THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 155
[Record No. 2020/384 JR.]

BETWEEN

KATY O'CONNOR

APPLICANT

AND
CHIEF APPEALS OFFICER
AND
MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION

RESPONDENTS

JUDGMENT of Mr. Justice Mark Heslin delivered on the 5th day of March, 2021

Introduction

1. On 27th August, 2019, the Applicant made an application for Domiciliary Care Allowance (hereinafter "DCA") in relation to her son. The said application was referred to a Medical Assessor who issued an opinion of 4th September, 2019 which noted that the Applicant's son: "…*currently requires supports at present however owing the fact that his assessments are not yet fully completed, the overall need for continual care and attention, based on the reports submitted is not substantially in excess of a similar aged child so as to fulfil the criteria for DCA at this time. Further specialist reports should be forwarded for consideration when available.*" A Deciding Officer considered the application and, by letter dated 7th November, 2019, confirmed to the Applicant that the qualifying conditions for the payment were not met at this time. The said 7th November, 2019 letter drew the Applicant's particular attention to the statutory time limit for submitting an appeal, being 21 days from the date of the decision. No appeal was lodged against the decision within the 21-day period which is specified in the Social Welfare Consolidation Act, 2005, as amended (hereinafter "the 2005 Act").

2. On 7th January, 2020, the Applicant sent an email to the First Named Respondent which stated that she wished to appeal the decision in relation to the DCA. No grounds were advanced in support of the appeal requested. By letter dated 17th January, 2020, sent to the Applicant by the Social Welfare Appeals Office, the Applicant was referred to the prescribed 21-day timeframe for the submission of an appeal in respect of a Deciding Officer's decision (found in Article 9(2) of the Social Welfare (Appeals) Regulations, 1998 (SI 108/1998)). The letter went on to make clear that legislation does make provision for the acceptance of an appeal outside this timeframe at the discretion of the Chief Appeals Officer "…*who will consider the circumstances of the case including the length of time since the decision was made*". The letter also stated, *inter alia, "I am sorry to advise that given the significant passage of time since the decision was made, it is not proposed to accept a late appeal of the Deciding Officer's decision from you in this case".*

3. On 17th January, 2020, the Applicant's solicitors made a request pursuant to the Freedom of Information Act, 1997, which was directed to the Department of Social Protection. The said request enclosed an "Authority" in which the Applicant consented to the release of her DCA files to Messrs KOD Lyons, Solicitors, in respect of her son, being a form signed by the Applicant on 7th January, 2020. By letter dated 22nd January, 2020, the Second

Named Respondent's department acknowledged receipt of the Freedom of Information Act request. On 18th February, 2020, the Freedom of Information Act request was granted and copies of the relevant records were furnished to the Applicant's solicitors.

4. In a letter dated 31st March, 2020, the Applicant's solicitors made a request to permit the lodgement of a late appeal in respect of the Deciding Officer's 7th November, 2019 decision. The response dated 8th April 2020, sent by the Social Welfare Appeals Office to the Applicant's solicitors, stated, *inter alia*, that "*in determining whether a late appeal will be accepted, the Chief Appeals Officer will have regard to the facts of the case including the length of the delay involved and will consider whether it has been established that there was good cause for the delay in submitting the appeal*". The letter noted that the Deciding Officer's decision was made on 7th November, 2019 and that the Applicant was advised that she could submit an appeal within 21 days and stated, *inter alia*, that *"given the significant passage of time since the decision was made, I am sorry to advise Ms. O'Connor that there are no grounds to accept a late appeal at this time".* The present proceedings constitute a challenge to the First Named Respondent's 8th April, 2020 decision (hereinafter "the Decision").

The Relief Sought by the Applicant

5. By order made by the High Court on 22nd June, 2020 (Meenan J.), the Applicant was granted leave to apply for judicial review in respect of the following relief:-

"1. An order of certiorari, quashing the decision of the First Named Respondent of 8th April, 2020, wherein the First Named Respondent unlawfully refused to extend time for an appeal.

2. A declaration that the First Named Respondent, in the decision of 8th April, 2020, failed to exercise her discretion at all, and/or fairly or reasonably, and/or in compliance with statute or regulation, and/or exercised it in breach of fair procedures and natural and constitutional justice, and/or fettered her own discretion and/or failed to have regard to relevant factors and/or, if taken into account, failed to give due weight to said factors and/or applied the wrong test/threshold.

3. An order of certiorari, quashing the decision of the Second Named Respondent of 7th November, 2019 wherein the Second Named Respondent disallowed the Applicant's claim for Domiciliary Care Allowance.

4. A declaration that the Second Named Respondent erred in law and/or breached the Applicant's right to fair procedures and natural and constitutional justice, in the decision of 7th November, 2019, in the premises that the Respondent failed to give any or adequate reasons and/or failed to have regard to matters which ought to have been considered.

5. *A declaration that the Second Named Respondent's decision of 7th November, 2019, is irrational/unreasonable, in the premises that inter alia all of the available evidence established that the criteria for Domiciliary Care Allowance was met.*

6. If necessary, an order pursuant to Order 84, rule 27(4) of the Rules of the Superior Courts, remitting the matter to the Respondent with a direction to reconsider it and reach a decision in accordance with the findings of This Honourable Court.

7. *If necessary, an order extending time to bring the within proceedings.*

8. Further or other order.

9. Liberty to apply.

10. Costs." *(emphasis added)*

6. At the outset of the hearing, this Court was informed that the Applicant no longer seeks the relief set out in paras. 3, 4, 5 and 7. It is for this reason that I have highlighted, in bold, the relief which the Applicant continues to pursue in the present case. The relief which is detailed in the 22nd June, 2020 Order granting leave mirrors the relief sought at para. D of the Applicant's Statement of Grounds, dated 11th June, 2020 which was filed in High Court on 16th June, 2020. As the 22nd June, 2020 order makes clear, the Applicant was grated liberty to seek judicial review in respect of the relief set out in para. D of the aforesaid Statement, on the grounds set out at para. E of the said Statement and the case before this court is concerned with the relief detailed at 1, 2, 6, 8, 9 and 10 as highlighted in bold above.

Relevant Legislation

7. Section 300(1) of the Social Welfare Consolidation Act, 2005, as amended (hereinafter "the 2005 Act") provides as follows:-

"(1) Subject to this Act, every question to which this section applies shall, save where the context otherwise requires, be decided by a deciding officer."

8. Section 311 of the 2005 Act begins as follows:-

"(1) Subject to subsection (4), where any person is dissatisfied with the decision given by a deciding officer or the determination of a designated person in relation to a claim under section 196, 197 or 198, the question shall, on notice of appeal being given to the Chief Appeals Officer within the prescribed time, be referred to an appeals officer.

(2) Regulations may provide for the procedure to be followed on appeals and references under this Part.

(3) An appeals officer, when deciding a question referred under section (1), shall not be confined to the grounds on which the decision of the deciding officer or the

determination of the designated person, as the case requires, was based, but may decide the question as if it were being decided for the first time."

9. Section 317 of the 2005 Act provides for the revision by an appeal officer of a decision made by an appeals officer, specifying the following:-

"(1) An appeals officer may at any time revise any decision of an appeals officer—

(a) where it appears to him or her that the decision was erroneous in the light of new evidence or new facts which have been brought to his or her notice since the date on which it was given…"

10. Article 9 of the Social Welfare (Appeals) Regulations, 1998 (S.I. No. 108 of 1998) as amended by Article 5 of the Social Welfare (Appeals) (Amendment) Regulations, 2011 (S.I. No. 505/2011) (hereinafter "the 1998 Regulations") provides as follows:-

"Submission of an appeal and information to be supplied by appellant.

9. (1) Any person (in these Regulations referred to as the appellant) who is dissatisfied with the decision of a deciding officer or the determination of a designated person and who wishes to appeal against such decision or determination, as the case may be, shall give notice in that behalf, in writing, to the Chief Appeals Officer.

(2) The time within which an appeal may be made shall be any time up to the expiration of 21 days from the date of the notification of the decision of a deciding officer or determination of a designated person, as the case may be, to the appellant.

(3) Notwithstanding sub-article (2), notice of an appeal given after the expiration of 21 days from the date of the notification of the decision of a deciding officer or determination of a designated person to the appellant may, with the approval of the Chief Appeals Officer, be accepted.

(4) The notice of appeal shall contain a statement of the facts and contentions upon which the appellant intends to rely.

(5) The appellant shall send to the Chief Appeals Officer along with the notice of appeal, such documentary evidence as the appellant wishes to submit in support of his or her appeal, and the notice shall contain a list of any such documents.

(6) Any person wishing to withdraw an appeal may do so by sending a written notice to that effect to the Chief Appeals Officer."

11. As can be seen from Article 9(2) of the 1998 Regulations, a very specific and relatively short period has been set down in legislation in respect of the bringing of an appeal. The case before this Court is particularly concerned with Article 9(3). It is clear that if an appeal is not brought within 21 days of the relevant decision by a Deciding Officer, an

appellant no longer has an automatic right to appeal, but the legislation grants discretion to the Chief Appeals Officer to allow, or not, an appeal to be lodged outside of the 21-day prescribed period.

The Pleadings

12. I have carefully considered all the pleadings in this matter. Insofar as the Applicant is concerned, these comprise the Statement of Grounds, the Applicant's verifying affidavit in respect of the Statement of Grounds and the Applicant's 15-paragraph affidavit, filed on 16th June, 2020 together with exhibits "KOC1" to "KOC5" thereto. The Respondent's pleadings comprise a Statement of Opposition which is dated 6th November, 2020 and a verifying affidavit sworn by Ms. Joan Gordon, who is the First Named Respondent, together with exhibits "JG1" to "JG3", inclusive, exhibited thereto and an affidavit sworn by Mr. Roy Baldrick, Assistant Principal Officer with the Second Named Respondent's department, together with exhibits "RB1" to "RB3" thereto. The Applicant did not swear any affidavit in response to those sworn by the First Named Respondent or by Mr. Baldrick.

Analysis of the Evidence

13. The evidence before this Court comprises the various averments made and the contents of the documents exhibited in the pleadings to which I have referred. It is appropriate to examine that evidence in some detail. For the sake of clarity, I have examined the evidence in chronological order, employing relevant headings, as follows.

