THE HIGH COURT

[2021] IEHC 215

[Record No. 2020/569 JR]

BETWEEN

H

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, THE MINISTER FOR JUSTICE, AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

DÁIL EIREANN

NOTICE PARTY

JUDGMENT of Mr. Justice Barr delivered electronically on the 24th day of March, 2021

Introduction

1. On 26th November, 2019 the applicant was charged with one count of assault causing harm and one count of false imprisonment of a particular person, on 17th September, 2019, contrary to ss.3 and 15 of the Non-Fatal Offences Against the Person Act 1997. The count of assault causing harm was later withdrawn and replaced with one of causing serious harm contrary to s.4 of the Non-Fatal Offences Against the Person Act 1997.

2. On 26th March, 2020 the first named respondent at a hearing at Cavan District Court, indicated through her representative that she had certified that in her opinion, the ordinary courts were inadequate to secure the effective administration of justice and the preservation of public peace and order in this case and that the prosecution should proceed before the Special Criminal Court. Upon receipt of that direction, the court returned the applicant for trial to appear before the Special Criminal Court in respect of the charges laid against him.

3. On 14th August, 2020, the applicant was given leave to proceed by way of an application for judicial review. In his notice of motion filed in the Central Office of the High Court on 19th August, 2020, the applicant has sought the following reliefs:-

"(1) *A declaration that any proclamation pursuant to s.35(2) of the Offences Against the State Act 1939 is only effective as a temporary measure.*

(2) *A declaration that the circumstances giving rise to the proclamation made by the Oireachtas pursuant to s.35(2) in 1972 can no longer be described as temporary, having regard to the considerable elapse of time.*

(3) *A declaration that the failure by the Oireachtas to enact anything other than temporary measures in respect of procedures for the trial of persons coming before special courts amounts to a breach of the right of the plaintiff under Article 38 of the Constitution.*

(4) *A declaration that the legislation enacted by the Oireachtas fails to give adequate guidance or set out sufficient criteria to determine when ordinary courts are*

inadequate and which categories of cases are appropriately dealt with before non-jury courts.

(5) If necessary an extension of time to bring proceedings on the basis that it is appropriate in the interest of justice to do so.

(6) Such further or other order as to this honourable Court may appear to be just and meet the case.

(7) An order providing for costs."

4. In essence, the argument put forward on behalf of the applicant is in the following terms: it is submitted that Part V of the Offences Against the State Act 1939, which provides for the making of the requisite proclamation by the Government and the establishment of the Special Criminal Court thereunder, are clearly intended to be temporary and emergency provisions. It was submitted that the temporary and emergency nature of the measures put in place pursuant to Part V of the Act, was clearly recognised in *The People (DPP) v. Quilligan* [1986] I.R. 495 and *Kavanagh v. Government of Ireland [*1996] 1 I.R. 321.

5. The applicant submitted that the present application essentially turned on an issue of statutory interpretation. It was submitted that the clear meaning of the words contained in this part of the Act, meant that the provisions put in place by the making of a proclamation by the Government were only intended to be temporary and emergency in nature. Where the current Special Criminal Courts had been in existence pursuant to a proclamation made in 1972 and had therefore been in existence for over 49 years and with no sign of that existence coming to an end, it could not be said that such provisions were either temporary or emergency in nature. It was submitted that in these circumstances, the continued existence of the Special Criminal Court under the proclamation made in 1972, was *ultra vires* the power given to the Government in the 1939 Act.

6. By way of preliminary objection, the respondent submitted that the applicant's application herein was out of time and that no adequate reason had been given by the applicant why the court should extend the time pursuant to the power conferred on it by O.84, r.21(3) of the Rules of the Superior Courts. Without prejudice to that objection, the respondent submitted that the proper construction of Part V of the 1939 Act, made it clear that the Government was entitled to make a proclamation providing for the establishment of special courts whenever it determined that it was necessary so to do. It was submitted that there was no provision in the statute whereby such courts could only be of limited duration, nor was there any sunset clause providing that such courts could only last for any particular period of time. It was submitted that the continued existence of the present Special Criminal Courts pursuant to the proclamation made in 1972 was entirely within the provisions of the Act.

7. The first issue that arises for determination is the issue as to whether the application herein was brought outside the time prescribed by the rules and, if so, whether the court

should grant an extension of time to the applicant to enable him to proceed with his application herein. In order to determine that issue, it is necessary to set out the background to the proceedings.

