [2011] IEHC 237 (para. 6.4)), it is nonetheless a power which falls to be exercised in accordance with established principles. It is not immune from challenge by way of judicial review.

54. The scope for judicially reviewing a decision that an investigation should be precluded because good reasons for an extension of time have not been demonstrated was identified by Hedigan J. in *Moran*. The scope is limited to where there has been a breach of the requirements of fair procedures in the process culminating in the formation of the impugned opinion or it has been demonstrated that the opinion that no good reasons existed has not been reached *bona fide*, is not factually sustainable or is unreasonable.

55. Accordingly, at leave stage, the Applicant in these proceedings is required to show that it is arguable that the reasons she identified to the Respondent in support of an extension of time or consideration of same by the Respondent were such that the Respondent did not fairly or rationally or *bona fide* conclude that she had failed to explain the delay and had not provided a justifiable excuse for the delay.

56. Having regard to the principles established in the case-law referred to in argument before me including *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301, *Moran v. Garda Síochána Ombudsman Commission* [2011] IEHC 237, *Shell E & P Ireland Limited v. McGrath* [2013] 1 I.R. 247, the test of whether there are good reasons for extending time is an objective one. For the case to be arguable on grounds prayed in aid by the Applicant, it is necessary for the Applicant to demonstrate that she advanced objectively good reasons capable of explaining and justifying delay such that the Respondent's decision might be treated as unsustainable in law on the basis that it was not properly open to the Respondent to conclude that the reasons advanced were not good reasons.

57. I am entirely satisfied that it was open to the Respondent applying an objective standard to conclude the Applicant had not advanced any such "*good reasons*". To the extent that she addressed her delay in making her complaint before it was determined to be inadmissible in July, 2021 at all, the Applicant relied on the traumatic impact of the alleged assault on her with ensuing health difficulties and the difficulties in pursuing a complaint against the gardai in a small rural town. The Respondent maintains in argument that the basis advanced by her could not objectively be contended to constitute good reasons for a twelve-year delay given all the circumstances of the case which include her admitted engagement throughout 2011 with the Office of the DPP in protracted correspondence. Indeed, by way of aside, although not in evidence and not referred to by in the decision-making process before the Respondent, the Applicant acknowledged in response to a question from me during the hearing that she had also pursued civil litigation against the third party in the intervening period.

58. Most importantly given the Court's role in judicial review proceedings which is not to substitute its view for that of the decision maker, I am satisfied that the reasons advanced were not of such weight or substance that the Respondent could not reasonably have concluded that a basis for an extension of time had not been demonstrated. Any concern I might have from the erroneous reference in the Memorandum of Decision in July, 2021 to the failure of the Applicant to respond to correspondence in respect of the need to show good reasons is fully addressed by the fact that such response as was provided amounted to nothing of substance beyond the little reason already advanced in the terms of the complaint itself as communicated in April 29th, 2021.

59. Furthermore, albeit not a factor in the inadmissibility decision made in July, 2021 because the Applicant did not refer to any previous complaint before the decision was made, it

seems to me that even had this information been provided to the Respondent before it determined the complaint to be inadmissible and even if the Respondent had the power of review which the Applicant relies upon in bringing these proceedings as a challenge to a purported decision in February, 2023, it could not objectively have provided a basis for extending time as the Applicant does not contend that she made a complaint for the purpose of transmission to the Respondent. Presuming for argument purposes that she had and her contentions in this regard were accepted as plausible, her failure to do anything about such a complaint over a twelve-year period would surely disentitle her from placing any reliance on such a complaint for the purpose of seeking an extension of time in respect of a fresh complaint made directly to the Respondent at such a significant remove.

60. Similarly, the claims advanced after the inadmissibility decision was communicated (and therefore not a factor considered by the Respondent in arriving at that decision) to the effect that the Applicant developed a new appreciation of the nature of the Garda misconduct occasioned by the treatment of the Adult Caution in her case on researching the Adult Caution Scheme in June, 2021 does not withstand scrutiny as a real basis for contending for an extension of time, even if it had been presented in support of her application at any time before the inadmissibility decision made in July, 2021. As the Respondent has pointed out, the Applicant has been aware for many years before making complaint in April, 2021 of the facts relating to administration of the Adult Caution in her case. This case is entirely distinguishable on its facts from *McEvoy v. GSOC* [2016] IEHC 269 where a cover up was alleged and new information previously unknown to the Complainant became available *via* a Garda whistleblower.

61. No arguable grounds have been identified by the Applicant for contending that the decision to find her complaint inadmissible on time grounds was unfairly or otherwise than *bona fide* made, factually sustainable and reasonable.

CONCLUSION

62. I am satisfied that the Applicant falls foul of the requirement to move promptly and within three months as prescribed under O.84, r.21 of the Rules of the Superior Courts. Whilst the Applicant has sought an extension of time "*if necessary*", in her Notice of Motion, such explanation for her delay in proceeding by way of judicial review as may be deduced from the papers which might arguably explain and excuse some of the delay could never excuse the full period of delay between July, 2021 and May, 2023 when the application was opened before the

Court having regard to the requirements of O.84, r.21(3) of the Rules of the Superior Courts, 1986.

63. Even if I am wrong in my view that the Applicant is out of time to proceed by way of judicial review and has no arguable entitlement to an extension of time in respect of the full period of her delay, I am satisfied that the Applicant does not demonstrate an arguable basis for contending that the decision that her complaint was inadmissible on time grounds should be amenable to relief by way of judicial review.

64. Accordingly, I refuse leave to proceed by way of judicial review in this case and dismiss the application.