27th August, 2019, DCA Application

14. It is not in dispute that, on 27th August, 2019, the Applicant made an application for DCA in respect of her son. Exhibit "KOC1" to the Applicant's affidavit comprises a copy of the 27th August, 2019 application which was marked as received on 28th August, 2019. It is not in dispute that, in the context of the said application, the Applicant furnished copies of a Speech & Language Therapy report dated 20th June, 2019 and an Educational Psychology report dated 15th July, 2019. Copies of the said reports comprise the Applicant's exhibit "KOC2". It is not dispute that the DCA application form states, *inter alia, "waiting for O.T. appointment"* (Part 2 of the application) and "*on waiting list for occupational therapist*" (Part 4 of the application). Thus, it is a matter of fact that when the application was submitted an Occupational Therapist's appointment was awaited and no Occupational Therapist's report accompanied the application. Furthermore, it is a matter of fact that both of the reports which accompanied the application referred to further assessments of the Applicant's son being recommended.

4th September, 2019, Medical Assessor's Opinion

15. It is not in dispute that the DCA application was referred to a Medical Assessor who issued an opinion on 4th September, 2019. A copy of same comprises exhibit "RB1" to Mr. Baldrick's affidavit. The Medical Assessor's opinion states, *inter alia*, the following:-

> *"Following a full & careful review of available medical evidence to date I acknowledge that Daniel (Danny) does require a level of supervision and help with his issues as outlined below…*

He is awaiting OT review.

I note Daniel currently requires support at present however owing the fact that his assessments are not yet fully completed, the overall need for continual care and attention, based on the reports submitted is not substantially in excess of a similarly aged child so as to fulfil the criteria for DCA at this time. Further Specialist reports should be forwarded for consideration when available."

7th November, 2019, Deciding Officer's decision

16. It is not in dispute that the application was then considered by a Deciding Officer who considered all of the evidence, including the Medical Assessor's opinion as well as the reports submitted by the Applicant. The Deciding Officer concluded that the Applicant's son did not meet the criteria for the payment of DCA at that time. The letter dated 7th November, 2019 from the Deciding Officer to the Applicant, stated, *inter alia,* that *"DCA can be paid in respect of a child who has a severe disability that requires care and attention substantially in excess of that needed by a child of the same age without their disability, this level of additional care should be needed for at least 12 months*". The 7th November, 2019 decision went on to refer to the contents of reports which had been submitted.

17. With regard to the Speech & Language Therapy report (June, 2019), the second paragraph on the second page of the 7th November, 2019 letter stated, *inter alia*, "*a further assessment for an autistic spectrum disorder was recommended". The next paragraph went on to state, inter alia, as follows: "NEPS report (May 2019) also confirmed that Danny's communication skills are an ongoing concern and require further investigation. A multidisciplinary assessment of Danny's social and communication skills to investigate an autistic spectrum/Asperger's query was recommended*." The fourth paragraph on the second page of the 7th November, 2019 decision noted that "*no further medical reports were provided with this application*" and continued in the following terms:-

"I, as the deciding officer dealing with your case, have decided, having considered your application in full, including all the evidence presented and medical opinions provided, that you do not meet the qualifying conditions for the payment, at this time.

This decision does not mean that I don't consider your child has a disability or that they don't need additional care, the diagnosis of your child's condition is not disputed and it is clear from your application that your child does require additional care and attention. However, the evidence provided does not indicate that the level of additional support required is substantially in excess of that required by children of the same age without their disability, as provided for in the qualifying conditions for the scheme."

18. The 7th November, 2019 decision went on to set out clearly what the Applicant's options were if she considered the decision to be incorrect. It is appropriate to quote from the 7th November, 2019 decision, *verbatim*, as follows:-

> "***What to do next:***
>
> *If you consider this decision is incorrect, there are a number of options available to you:*
>
> # *You have a right to request a review of the decision by a Deciding Officer by contacting this office with any further documentary evidence you think is relevant to your case.*
>
> # *You also have a right to appeal this decision directly to the independent Chief Appeals Officer at: Social Welfare Appeals Office, FREEPOST, D'Olier House, D'Olier Street, Dublin 2, D02 XY31 or by email to: swappeals@welfare.ie. More information on how to do this is available at:*
>
> *https://www.socialwelfareappeals.ie/your_appeal/how_to_make_appeal/*
>
> # *OR you can pursue both a review and an appeal of the Decision separately.*
>
> ***IMPORTANT: The statutory time-limit for submitting an Appeal is within 21 days of the date of this Decision (i.e. this letter). Failure to submit an Appeal in a timely manner may result in the Appeal being rejected. If you wish to seek a review before your Appeal, it is important that you do so as soon as possible."***

19. In the foregoing manner, not only were the various options available to the Applicant very clearly outlined to her, it was emphasised that, should she wish to submit an appeal, the statutory time limit for doing so was within 21 days of 7th November, 2019. Given that the final paragraph of the Deciding Officer's decision appeared in bold text in a paragraph beginning with the word "***IMPORTANT***" in capital letters, there can be no doubt about the fact that the Applicant was made aware of the 21-day time limit and that, if it was not complied with, a late appeal might be rejected.

20. It is acknowledged that the Applicant was aware of the 21-day time limit in respect of the bringing of an appeal. In her affidavit which was filed on 16th June, 2020, the Applicant offers no explanation for why she did not bring an appeal within 21 days of 7th November, 2019, i.e. by 28th November, 2019. With regard to the period of time commencing on 7th November, 2019, the Applicant says nothing until, in para. 9 of her affidavit, she avers that: *"I decided to seek legal advice, after which point an application under the Freedom of Information Act was sought on 17th January, 2020. I then tried to enter the appeal process."* The Applicant says nothing on affidavit concerning the period of over two months which elapsed between 7th November, 2019 and 17th January, 2019. Nor does the Applicant mention, in her affidavit, or in her Statement of Grounds, that, in an email dated 7th January, 2020, the Applicant called for an appeal.

7th January, 2020, Applicant's request for an Appeal

21. In an email sent on 7th January, 2020 to the First Named Respondent which gave the name, date of birth and address of the Applicant's son, the Applicant stated, *inter alia*, the following:-

> *"Subject: domiciliary allowance appeal*
>
> *Dear Chief Appeals Officer,*
>
> *I wish to appeal the decision for domiciliary allowance for my son…*
>
> *I would like a review of my case too*
>
> *My PPS number is…"*

22. It has not been explained why the Applicant did not make any mention of this 7th January, 2020 request for an appeal when seeking leave to bring judicial review proceedings. Before looking at the response, it is appropriate to point out that, in this 7th January, 2020 request, the Applicant does not say that there was anything which prevented her from bringing an appeal within 21 days of 7th November, 2019. Nor does she say why it took her until 7th January, 2020 to make a request, albeit a late request, for an appeal. Furthermore, no additional information was proffered in respect of the appeal which was sought on 7th January 2020 and no grounds were offered in support of that request for an appeal.

17th January, 2020, decision

23. In response to the Applicant's 7th January request for an appeal, a letter from the Social Welfare Appeals Office dated 17th January, 2020 stated as follows:-

> *"Dear Ms. O'Connor,*
>
> *I refer to your correspondence received in this office on 7th January 2020 regarding your Domiciliary Care Allowance claim.*
>
> *The Social Welfare (Appeals) Regulations S.I. 108 of 1998 prescribe a timeframe for the submission of an appeal of a Deciding Officer's decision of 21 days from the date of notification of the decision. While the legislation does make provision for the acceptance of an appeal outside this timeframe, this is at the discretion of the Chief Appeals Officer in circumstances who will consider the circumstances of the case including the length of time since the decision was made.*
>
> *It is noted that the original formal written decision on your claim would appear to have issued on 7th November 2019. However our records indicate that your letter of 7th January 2020 was the first correspondence we received in connection with your Domiciliary Care Allowance application.*

I am sorry to advise that given the significant passage of time since the decision was made, it is not proposed to accept a late appeal of the Deciding Officer's decision from you in this case.

Accordingly no appeal has been registered in relation to your decision.

I regret this office can be of no further assistance to you in this matter."

24. The Applicant makes no mention of this 17th January, 2020 decision in her statement of grounds or in her affidavit and this was not something brought to the attention of the court when the Applicant sought leave to bring judicial review proceedings.

25. It is important to emphasise that no challenge was made to the 17th January, 2020 decision. Insofar as the 17th January, 2020 letter refers, *inter alia*, to "the significant passage of time" since the 7th November, 2019 decision, the same letter refers to the 21-day statutory timeframe which is laid down in respect of the bringing of an appeal. When compared to that 21-day period, the expiry of two months (i.e. from 7th November, 2019 to 7th January, 2020) can fairly be described as a "significant passage of time" in my view. It needs to be emphasised, however, that the 17th January, 2020 decision is not the subject of any challenge in the present proceedings.

26. It is a matter of fact that the 17th January, 2020 letter to the Applicant made it clear, *inter alia*, that the passage of time since the Deciding Officer's decision was of relevance to the Applicant's late request for an appeal and that this delay was a material part of the refusal to accept a late appeal. Despite this, the Applicant did not respond to the 17th January, 2020 decision by offering any explanation for the cause of the delay. Nor did the Applicant submit a renewed request for the acceptance of a late appeal which was accompanied by, for example, details explaining the passage of time from 7th November, 2019 onwards. In fact, despite being clearly on notice of the importance of delay in the context of a request for a late appeal, it was not until over ten weeks later that a further request was made to permit the lodging of a late appeal. This was by means of a letter dated 31st March, 2020 sent by the Applicant's solicitors which will be examined later in this decision.

17th January, 2020, Freedom of Information Request

27. On the same day the First Named Respondent wrote to the Applicant refusing to accept a late appeal, the Applicant's solicitors wrote to the FOI Unit of the Department of Social Protection, making a request under the Freedom of Information Act ("FOI request"). The FOI request was for a copy of the Applicant's DCA file containing all documents held by the Department of Social Protection. The FOI request of 17th January, 2020 enclosed a one-page form of "Authority" in which the Applicant consented to the release of her DCA files to her solicitors in respect of her son and the Applicant gave her solicitors full authority to raise queries in respect of her application. This Authority was signed by the Applicant and is dated 7th January, 2020. It will be recalled that 7th January, 2020 is the same day the Applicant sent an email to the First Named Respondent calling for an appeal

of the DCA decision, which request was declined by way of the 17th January, 2020 letter from the Social Welfare Appeals Office.

28. In her affidavit filed on 16th June, 2020 grounding her application for judicial review, the following is as much as the Applicant says in relation to the delay between 17th January, 2020 and the submission, on 21st March 2020, of what was her second request that a late appeal be permitted:-

> *"…an application under the Freedom of Information Act was sought on 17th January 2020. I then tried to enter the appeal process. I say and believe that my legal advisors wrote to the First Named Respondent on 31st March 2020…"*

Nowhere does the Applicant aver that it was not possible for her to submit a request for a late appeal sooner than 31st March, 2020. Nor does the Applicant refer to any difficulties which caused delay with regard to requesting an appeal, be that prior to or subsequent to 17th January, 2020. Although a reference is certainly made to the Applicant seeking legal advice, the Applicant does not say when she first sought it, when she obtained it and whether and/or to what extent there was a link between any such legal advice and the fact that it was not until 31st March, 2020 that a further request for a late appeal was made.

22nd January, 2020, FOI Officer's Letter to the Applicant

29. On 22nd January, 2020, an FOI officer with the Social Welfare Services Office wrote to the Applicant to acknowledge her FOI request. Nowhere in the Statement of Grounds is it pleaded that it was not possible for the Applicant to make a request that a late appeal be permitted until a response had been received to her FOI request. Nor does the Applicant make any such averment on affidavit. Nowhere is it pleaded or averred that the absence of any documentation rendered it impossible to comply with the 21-day statutory time limit for an appeal. Nor is it pleaded or averred that the absence of any documentation, which documentation was only available in response to an FOI request, caused the delay up to 31st March, 2020. It is clear from the evidence, however, that the absence of a response to the Applicant's FOI request did *not* in fact prevent the Applicant from calling for an appeal on 7th January 2020, a call made ten days *prior* to the Applicant's FOI request.

18th February, 2020, Response to FOI Request

30. By letter dated 18th February, 2020, the relevant FOI officer in the Department of Employment Affairs and Social Protection wrote to the Applicant to confirm the grant of her FOI request in respect of the following records: *"Copy of Ms. O'Connor's Domiciliary Care Allowance file in respect of Daniel O'Dwyer, containing all documents which you hold in relation to this matter."* The 18th February, 2020 letter attached a schedule of the relevant records and, in order to see what these records comprised, it is appropriate to quote from the relevant schedule, *verbatim*, as follows:-

Document No.	Brief Description and Date of Record	No. of Pages	Decision: Grant/Part Grant/Refuse
1	Domiciliary Care Allowance received 28/08/2019	26	Grant
2	Department's Medical Assessor's opinion dated 04/09/2019	2	Grant
3	Decision letter which issued 07/11/2019	3	Grant
4	Freedom of Information request received 22/01/2020	3	Grant
5	Freedom of Information acknowledgment letter issued 22/01/2020	2	Grant

31. With regard to the foregoing documents, the first comprises the DCA application form which the Applicant completed on 27th August, 2019 and which was received on 28th August 2019. Thus, prior to making the FOI request, the Applicant either already had a copy or plainly knew what it contained, given the fact that it was her own document.

32. The second document is a two-page opinion by the Department's Medical Assessor which was plainly generated in September 2019, in the context of a consideration of the Applicant's DCA application. It will be recalled that, as part of the 27th August 2019 application, the Applicant furnished a Speech & Language Therapy (or "SALT") report, dated 20th June 2019, and a report from the National Educational Psychological Service ("NEPS") dated 15th July, 2019. The Medical Assessor's opinion dated 4th September, 2019 is one which is explicitly based on "…*a full & careful review of available medical evidence to date".* It is plain that the Medical Assessor's opinion was based on the reports submitted by the Applicant, being the SALT and NEPS reports, the contents of which reports the Applicant was plainly well aware of. In other words, there was no fresh assessment of the Applicant's son carried out by the Medical Assessor. On the contrary, and as the final paragraph of the Medical Assessor's opinion makes clear: *"I note Daniel currently requires support at present however owing the fact that his assessments are not yet fully completed, the overall need for continual care and attention**, based on the reports submitted** is not substantially in excess of a similarly aged child so as to fulfil the criteria for DCA at this time. Further specialist reports should be forwarded for consideration when available.* (emphasis added)". Although it is the case that a copy of the two-page Medical Assessor's opinion was furnished to the Applicant on 22nd February 2020 as part of the response to her FOI request of 17th January, 2020, the substance of

the Medical Assessor's opinion is reflected in the Deciding Officer's 7th November, 2019 decision. In other words, the Medical Assessor's opinion is reflected in the 7th November, 2019 decision, which the Applicant has been aware of since then. Furthermore, the basis for the Medical Assessor's opinion comprise the contents of reports which the Applicant furnished. Thus, there was nothing new in this two-page document, which the Applicant received in response to her FOI request.

33. The third document provided to the Applicant on 18th February, 2020 was the decision letter dated 7th November, 2019. The Applicant plainly knew the contents of same as she had already received this letter. I have previously looked at the contents of that 7th November 2019 decision which, like the Medical Assessor's opinion, notes that further assessments were recommended and that, based on the evidence presented and medical opinions provided, the qualifying conditions for the payment were not met "*at this time*". Thus, there was nothing new in this document which the Applicant received in response to her FOI request.

34. The fourth document comprised the Applicant's FOI request of 22nd January, 2020, whereas the fifth document is the acknowledgment letter, dated 22nd January, 2020, in respect of the FOI request. Once more, there was nothing new in this correspondence and their contents were already known to the Applicant.

35. The foregoing comprises the totality of the FOI response. It can fairly be said that, with the exception of the Medical Assessor's two-page opinion, the Applicant already had all of these documents. Furthermore, there was nothing new in the Medical Assessor's opinion, given that it was based on documents which the Applicant herself had provided and given the fact that the Medical Assessor's 4th September, 2019 opinion was reflected in the Deciding Officer's decision of 7th November, 2019.

36. Furthermore, nowhere does the Applicant aver that the documents she received on 18th February, 2020 in response to her FOI request, necessitated the taking of any steps relevant to a request that a late appeal be considered. Nor does the Applicant claim on affidavit or in her Statement of Grounds that the response, on 18th February, 2020, to her FOI request resulted in, contributed to, or explains in any way the delay between 18th February 2020 and 31st March 2020. There is no averment by the Applicant to the effect that either her FOI request or the response thereto had anything to do with the delay in seeking liberty to bring a late appeal. Nor has the Applicant explained why her FOI request was not made until 17th January 2020, given the fact that she knew over two months earlier, on 7th November 2019, that her application had been declined.

4th March, 2020, Letter from School Principal

37. The Applicant has exhibited, *inter alia*, a short letter dated 4th March, 2020 from a school principal confirming that her son "*…is receiving SNA access on a weekly basis as part of his education…*" in the relevant National School. Nowhere does the Applicant aver that there was any delay or difficulty in obtaining such a letter. The Applicant does not claim that such a letter could not have accompanied her 27th August 2019 application. Nor does the Applicant assert that such a letter could not have been obtained within 21 days

of her receipt of the Deciding Officer's 7th November, 2019 decision. The Applicant does not assert that it was impossible or that there were any difficulties in obtaining such a letter prior to 4th March, 2020. The Applicant proffers no evidence on affidavit as to any supposed connection between obtaining a letter of the type she obtained on 4th March 2020 letter and the delay regarding requesting an appeal within the 21-day statutory timeframe or, for that matter, the delay up to 7th January, 2020 (being her first request in respect of a late appeal) and/or the further time which elapsed up to 31st March, 2020 (being her second request for a late appeal).

31st March, 2020, letter requesting late Appeal

38. In para. 10 of her affidavit, filed on 16th June, 2020, the Applicant avers that her legal advisors wrote to the First Named Respondent on 31st March, 2020 explaining that, while the appeal was outside of the 21-day period, the legislation does make provision for the acceptance of an appeal outside this timeframe and she confirms that her solicitors included the 4th March, 2020 letter from her son's school principal "…*confirming that Daniel receives SNA access on a daily basis".* In fact, the letter states that he son receives SNA access on a "*weekly basis*", but nothing would appear to turn on the foregoing for the purpose of the present proceedings. The Applicant also exhibits the 31st March, 2020 letter sent by her solicitors to the First Named Respondent and it is appropriate to set it out *verbatim* as follows:-

> *"Dear Ms. Gordon,*
>
> *I refer to the above and confirm that we act on behalf of the Applicant.*
>
> *By letter dated 7th November 2019 our client was refused her application for DCA. In respect of progressing matters, she made an appointment to seek advice from this office and on foot of legal advices we applied on the 17th January 2020 for an application under the Freedom of Information Act for a copy of our client's file. On foot of advices our client registered an appeal with the Social Welfare Appeals Office, albeit outside the twenty-one-day period. Whilst the regulations prescribe a timeframe for the submission of an appeal within twenty-one-days the legislation does make provision for the acceptance of an appeal outside this timeframe. In circumstances where our client was attempting the process (sic) the information she had received and endeavouring to seek advice on the next steps that she should take I would be grateful if you could exercise your discretion in favour of receiving this appeal rather than forcing her into a situation where she is having to reapply with the same information to be refused again.*
>
> *Please find attached some very relevant information about the child's care circumstances particularly confirmation that he has access to a special needs assistant which is provided for children his care needs (sic) are substantially more than other children of the same age.*

In all the circumstances of this case it would appear to be reasonable and proportionate to enable her to access the appeals system and I look forward to hearing from you to confirm same."

39. A number of comments can be made in respect of the foregoing. It is stated that the Applicant made an appointment to seek advice but it is not explained when legal advice was sought or given. Nowhere in this letter is it suggested that there was any difficulty encountered by the Applicant in seeking legal advice or that there was anything which prevented the Applicant from seeking and receiving legal advice within 21 days of 7th November, 2019. If it is the case that legal advice was not sought by the Applicant until January 2020, the delay in seeking and obtaining such legal advice is not explained. Whereas reference is made to the 17th January 2020 FOI request, it is not claimed that the Applicant, prior to that date, was unaware of her entitlement to make such a request or that there was anything which prevented an FOI request being made by or on behalf of the Applicant within 21 days of the 7th of November or at any point prior to 17th January, 2020.

40. The aforesaid letter specifically states, *inter alia*, the following: "*on foot of advices our client registered an appeal with the Social Welfare Appeals Office, albeit outside the twenty-one-day period"*. This appears to be confirmation that the Applicant's 7th January 2020 request for an appeal was one made "*on foot of advices*". It is a statement which plainly refers to a prior request for an appeal and it plainly acknowledges that such a request was made outside the statutory 21-day period. Counsel for the Applicant confirmed during the hearing that, when the relevant application was drafted, the Applicant's legal advisors were unaware of the 7th January 2020 request for an appeal and the 17th January 2020 response. I accept entirely and without reservation that counsel was unaware of the foregoing, but the contents of the 31st March 2020 letter suggests that the Applicant's solicitors may well have been aware, at least on 31st March 2020, of a *prior* request for an appeal made by the Applicant outside the 21-day period.

41. In para. 3 of the Applicant's Grounds, it is pleaded, *inter alia*, that "*In refusing to extend time for the appeal, the First Named Respondent did not give any, or adequate weight, to the fact that the Applicant was engaged in seeking legal advice"*. However, nowhere in her grounding affidavit does the Applicant aver that it was not possible for her to have sought and obtained legal advice within 21 days of 7th November 2019, nor does she refer to any difficulties or delays encountered in seeking or obtaining legal advice promptly thereafter. Furthermore, there is no evidential link proffered either by the Applicant, on affidavit, or in her solicitor's 31st March 2020 letter, between the Applicant's engagement in seeking legal advice and anything which is said to have rendered it impossible to call, *prior* to 31st March 2020, for a late appeal to be accepted. Plainly, the fact that the Applicant may have been engaged in seeking legal advice did *not* prevent the Applicant from calling for an appeal on 7th January 2020. Furthermore, the letter of 31st March suggests that the 7th January 2020 request for a late appeal was made "o*n foot of advices".*

42. Simple and understandable inadvertence on the part of the Applicant's solicitors could well explain why the application for leave did not refer to the 7th January appeal request and 17th January 2020 refusal. Insofar as the Applicant is concerned, pure inadvertence may also well explain why she did not ensure that the 7th and 17th January communications were referred to and exhibited with her application. Indeed, she may not have realised their significance. Regardless of the foregoing, it cannot be disputed that, on 7th January 2020, the Applicant sought to have the 7th November 2019 decision appealed and, when so doing, she proffered no reason for or evidence touching on the delay in seeking an appeal. Nor does this 31st March 2020 letter do so in my view. The said letter acknowledges the fact that a prior request for an appeal was made outside the 21-day period. The 31st March, 2020 letter is also plainly outside the relevant 21-day period.

43. The only thing said in the 31st March, 2020 letter in an attempt to explain the delay in seeking a late appeal is the following: ". . . *our client was attempting the process (sic) the information she had received and endeavouring to seek advice on the next steps that she should take…*" Several comments can be made in relation to the foregoing. If the reference to processing information is a reference to processing the information in the 7th November 2019 decision, it is difficult to understand how or this constitutes any explanation for delay. I say this because the 7th November 2019 letter informed the Applicant of the decision and the reasons for it and was very clear as to what her options were. These threefold options were set out in detail and. In bold text after the word "***IMPORTANT***", the Applicant's particular attention was drawn to the relevant 21-day statutory time limit in respect of bringing an appeal. The Applicant was also informed on 7th November 2019 that if she failed to submit an appeal in a timely manner it may result in the appeal being rejected. It is uncontroversial to say that each and every Applicant for DCA who receives a negative decision will need to "*process*" this information, but the statutory limit of 21 days is clear and the need to process information does not appear to be a reason, much less a good reason, to explain why a statutory 21-day time limit in respect of an appeal was not complied with, particularly when no specifics are contained in the 31st March, 2020 letter as to any difficulties said to have been encountered by the Applicant.

44. If the reference to the Applicant *processing* information is a reference to processing the information received on 18th February 2020 in response to her FOI request, this is also difficult to understand and, in my view cannot amount to a valid explanation for delay. In the manner examined earlier in this decision, there was nothing new in the information which the Applicant received in response to her FOI request. Furthermore, if the reference to processing information does refer to the response to the FOI request, the 31st March 2020 letter is entirely silent in relation to the time which elapsed from 7th November 2019 (the initial decision) and 17th January 2020 (the FOI request). Nothing is said in the 31st March 2020 letter about any issue or difficulty which prevented or delayed the making of an FOI request or the seeking of an appeal.

45. Furthermore, it is a fact that the processing of information did not prevent the Applicant from submitting, on 7th January 2020, a request for an appeal, a request which appears to have been made by the Applicant on foot of advices. Given the nature of the information in the documentation which comprised the response to the Applicant's FOI request, it is impossible, to accept that processing the information, none of which was new, created or explains any delay with regard to seeking an appeal. Furthermore, nowhere in the 31st March, 2020 letter is there an attempt to explain any difficulties or delay said to have arisen between 18th February 2020 (the response to the FOI request) and 31st March, 2020 (the second request for a late appeal). For example, there was no setting out of what steps the Applicant or her legal advisors regarded as necessary and which would require time to deal with, arising from the FOI response. In short, it is fair to say that no specifics are given of any problems said to have arisen for the Applicant which are said to have resulted in particular delay or delays.

46. Insofar as reference is made, in the 31st March 2020 letter, to the Applicant "*endeavouring to seek advice on the next steps that she should take*", this is also impossible to accept by way of an explanation for delay. In para. 8 of her affidavit, the Applicant refers to the 7th November 2019 decision and, in para. 9, she avers that she decided to seek legal advice. She does not, however, say when she sought such advice. Nor does she claim to have encountered any difficulties which delayed the seeking of advice by her or the receipt of such advice. Similarly, the 31st March, 2020 letter does not claim that, at any stage, the Applicant encountered difficulties in seeking legal advice or in obtaining same. Nowhere in the 31st March 2020 letter is it asserted that legal advice could not have been sought or obtained by the Applicant within 21 days of 7th November 2019. It is not said on behalf of the Applicant that she encountered difficulties which made it impossible to seek advice in November 2019 or in December 2019 and, if it be the case that the Applicant did not seek and receive legal advice until January 2020, nowhere is it explained why this was the case or why such advice could not have been sought and obtained sooner. If, as appears to be the case, the Applicant obtained legal advice in January 2020, the 31st March, 2020 letter does not explain, with reference to the seeking of or provision of legal advice, why it was not until 31st March 2020 that a second request for a late appeal was made. There are no specifics contained in the 31st March 2020 letter which are proffered in an attempt to account for the passage of time of almost three months between 7th January 2020 (the date the Applicant signed an "Authority" in favour of her solicitors in connection with an FOI request and being the same date the Applicant emailed the First Named Respondent to call for an appeal) and 31st March, 2020 (the letter constituting a second request for a late appeal).

47. Furthermore, and with regard to the reference in the 31st March 2020 letter to "*advice on the next steps that she should take*", it will be recalled that the 7th November 2019 letter was comprehensive and explicit as to the various steps open to the Applicant to take if she considered the decision of 7th November 2019 to be incorrect, namely, she could request a review by a Deciding Officer or she could make an appeal to the Chief Appeals Officer within 21 days or she could pursue both a review and an appeal of the decision separately.

48. Nowhere in the 31st March, 2020 letter is it asserted that it was not possible for the Applicant to take the step of requesting a late appeal until 31st March 2020 (and the Applicant had plainly taken such a step almost three months earlier on 7th January 2020 without, it seems, either the need to "*process*" any further information or the need for any additional advice on "*next steps*"). As noted earlier, the 31st March 2020 letter appears to confirm that the 7th January 2020 (first) request for a late appeal was made "*on foot of advices*", suggesting, therefore, that there was, in fact, no need for further advice as to "*next steps*" prior to the 31st March 2020 letter, which constituted a (second) request for a late appeal.

49. It is also appropriate to observe that it is not asserted that a letter from the relevant school principal was regarded as vital to the submission of an appeal within the 21-day period or was regarded as vital to a request for a late appeal and the fact a late appeal was sought on 7th January 2020 *without* the 4th March 2020 letter from the school principal is not in doubt. Nor is any explanation proffered in relation to the delay of over three weeks between 4th March 2020 (the date of the school principal's letter) and the 31st March 2020 request for a late appeal. The foregoing constituted a delay of 26 days which, of itself, exceeds the statutory time limit for the bringing of an appeal.

50. The final paragraph of the 31st March, 2020 letter in effect makes a request that the First Named Respondent look at "**all the circumstances**" of the case and, in that context, the Chief Appeals Officer is invited to exercise her discretion in favour of allowing the late appeal, in that the final paragraph reads "***In all the circumstances of this case*** *it would appear to be reasonable and proportionate to enable her to access the appeals system and I look forward to hearing from you to confirm same*" (emphasis added).

8th April, 2020, Decision challenged in the Present Proceedings

51. On 8th April, 2020, the Social Welfare Appeals Office wrote to the Applicant's solicitor, confirming that a late appeal would not be permitted. This is the Decision which is challenged in the present proceedings and it is appropriate to set it out *verbatim* as follows:-

> *"I refer to your representations on behalf of Ms. Katie (sic) O'Connor regarding her Domiciliary Care Allowance claim.*
>
> *The timeframe for appealing a decision of a Deciding Officer is defined in legislation (Article 9(2) of the Social Welfare (Appeals) Regulations, 1998 (SI 108/1998)) as 21 days from the date of the decision in question. The legislation provides that a notice of appeal made outside of the 21-day timeframe may be accepted with the approval of the Chief Appeals Officer. In determining whether a late appeal will be accepted, the Chief Appeals Officer will have regard to the facts of the case including the length of the delay involved and will consider whether it has been established that there was good cause for the delay in submitting the appeal.*
>
> *I note that the Deciding Officer's decision which Ms. O'Connor wishes to appeal was made on 7th November 2019 and she was advised that she could submit an appeal*

to this office. However, there is no record of any appeal from Ms. O'Connor at that time.

Given the significant passage of time since the decision was made, I am sorry to advise Ms. O'Connor that there are no grounds to accept a late appeal at this time.

Accordingly, no appeal has been registered in relation to Ms. O'Connor's decision."

Averments by the Chief Appeals Officer that she made the 8 April 2020 Decision

52. Ms. Joan Gordon is the Chief Appeals Officer and the First Named Respondent herein. On 17th November, 2020, Ms. Gordon swore an affidavit in her capacity as Chief Appeals Officer. That affidavit was sworn on behalf of the Respondents from a review of the records associated with the application made by the Applicant and from facts within Ms. Gordon's own knowledge save where otherwise appearing and where so appearing Ms. Gordon averred that she believed these facts to be true and accurate. The foregoing is clear from para. 1 of Ms. Gordon's affidavit. In para. 2 of her 17th November 2020 affidavit, Ms. Gordon states, *inter alia*, that "***I have read the Statement of Opposition filed on behalf of the Respondents and so much of the Statement as relates to my own acts and deeds is true***…" (emphasis added). Paragraph 18 of the Statement of Opposition begins by stating "*By letter of 8th April 2020* ***the First Named Respondent wrote to the Applicant's solicitors refusing permission*** *for the lodgement of a late appeal*". (emphasis added). Paragraph 18 of the Statement of Grounds goes on to quote from the 8th April, 2020 Decision, whereas para. 19 of the Statement of Grounds begins by stating: "***The decision of the Chief Appeals Officer was made*** *in accordance with the statutory scheme established by the 2005 Act and the 1998 Regulations* ***and was a proper exercise of the discretion vested in her by that statutory scheme.*** *Having considered the totality of the circumstances of the case, including the passage of time since the making of the decision of 7th November 2019,* ***the Chief Appeals Officer was not satisfied that a late appeal should be allowed by the Applicant.*** *The discretion exercised by the Chief Appeals Officer in the context of an individual case is entitled to appropriate deference from This Honourable Court*." (emphasis added). Paragraph 20 of the statement of grounds states, *inter alia*, that "*No illegality attaches to* ***the decision of the Chief Appeals Officer****…"* (emphasis added), whereas para. 21 of the Statement of Grounds begins "***In making the decision of 8th April 2020 the Chief Appeals Officer did not fail to exercise her discretion*** *in a fair or reasonable manner*…" (emphasis added). Paragraph 22 of the statement of grounds begins "***it is denied that the Chief Appeals Officer failed to give any or any adequate weight*** *to the fact that the Applicant was engaged in seeking legal advice"* (emphasis added), whereas para. 23 of the Statement of Grounds begins "***It is denied that the Chief Appeals Officer erred in law*** *in applying the wrong threshold for the granting of an extension of time…*" (emphasis added).

53. Given the explicit averment made by the Chief Appeals Officer that, so much of the Statement of Opposition as relates to her acts and deeds is true, there is clear and uncontroverted evidence before this Court that the 8th April 2020 Decision which is challenged in the present proceedings is a decision which was made by the First Named

Respondent. The Applicant furnished no replying affidavit in response to that sworn by the First Named Respondent. Furthermore, nowhere in her affidavit did the Applicant assert that the 8th April 2020 Decision was made other than by the First Named Respondent. There is no evidence whatsoever before this court that the First Named Respondent did not make the 8th April 2020 Decision or that the First Named Respondent delegated the making of that decision to some other party. There is, on the other hand, clear uncontroverted evidence of the fact that the 8th April 2020 Decision which is challenged in these proceedings, was made by the Respondent and, thus, that she did not delegate the making of that Decision, or the exercise of her discretion to someone else. The averments by the Chief Appeals Officer with regard to the contents of the Statement of Opposition put the foregoing beyond doubt.

54. It is also clear from the First Named Respondent's Decision dated 8th April 2020 that the First Named Respondent considered all the circumstances of the case in the context of deciding whether a late appeal should or should not be accepted. This is evident from the reference in the Decision to the First Named Respondent having had regard "*to the facts of the case"* including the *"length of the delay involved*" and considering whether it had been established that there was "*good cause for the delay in submitting the appeal*". For the First Named Respondent to have done so reflects precisely what the 31st March, 2020 letter from the Applicant's solicitors invited the First Named Respondent to do, the foregoing letter having referred to "*all the circumstances of this case*".

55. It is clear from the Decision that one of the factors which the First Named Respondent had regard to was the passage of time which had occurred since 7th November 2019. That the passage of time was a relevant factor is also perfectly clear from a reading of the 31st March 2020 letter sent by the Applicant's solicitors to the First Named Respondent. It will be recalled that the 31st March, 2020 letter refers to the 7th November 2019 decision and is explicit about the fact that the Applicant "*registered an appeal… albeit outside the twenty-one-day period*". The letter went on to refer to the 21-day prescribed timeframe for the submission of an appeal and to the First Named Respondent's discretion to allow a late appeal. Thus, the passage of time was explicitly acknowledged to be of relevance according to the terms of the 31st March 2020 letter. In other words, the evidence before this court is to the effect that *both* the First Named Respondent and the Applicant's solicitors regarded delay as a relevant factor in the context of a decision as to whether or not the First Named Respondent's discretion should be exercised in favour of allowing a late appeal.

56. It is also clear from the Decision that another of the factors considered by the First Named Respondent was whether a good reason had been proffered for the delay with regard to seeking an appeal. This is plain from the final phrase in the second paragraph of the Decision which refers, *inter alia*, to the First Named Respondent *considering "whether it has been established that there was good cause for the delay in submitting the appeal*". It is equally clear from the evidence before this Court that whether there was a good reason or a good cause for the delay was also considered by the Applicant's solicitors to be a relevant factor to be considered by the First Named Respondent. This is clear from

the 31st March, 2020 letter in which, having referred to the prescribed 21-day time limit and the provision in the legislation for the acceptance of a late appeal, the letter purports to give a reason or cause for the delay, which reason is urged upon the First Named Respondent as a basis for exercising her discretion in favour of allowing a late appeal. The supposed reason or cause for the delay proffered in the 31st March, 2020 letter is as follows: "*In circumstances where our client was attempting the process (sic) the information she had received and endeavouring to seek advice on the next steps that she should take I would be grateful if you could exercise your discretion in favour of receiving this appeal…"* It cannot be doubted that the foregoing was said on behalf of the Applicant as a reason or cause to explain what was an undoubted failure to lodge an appeal within the 21-day statutory timeframe and was said in an attempt to explain a cause for the delay in seeking an appeal out of time. I have already looked closely at this reason proffered.

57. Nowhere in the Decision is any reference made to any policy operated by the First Named Respondent, much less a rigid policy, of, for example, refusing to permit appeals which are late by a specific number of days, weeks or months. Nor has the Applicant put before the court any evidence whatsoever of such a policy. Rather, it is clear from the face of the Decision that the First Named Respondent engaged with the case before her and did so by having regard to a range of considerations. It is clear that the First Named Respondent considered the facts of the case before her, considered the length of the delay involved and considered whether it had been established that there was a good reason or good cause for the delay in submitting the appeal. It is not in doubt that the First Named Respondent declined to accept the late appeal, but a reading of the entirety of the Decision makes it clear that the First Named Respondent did not take a "blinkered" approach and simply conclude that because of the passage of time, alone, since the 7th November 2019 decision, there could be no question of a late appeal being accepted. On the contrary, it is plain that the Decision resulted from a consideration of a variety of factors, which the Applicant's solicitors also regarded as relevant. Nor does the Decision evidence a consideration of any irrelevant factors.

138 -v- 21 days

58. Insofar as the penultimate paragraph of the Decision refers to "*the significant passage of time"* since the 7th November 2019 decision, it is a matter of fact that some 138 days had elapsed between the 7th November 2019 decision and the 31st March 2020 letter from the Applicant's solicitors. It will be recalled that the statutory time limit laid down by the Oireachtas in respect of the bringing of an appeal is 21 days. When compared to the said 21-day period, a passage of time of 138 days was undoubtedly an extremely significant passage of time. In the Decision, the First Named Respondent confirmed her view that there were "*no grounds to accept a late appeal at this time*". Earlier in this judgment, I examined the evidence before this Court closely, including what was said on behalf of the applicant as a reason to explain delay or as grounds to permit a late appeal. It is fair to say that the cause of the Applicant's delay up to 31st March 2020 has never been adequately identified or explained. In light of the evidence which was before the First Named Respondent, it could hardly be said that the Decision of 8th April 2020 was

unreasonable, or irrational. It is clear from the face of the Decision that the First Named Respondent did not purport to apply a single "good cause" test, nor did she focus exclusively on same. Rather, it is plain from the face of the Decision that the First Named Respondent considered a range of relevant issues including the facts of the case, the length of the delay, whether any reason had been proffered and the extent to which this could be considered to be a good reason for the delay, being factors which fed into the exercise by the First Named Respondent of what is undoubtedly a wide discretion conferred on her by statute.

59. There is no evidence before the court which would allow a finding that the First Named Respondent's decision was taken *solely* on the basis that a significant amount of time had passed since 7th November 2019. It is clear from the face of the decision itself that the passage of time was undoubtedly a factor which was taken into consideration, but it is equally clear that it was not the *only* factor which the First Named Respondent took account of. Indeed, the court has before it a positive averment by the First Named Respondent, which is uncontroverted, to the effect that, having considered the totality of the circumstances of the case, including the passage of time since the making of the decision of 7th November 2019, the First Named Respondent was not satisfied that a late appeal should be allowed. The foregoing is clear from para. 19 of the statement of opposition the accuracy of which is averred in para. 2 of the First Named Respondent's 17th November 2020 affidavit.

Discussion and decision

60. I am grateful to counsel for the respective parties who provided the court with detailed written submissions which were supplemented during the hearing by skilled oral submissions. It is fair to say that certain portions of the written submissions prepared on behalf of the Applicant on 19th January 2021 were not relevant in circumstances where, when the trial commenced, it was made clear that the 7th November 2019 decision was no longer being challenged and the relief at 3, 4, 5 and 7 of para. D of the Applicant's statement of grounds was no longer being pursued. For this reason, certain portions of the written submissions on behalf of the Respondents, dated 26th January 2021, were not relevant to the hearing which took place on 2nd February 2021. I have, nonetheless, very carefully considered all relevant written submissions and all oral submissions made at the hearing. Rather than summarise the respective submissions made by both sides, I propose to refer to relevant submissions in the context of examining the key issues which fall for this Court to decide

Whether the Chief Appeals Officer considered the application

61. In opening the case, counsel for the Applicant made it clear that the case had been narrowed down to a relatively small, number of nevertheless very important points. The Applicant's counsel summarised the key issues as being whether the Chief Appeals Officer is obliged to consider the application herself and, if so, did she do so and was her discretion exercised properly. Counsel for the Applicant submitted that the First Named Respondent's powers, pursuant to Article 9 (3) of the 1998 Regulations are powers conferred on her as a p*ersona designata*. In oral submissions, Counsel for the Applicant, relying on the Supreme Court's 11th May 2010 decision in *McCarron v. Kearney & Ors*.

[2010] IESC 28, argued the relevant discretion was vested in the First Named Respondent alone and that she could not delegate the exercise of her discretion to anyone else. The Applicant's Counsel also referred the court to the Supreme Court's decision in *McCarron*, in which Fennelly J. made reference (at para. 64) to an earlier decision by the Supreme Court in *Dunne v. Donohoe* [2002] 2 IR 533, wherein Keane C.J. noted the existence of a wide range of statutes conferring discretionary powers and stated, *inter alia*: -

> *"One is entitled to assume that in all such instances the Oireachtas decided that the power should be exercised by a senior Garda officer in a particular locality for what seemed to them (the Oireachtas) good reasons, but they would, of course, have been perfectly entitled to confer the power in question on another body, such as a court of local and limited jurisdiction, a local authority or some other state agency. It follows, in my view, that the learned High Court Judge was correct in holding that the power conferred on Garda superintendents by section 3 of the Act of 1925 was conferred on him as a persona designata and that, accordingly it vested in him a discretion which he could not abdicate to anyone else. Accordingly, while he can only exercise that discretion within any relevant statutory limitations, he cannot be required to exercise it in any particular manner by any other body or authority".*

62. There is no dispute in relation to the foregoing principle but, in light of the evidence before this Court, it is not a principle which can avail the Applicant. A submission was made to the effect that it would be reasonable for this Court to "*infer*" from the contents of the affidavit sworn by the First Named Respondent on 17th November 2020 that the Chief Appeals Officer did not make the decision of 8th April 2020. I regard myself as bound to reject that submission. In my view it is wholly undermined by the positive averment made by the Chief Appeals Officer that so much of the statement of opposition as relates to her acts and deeds is true. The statement of grounds which the Chief Appeals Officer avers to be correct makes clear, repeatedly, that the decision was made by the Chief Appeals Officer. Nor has the Applicant proffered any evidence to the contrary. In my view, the evidence before the court presents an insurmountable problem for the Applicant insofar as she seeks to advance a persona designata argument or, perhaps more accurately, an argument that the First Named Respondent did not make the decision which is challenged, and/or delegated her decision-making powers.

63. I am also of the view that there is a second insurmountable obstacle, namely that the Applicant has not pleaded a *persona designata* issue. If one examines the statement of grounds, nowhere do the words "*persona designata*" appear. Furthermore, nowhere is it asserted in the Applicant's statement of grounds that the First Named Respondent did not make the 8th April 2020 decision. Nowhere does the Applicant assert, on affidavit, that the Decision was not made by the First Named Respondent. Nowhere in the pleadings does the Applicant assert that the First Named Respondent abdicated or delegated her discretion to another party. On behalf of the Applicant, it was submitted that the *persona designata* issue is pleaded in para. 2 of the relief sought at D in the statement of grounds. For the sake of clarity, I have set out, below, the relevant paragraph, and have

highlighted, in bold, those words which, it is submitted by counsel for the Applicant, constitute the plea which encompasses a *persona designata* argument:-

> ***"2. A Declaration that the First Named Respondent, in the decision of 8 April 2020, failed to exercise her discretion at all*** *and/or fairly or reasonably, and/or in compliance with statute or regulation, and/or exercised it in breach of fair procedures and natural and constitutional justice, and/or fettered her own discretion and/or failed to have regard to relevant factors and/or, if taken into account, failed to give due weight to said factors and/or applied the wrong test/threshold". (emphasis added)*

64. In my view, the wording highlighted in bold cannot fairly be said to constitute a plea that the First Named Respondent did not make the decision. Rather, it appears to me to be a plea that, in making the Decision, the First Named Respondent allegedly failed to exercise her discretion properly or at all. Even I am entirely wrong in the foregoing view, it is indisputable that nowhere in para. E of the Statement, which sets out the grounds upon which the Applicant seeks relief, is it claimed that the Chief Appeals Officer did not make the Decision or that the First Named Respondent abdicated or delegated decision–making to someone else, or that someone else made the decision and exercised the First Named Respondent's discretion. On the contrary, the pleas made in paras. 2 – 4 explicitly refer to the First Named Respondent in the context of the decision, the following being extracts: -

- *"The **discretion afforded to the First Named Respondent** must be **exercised** fairly and reasonably . . ." (para. E (i) (2) of the statement of grounds) (emphasis added);*
- ***"In refusing to extend time for the appeal, the First Named Respondent** did not give any, or adequate weight, to the fact that the Applicant was engaged in seeking legal advice . . ." (Para. E (i) (3) of the statement of grounds) (emphasis added);*
- *"Further, the **First Named Respondent** erred in law in applying the wrong test/threshold for the granting of an extension of time . . ." (Para. E (i) (4) of the statement of grounds) (emphasis added).*

65. In my view, a reading of the statement of grounds, in particular the foregoing, demonstrates that the case made is not to the effect that the First Named Respondent did not make any decision and or that someone other than the First Named Respondent made the relevant decision but that, in making the Decision, the First Named Respondent acted unlawfully with regard to the exercise of her discretion.

66. In oral submissions made in response, Counsel for the Respondents asserts that the p*ersona designata* issue was not pleaded and was not properly before the court and, for the reasons set out in this decision, I agree. Counsel for the Respondents also pointed out that, in the Applicant's written legal submissions of 19th January 2021, there was no reference to the Supreme Court's decision in Kearney, whereas the High Court's 2008

decision in *Kearney* was referenced. A careful reading of the Applicant's written legal submissions demonstrates that as much as is said on the issue on behalf of the Applicant is that "*It is also unclear if the First Named Respondent exercises this discretion herself or through administrative staff*". That single sentence in the Applicant's legal submissions does not constitute a plea which is properly before the court and which is based on a *persona designata* issue. Nor is that sentence in the Applicant's written legal submissions reflected in any evidence before the court. On the contrary, the evidence wholly undermines same. It is also appropriate to observe that in the Supreme Court's decision in *A.P. v. DPP* [2011] IESC 2, the then Chief Justice made the following clear (at para. 21): -

> *"When an Applicant seeks leave to apply for judicial review he does so on specific grounds stated in the statement required. . . . . .The order of the High Court determines the parameters of the grounds upon which the application proceeds. The process requires the Applicant to set out precisely the grounds upon which the application is to be advanced. On any such application the High Court has jurisdiction to allow an amendment of the statement of grounds, if it thinks fit. Once an application for leave to appeal has been granted the basis for the review by the Court is established".*

67. In the present case, the relevant order which determines the basis for the review by this Court was made on 22nd June 2020. Thus, the Applicant is confined to seeking the relief set out in that order, namely the relief specified in para. D on the grounds set out in para. E of the Applicant's statement of grounds. I am entirely satisfied that the Applicant has set out precisely the grounds upon which the application is to be advanced and I am equally satisfied that the statement of grounds does not plead a claim based on the *persona designata* issue which was raised in skilled oral submissions during the hearing. Even if I am wrong in that, I am entirely satisfied that there is no evidence which supports such a plea. On the contrary, the uncontroverted evidence by the Chief Appeals Officer wholly undermines such a plea even if it were properly before this Court.

Whether the First Named Respondent exercised her discretion properly

68. On behalf of the Applicant, it was argued that the First Named Respondent did not exercise her discretion properly when refusing to allow a late appeal. In skilled and sophisticated submissions, it was argued that the 2005 Act and the Regulations made thereunder must be interpreted as widely as possible, reliance being placed on the dicta of Peart J. in *L.D. v. Chief Appeals Officer* [2014] IEHC 641 where (at para. 38) the learned judge stated the following: -

> *"The Act should in my view be interpreted as widely as the words reasonably permit in order to reflect the permissive nature of the legislation, and the very detailed procedures laid down for decision-making, and the procedures provided for revision at any time of decisions. It seems to be the clear intention that Applicants for DCA and other benefits are provided with different opportunities to reasonably put their case, and to do so in a fair manner and comprehensively".*

69. The foregoing comments by Peart J. were made in the context of his analysis of the appeals system, as provided for in Part 10 of the 2005 Act. In my view, Peart J.'s decision in *L.D*. reflects the approach which was plainly taken by the First Named Respondent, namely that all circumstances and matters raised by or on behalf of an Applicant be considered. Insofar as Peart J. made reference in *L.D*. to the procedures laid down for decision–making and procedures provided in the 2005 Act relating to review of decisions, it should be borne in mind that, in the 7th November 2019 decision, the Applicant was informed about the three options which were then available to her, should she wish the decision to be reviewed or challenged. The applicant was also put squarely on notice of the 21 – day time limit in respect of an appeal and the fact that a late appeal might not be considered. Furthermore, the principle articulated in *L.D*., that the 2005 Act should be interpreted as widely as the words reasonably permit, does not mean that the First Named Respondent is obliged to permit each and every late appeal which is sought. Even giving the relevant Act and Regulations as wide an interpretation as possible, it is incontrovertible that the Oireachtas has chosen to set a 21 – day time limit for the lodging of appeals and the statutory regime requires the approval of the Chief Appeals Officer for a late appeal to be allowed. Thus, the very structure which the Oireachtas created is one which necessarily acknowledges that, in some circumstances, extensions will be refused, the discretion to allow or refuse late appeals being vested in the First Named Respondent.

The proposition that delay may not be a relevant factor

70. In submissions, it was argued on behalf of the Applicant that delay with regard to seeking an appeal may not be a relevant factor for the First Named Respondent to take into account at all. This is a submission I am bound to reject. It is true to say that the 1998 Regulations do not specify an outer limit by which a request for a late appeal may not be made or may not be considered. However, this is not to suggest that a request for a late appeal must be accepted by the First Named Respondent, regardless of the delay between the original decision and the application which is made for a late appeal. On the contrary, the fact that time is plainly a relevant consideration flows from the decision by the Oireachtas to impose a relatively short 21 – day period during which parties are entitled to bring appeals. Beyond that 21 – day period, a relevant party ceases to have any entitlement to bring an appeal as of right. The "right" to appeal becomes, instead, a question for the discretion of the First Named Respondent, in that Article 9(3) of the 1998 Regulations makes clear that a notice of appeal given after 21 days from the relevant decision ". . . *may, with the approval of the Chief Appeals Officer, be accepted*". If something *may* be accepted, it is plain that the legislation envisages that it *may not* be accepted, depending on the circumstances. Delay is plainly a valid consideration and the Decision in the present case did not, in my view, breach any principle articulated in any of the authorities relied upon by the Applicant, *L.D*. included.

Legislative intent

71. The proposition that the Decision which is challenged in the present case robs the 2005 Act or the relevant Regulations of their "legislative intent" is one I am also bound to reject. It was clearly part of the intent of the Oireachtas that the right to bring an appeal

extended to those who brought their appeal within 21 days of the relevant decision. Thereafter, the approval of the Chief Appeals Officer was required for a late appeal. The legislation envisages that such approval may, or may not, be given, depending on the circumstances. To consider that legislature intended that each and every appeal, regardless of how late, must be allowed is to do violence to the plain meaning of the words used in the Regulations. In the present case, the Chief Appeals Officer declined, for stated reasons, to give approval. The relevant Regulations plainly anticipate a situation whereby certain late appeals will not be permitted, as in the present case. A submission based on an alleged breach of legislative intent cannot avail the Applicant, given the wording used in the legislation.

Significant passage of time

72. It was also argued on behalf of the Applicant that it was inappropriate for the First Named Respondent to regard the lapse of time, from 7th November 2019, as being a "*significant passage of time*" (a phrase which appeared in the penultimate paragraph of the 8th April 2020 decision). I am bound to reject this submission. The permitted time period for an appeal was undoubtedly 21 days, commencing on 7th November 2019. When, on 8th April 2020, the First Named Respondent's letter referred to the significant passage of time since the Decision was made, some 146 days had elapsed since 7th November 2019. 138 days had elapsed between the 7th November 2019 decision and the 31st March 2020 letter from the Applicant's solicitors, requesting that a late appeal be considered. Even if one subtracts from the total of 138 days, the 21 days during which there was an unconditional right to appeal, 117 days had elapsed between 28 November 2020 (the final day for an appeal in accordance with Article 9(2) of the 1998 Regulations) and the 31 March 2020 (the letter requesting a late appeal). In my view, if legislation specifies a time period within which an appeal is to be brought and if delay constituting a *multiple* of that time period ensues, it could hardly be unfair to describe delay as a "*significant*" period of time. Such delay is both substantial and of a significant period, having regard to the 21-day statutory time period prescribed for an appeal.

A fettering of discretion

73. During submissions, it was argued that it was also inappropriate for the First Named Respondent, in the 17th January 2020 letter (declining the first request for a late appeal) to have considered the delay up to that point as being a "*significant passage of time*". It will be recalled that the letter to the Applicant which was sent on 17th January 2020 by the Social Welfare Appeals Office in response to the Applicant's 7th January 2020 request for an appeal, referred, *inter alia*, to "*the significant passage of time since the decision was made*". The 17th January 2020 decision is not the subject of any challenge but in my view the foregoing description could hardly be said to be unreasonable or unfair, given the facts. As of 17th January 2020, over 70 days had elapsed since the decision of 7th November 2019. When compared to the 21 – day period prescribed for appeals, this is undoubtedly a significant passage of time. In submissions it was argued on behalf of the applicant that the reference in both the 17th January 2020 and 8th April 2020 letters to "*the significant passage of time*" suggested a fettering of the First Named Respondent's discretion in respect of the Decision which is challenged. I do not accept this submission.

It seems to me that the view taken by the First Named Respondent on 17th January 2020 to the effect that there had been a significant passage of time since the 7th November 2019 decision was a view which flowed from the facts and was reasonable to take in light of those facts. Similar comments apply in relation to the view expressed in the Decision which is challenged.

74. The evidence demonstrates that, as of 8th April 2019, there had been a significant passage of time since the 7th November 2019 Decision was made. To my mind that is objectively true, and particularly so when one compares the delay to the prescribed 21 – day period in respect of appeals. There is no evidence before the court that the First Named Respondent applied any fixed policy or that her discretion was fettered in any way and submissions based on the phrase "*a significant passage of time since the decision*" offer no support for the claim that there was a fettering of the First Named Respondent's discretion or that a rigid policy was applied or that she erred in the Decision . It was, however, entirely appropriate and within her power for the First Named Respondent to do what the evidence demonstrates that she did, namely to consider all the circumstances of the case, including the submissions made by the Applicant's solicitors of 31st March 2020. As part of that consideration, the First Named Respondent very properly had regard, *inter alia*, to the facts of the case, to the fact of delay, to what excuse or cause was proffered for same and whether any explanation offered constituted, in the view of the Chief Appeals Officer, a good reason or a good cause to exercise her discretion in favour of permitting the late appeal.

75. Earlier in this judgment, I examined the evidence before the court, including the submissions made to the First Named Respondent by the Applicant's solicitors in their 31st March 2020 letter. Suffice to say that no reason was provided which adequately explains the undoubted failure to lodge an appeal within the 21-day prescribed time limit, nor is any explanation proffered which adequately explains why it took until 31st March 2020 for the application to be made in respect of the late appeal, being, as a matter of fact a second request for a late appeal to be allowed. It is also clear from the 31st March 2020 letter that the Applicant's solicitors invited the First Named Respondent to consider "*all the circumstances of this case*" and factors which are explicitly referred to in the 31st March 2020 letter included (1) the date of the original decision of 7th November 2019, (2) the fact that an appeal was not brought on time, (3) delay which was acknowledged to have occurred and (4) things which were said in an obvious attempt to explain the passage of time in the context of the First Named Respondent being asked to exercise her discretion in favour of receiving the appeal.

Relevant considerations in the exercise of discretion to extend time

76. As well as the evidence demonstrating that the First Named Respondent took all relevant circumstances and factors into account, useful guidance is given in Superior Court authorities regarding the considerations to be taken into account in the exercise of discretion to extend time. Among the authorities referred to by counsel for the Respondents is the Supreme Court's decision by Clarke J. (as he then was) in *Tracey v. McCarthy* [2017] IESC 7. In that case, the plaintiff/appellant sought an order extending

time to appeal from a judgment of the High Court given in March 2008, wherein the High Court declined to quash a finding of the Respondent District Court judge. Among other things, the decision in *Tracey* makes clear that it was not necessary for a Respondent to establish prejudice in order to be able successfully to resist an application for an extension of time. This is clear from para. 4.12 of the judgment. At this juncture, it is appropriate to point out that the discretion conferred on the First Named Respondent by Article 9(3) of the 1998 Regulations is a wide one in that she may approve (or not) a notice of appeal which is given after the expiration of 21 days from the relevant decision. Nowhere do the regulations state that the First Named Respondent's discretion to decline to approve a late appeal is dependent on the First Named Respondent, or any other party, establishing prejudice. Although the Supreme Court's decision in *Tracey* plainly concerns the approach of the Superior Courts to the question of an extension of time to appeal, I am satisfied that the principles explained therein provide useful guidance in relation to considerations which are appropriate for other decision-makers to have regard to when exercising a discretion in respect of a late appeal, as in the present case. At para. 4.5, Clarke J. (as he then was) made it clear that there was a requirement on a party who seeks to bring an appeal out of time to furnish an explanation as to why the extension of time is needed as well as why there was delay in bringing the application for an extension of time: -

> *"The question, therefore, really turns on the explanation given for an appeal not being brought in time or, perhaps, more accurately, why an application for an extension of time has not been brought before now. In passing it is worth noting that Goode Concrete provides authority for the proposition that a court needs to consider, in the event that it is satisfied that there is a good explanation for an appeal not being brought in time, whether, nonetheless, the Applicant sought to have time extended in a timely way. The mere fact that one has an acceptable excuse for not appealing within the time provided for by the rules does not mean that one can sit back and wait indefinitely to bring an application for an extension of time. The very fact that the rules provide a relatively short period for filing a notice of appeal necessarily implies that a person is under an obligation to move reasonably quickly if finding themselves in a position where they need to seek an extension of time".*

77. The case before this Court is not an appeal against the 8th April 2020 decision. Nor is it for this Court to substitute its own decision for the one made by the First Named Respondent. I am very conscious of the foregoing, yet it seems to me that to determine the issues before the court, I cannot ignore the evidence. The evidence demonstrates that neither the Applicant, nor anyone representing her, has ever given a clear or satisfactory explanation for the appeal not having been brought in time. Nor has any clear or satisfactory explanation been given in relation to why it was not until 31st March 2020 that a request was made to permit a late appeal. Equally, no explanation has been offered to explain the fact that the 31st March 2020 letter constituted a *second* request to allow a late appeal, the first request having been made on 7th January 2020. Nor has any

explanation been given in relation to the delay up to 7th January 2020 or, for that matter, between 17th January 2020 (when the first request was declined) and 31st March 2020.

Good cause

78. The principles outlined by the Supreme Court in *Tracey* seem to me to be equally relevant to the Decision which the First Named Respondent was called upon to make. It seems to me that it was entirely appropriate for the First Named Respondent, as part of a consideration of all the circumstances, to consider whether there was a good reason or a good cause for the delay in submitting the appeal. That is plainly something the First Named Respondent did and, in my view, this was entirely proper. In skilled submissions it is argued on behalf of the Applicant that the First Named Respondent fell into error by imposing what the Applicant's counsel described as a "*good cause test*" whereas, it was submitted, all that is required under Regulation 9 (3) is for the First Named Respondent's "*approval*" of the late appeal.

79. In submissions on behalf of the Applicant, reliance was placed on the well-known decision in *State (Lynch) v. Cooney* [1982] I.R. 337 in which Henchy J. stated the following with regard to the exercise of a power confirmed by the legislature:-

> *"This means, amongst other things, not only that the power must be exercised in good faith, but that the opinion or other subjective conclusion set as a precondition for the valid exercise of the power must be reached by a route that does not make the exercise unlawful – such as by misinterpreting the law, or by misapplying it through taking into consideration irrelevant matters of fact, or through ignoring relevant matters. Otherwise, the exercise of the power will be held to be invalid for being ultra vires."*

80. For the Applicant, it was submitted that, by using the term "*good cause*" in the Decision, the First Named Respondent had impermissibly imposed a test involved the misinterpretation of the law and the taking into account of irrelevant considerations. The evidence before the court offers no support from that submission. The First Named Respondent was entitled, as part of her consideration of all the circumstances in the case before her, to consider whether a good cause or a good reason had been offered in respect of delay. This was a relevant factor for the First Named Respondent to have taken into account. Nor does the evidence support the submission that the reasons offered by the Applicant's solicitor for the delay were "*discarded*" on the basis of "*the significant passage of time"…*"*which does not even feature in the exercise of discretion*", the foregoing being part of the Applicant's written submissions. Rather, the uncontroverted evidence before the court is that the First Named Respondent considered the totality of the circumstances of the case and this included the passage of time from the 7th November, 2019 decision. The First Named Respondent's consideration of the entire of the circumstances also included the length of the delay and the reasons offered by the Applicant's solicitors for it. Again, these were proper considerations to have regard to. In the manner examined earlier in this judgment, a finding by the First Named Respondent, on 8th April, 2020, that there had been a significant passage of time since the 7th November, 2019 decision was undoubtedly sound and the factual context or analysis

involved in the First Named Respondent expressing such a view was plainly well known to the Applicant and her solicitors, given that all parties were aware of the 7th November, 2019 Decision, how much time had expired since then and what was said in the 31st March, 2020 letter.

81. How, it might be asked, is the First Named Respondent to decide whether to grant or to refuse "*approval*" in respect of a late appeal requested? To my mind, the First Named Respondent can only decide on whether or not to give such approval following a consideration of all the circumstances in respect of the particular case before her. The evidence demonstrates that this is what the First Named Respondent did. Relevant circumstances include whether there was, or was not, a good cause for the delay. This was no error on the part of the First Named Respondent. Rather, it was to engage in the type of consideration the First Named Respondent was required to engage in. Despite dealing with Superior Court appeals, the following observation from para. 4.12 of the Supreme Court's decision in *Tracey* also seems to me to be relevant to the issue:- *"Ordinarily appeals should be brought in time and if they are not, without good and sufficient reason, brought within the time specified then the right to appeal will be lost . . ."*.

82. The evidence before this Court demonstrates that the Applicants appeal was not brought in time. The evidence before the courts also demonstrates that there was no good cause or sufficient reason proffered to explain the failure to bring the appeal in time. The evidence also demonstrates that there was no good or sufficient cause or reason to explain the undoubted delay up to 31st March 2020 when the approval of the First Named Respondent was sought in respect of the late appeal. The Chief Appeals Officer took the view that there were no grounds to accept a late appeal and that could hardly be said to be unreasonable or irrational having regard to the evidence before the court. Nor does the Applicant plead that the Decision was irrational.

83. The approach taken by the First Named Respondent constituted a proper exercise of the jurisdiction vested in her by the 2005 Act and the 1998 Regulations. There was no error in law in respect of the approach taken by the First Named Respondent to the exercise of her discretion. She did not fail to exercise her discretion at all, nor did she fail to exercise her discretion fairly or reasonably. The First Named Respondent did not fail to exercise her discretion in compliance with statute or regulations. Nor did she exercise her discretion in breach of fair procedures or natural and constitutional justice. There is no evidence whatsoever to support the proposition that the First Named Respondent fettered her own discretion. She clearly considered, quite properly, the passage of time between the 7th November 2019 Decision and the application made on behalf of the Applicant to permit a late appeal and the foregoing is one of the factors which it was entirely proper for the First Named Respondent to have considered. It is clear that the First Named Respondent did so in the context of taking into account the circumstances of the case before her. To have done so does not amount to the operation of a fixed policy, nor was it to fetter her discretion. There is no evidence to support the proposition that the First

Named Respondent failed to have regard to relevant factors or applied the wrong test or threshold.

84. The decision of Baker J. in *M.D. v. Minister for Social Protection* [2016] IEHC 70, in which Baker J, granted a declaration that the Respondent erred in law and breached fair procedures and constitutional justice by failing to properly consider all of the evidence furnished by the Applicant, is not a decision which is of relevance in light of the facts before this Court. There is no evidence to show that the First Named Respondent as decision maker did not engage with the evidence before her in a meaningful way or that she erred in law or breached fair procedures or natural and constitutional justice by failing properly to consider all of the evidence furnished by the Applicant.

85. Nor does the decision by Baker J. in *Keon v. Gibbs* [2015] IEHC 812 assist the Applicant in the case before this Court. That case concerned the approach of the High Court to an application to extend time to appeal a decision of the Private Residential Tenancies Board under the provisions of O. 84 C of the Rules of the Superior Courts, an application having been brought by way of notice of motion seeking an order extending time for service and lodgement of a notice of appeal against an order made by the said Board. During the course of the submissions, counsel for the appellant drew this Court's attention to para. 22 of the judgment wherein it is stated that:-

> *"Appeals are by way of notice of motion and the court has power to extend the period for bringing of an appeal pursuant to O. 84C r. 5(b) as follows:*
>
> *'within such further period as the Court, on application made to it by the intending appellant, may allow where the Court is satisfied that there is good and sufficient reason for extending that period and that the extension of the period would not result in an injustice being done to any other person concerned in the matter.'"*

86. It was submitted on behalf of the Applicant that no such language can be found in Article 9(3) of the 1998 Regulations. That is undoubtedly true and nowhere in Article 9(3) will one see any reference to a "good reason" or "sufficient reason" for extending the period within which an appeal against a Deciding Officer's decision can be brought. That is not, however, the end of the analysis. On the contrary, for the First Named Respondent to exercise her discretion properly and lawfully plainly must involve a consideration of factors which are not explicitly referred to in Article 9(3). One of these factors, I am entirely satisfied, is the period of time which has elapsed since the original decision was made. Another factor was undoubtedly the reason proffered as to why an appeal was not brought in time in the first place. A third concerns the reason or reasons proffered to explain why the Applicant did not seek to bring a late appeal at an earlier stage. The First Named Respondent must also have regard to the facts of the case in the context of a consideration of all relevant circumstances involved in the particular case before her. None of the foregoing is spelled out in Article 9(3) which merely refers to the "*approval*" of the Chief Appeals Officer which "*may*" permit a late appeal to be accepted.

Approval

87. It is important to observe, however, that "*approval*" is not a test. Rather, "*approval*" of the Chief Appeals Officer, in respect of a late appeal, is the outcome which is necessary for a late appeal to be permitted. That outcome depends on the First Named Respondent giving consideration to a range of relevant factors as she did in the present case, those factors including delay and the reasons offered in an attempt to excuse same. In other words, the fact that Article 9(3) of the 1998 Regulations does not set out an exhaustive list of the factors which the First Named Respondent is to consider in the context of the proper exercise of her discretion, does not mean that the First Named Respondent fell into error when, in the present case, one of the factors she took into account was whether, having regard to the submissions made by the Applicant's solicitors on 31st March, 2020, a good cause or reason had been given to explain the delay in submitting the request for an appeal. It is in the foregoing context that I am satisfied that the decision in *Keon* provides no basis or support for the relief sought by the Applicant in the present proceedings. On the contrary, it is a decision which, among other things, illustrates the principle that, when considering to permit, or not, a late appeal, it is appropriate for a decision maker to have regard to factors including whether a good reason has been proffered for the delay.

88. There is not dispute between the parties concerning the principle that, where legislation confers a discretionary power, the decision maker must exercise that discretion properly in each individual case. Nor is there any disagreement concerning the principle that a decision maker cannot fetter their discretion with reference to a fixed set of rules or rigid policy. The Applicant has not, however, provided any evidence to support the claim that the First Named Respondent fettered her discretion in any way. During the course of oral submissions, counsel for the Applicant suggested that there could be no greater example of a fettering of discretion than for the First Named Respondent to have impermissibly delegated her decision making power and her discretion to a third party, being what was suggested on behalf of the Applicant. I have already addressed this argument which, I am entirely satisfied, is nearly pleaded in the case before this Court, nor supported by any evidence. On the contrary, uncontroverted evidence conclusively refutes this proposition.

Section 301(1)(a) of the 2005 Act

89. Section 301(1)(a) of the 2005 Act provides a right to seek a review of a decision made by a Deciding Officer. The relevant extract from the section states as follows:-

> *"A deciding officer may at any time—*
>
> *(a) revise any decision of a deciding officer—*
>
> *(i) where it appears to him or her that the decision was erroneous—*
> *(I) in the light of new evidence or of new facts which have been brought to his or her notice since the date on which the decision was given, or*
> *(II) by reason of some mistake having been made in relation to the law or the facts"*

90. Thus, s. 301 creates a very broad power pursuant to which decisions made by Deciding Officers under s. 300 can be revised. There is no time limit in respect of such a revision.

Nor is the power limited to revising a decision which is said to have involved an error of law. On the contrary, a revision of a decision is possible where it appears that there was a mistake in relation to the law or in relation to facts or in light of new evidence or in light of new facts. It is uncontroversial to say that if someone is unhappy with a decision made by a Deciding Officer but did not seek an appeal within the prescribed 21-day period or if they were unable to secure approval in respect of a late appeal, they nonetheless remain entitled to seek a review of a Deciding Officer's decision pursuant to s. 301(1)(a). It will be recalled that in the original Decision of 7th November, 2019, the Applicant was specifically informed that one of the options available to her was her right to request a review. Regardless of any decision this Court makes, that option remains available to the Applicant in the context of what is a very comprehensive framework in the 2005 Act providing a variety of routes by which decisions can be challenged.

Decision Summarised

91. For the reasons detailed in this decision, I am satisfied that the Applicant has not established an entitlement to any of the relief sought. Article 9(3) of the 1998 Regulations undoubtedly vests in the Chief Appeals Officer a discretion to allow an appeal to be lodged outside of the 21-day period prescribed in Article 9(2). Regardless of how wide an interpretation is given to the relevant provisions in the 2005 Act and the 1998 Regulations, the discretion granted to the Chief Appeals Officer to allow an appeal to be lodged outside of time necessarily means that, in the proper exercise of this discretion, some appeals will not be allowed, as in the present case. In taking into account, *inter alia*, the passage of time between the original Decision and the application for a late appeal, the First Named Respondent did not take an irrelevant matter into account or wrongly exercise her discretion or fetter the discretion conferred on her by legislation. In my view, the proposition that such delay is not one of the relevant factors to be taken into account by the First Named Respondent in the exercise of her discretion under Article 9(3) is unsustainable. In my view, delay and what is said to have caused the failure to bring an appeal within the prescribed 21 day time period and what is said to be the cause of further delay with regard to seeking consent to bring a late appeal and whether there is a good explanation comprise relevant factors for the Chief Appeals Officer to take into account in the context of considering all facts and circumstances in respect of the case before her. The proposition, advanced on behalf of the Applicant, that the Chief Appeals Officer erred by asking whether there was a good cause or good reason for delay is predicated on the proposition that an Applicant does not have to justify the granting by the Chief Appeals Officer of an extension of time. In truth, it is a proposition which would rob the Chief Appeals Officer of her discretion, as the logic of the argument is that the Chief Appeals Officer must approve an extension of time whenever this is sought, regardless of the delay since the original decision and regardless of the reason, or lack of reason to explain the delay.

92. The foregoing proposition, in my view, flies in the face of the relevant legislative regime and is wholly inconsistent with principles derived from the authorities. In the manner explained in this decision, I am satisfied that the Applicant's claim falls to be dismissed. In taking this decision, I want to make clear that this Court could have nothing but

sympathy for the Applicant and her son and the fact that the Applicant's 7th January 2020 request for an appeal (which was declined on 17th January 2020) was not referred to at the leave stage has played no part in this Court's decision. Mistakes can and do happen and this is entirely understandable. Nor has the existence of the right enjoyed by the Applicant pursuant to s. 301(1)(a) of the 2005 Act been relevant to this Court's decision. It does, however, remain open to the Applicant, at any time, to seek a revision of the 7th November 2019 decision under that section, although, for the reasons set out in this judgment, the Applicant's case is one which must be dismissed.

93. On 24th March 2020 the following statement issued in respect of the delivery of judgments electronically:

> *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."*

Having regard to the foregoing, the parties should correspond with each other forthwith, with regard to the appropriate form of final order, including as to costs. In default of agreement between the parties on that issue, short written submissions should be filed in the Central Office within 21 days from the date of this judgment.