Background

8. As already noted, on 26th November, 2019, the applicant was charged with the offences stated above. At a hearing before Cavan District Court on 26th March, 2020, a representative of the first respondent, stated in open court that the first respondent had certified that the ordinary courts were not adequate for the administration of justice in this case and therefore she had directed that the applicant should be sent forward for trial to the Special Criminal Court. An order in those terms was made by the District Court. While Mr. John Quinn, the applicant's solicitor, has not stated in his affidavit the date upon which he began representing the applicant, it would appear that he was certainly representing him by the time of the court hearing on 26th March, 2020, due the fact that he has set out in his affidavit what transpired at the court hearing on that date.

9. By email dated 17th April, 2020, the applicant's solicitor requested the first respondent to set out her reasons why the matter was being prosecuted before the Special Criminal Court. When he received no response to that query, he sent a further email on 29th April, 2020, reiterating the request.

10. On 30th April, 2020 the applicant's solicitor received an email from a solicitor with responsibility for the Special Criminal Court section in the first respondent's office, indicating that she had passed the query to the relevant Directing Officer and that she was awaiting a response.

11. When the applicant's solicitor received no further correspondence in the matter, he sent a further email on 3rd June, 2020 reiterating the previous requests. He informed the first respondent that if the applicant did not receive a response outlining her reasons, within a period of seven days, Mr. Quinn would have no option but to initiate court proceedings on behalf of his client.

12. By letter dated 19th June, 2020 the Chief Prosecution Solicitor in the office of the first respondent, set out the reasons for the decision that had been made by the first respondent, in the following terms:-

> *"These offences are not scheduled under Part V of the Offences Against the State Act 1939. The DPP directed that your client be prosecuted before the Special Criminal Court when she certified in accordance with s.46(2) of the 1939 Act that she was of the opinion that the ordinary courts were inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to his trial.*
>
> *The Director formed the opinion on the basis of information furnished by An Garda Síochána that your client is a member of a criminal organisation and is also associated with an unlawful organisation, both of which would be prepared to*

interfere with the administration of justice, and in particular to intimidate or otherwise interfere with a jury."

13. In his affidavit sworn on 14th August, 2020, Mr. Quinn stated that having become aware of that correspondence, the applicant instructed that he was anxious to discuss matters with counsel. Due to the ongoing Covid-19 crisis, ordinary visits with prisoners did not take place. Practitioners were only in a position to avail of video call facilities. Mr. Quinn went on to state that on an unspecified date he contacted Castlerea Prison and indicated his desire to arrange a consultation with his client. He was informed that one would take place on 16th July, 2020. He stated that on that date both he and counsel were informed some minutes before the consultation was to commence, that it could not be facilitated due to logistical issues within the prison. He stated that he again contacted the Irish Prison Service and a further video consultation was scheduled for 11th August, 2020.

14. Mr. Quinn went on to outline what occurred at that consultation in his affidavit in the following terms at para. 13 (although numbering sequence incorrect):-

> *"13. I say that on that date the reasons given by the first named respondent were discussed with the applicant. I informed him that the legal challenge that had previously been envisaged in respect of the failure to give reasons was no longer an issue, insofar as the first named respondent had now set out the basis relied upon for the issue of a certificate pursuant to s.46(2) of the 1939 Act. However, the applicant maintained his dissatisfaction with the fact that his trial would be governed by temporary emergency legislation, in circumstances where the rationale for special courts could no longer be said to be temporary, having regard to the fact that the proclamation made in 1972 pursuant to s.35(2) of the 1939 Act had not been revoked."*

15. On 14th August, 2020, an ex parte application was made to the High Court on behalf of the applicant seeking liberty to seek the reliefs set out in his statement of grounds by way of judicial review. Leave was granted to the applicant on that occasion. On 19th August, 2020 the notice of motion herein was filed in the High Court. A statement of opposition was filed on behalf of the respondents on 6th October, 2020. On 12th January, 2021, on the application of the applicant, an order was made by the High Court joining the notice party to the proceedings.

Order 84, r.21 of the Rules of the Superior Courts

16. As the first issue for determination by the court is whether the present application has been brought beyond the time permitted by the RSC and, if so, whether the court should extend time for the bringing of the application, it is appropriate to set out the relevant provisions of the rules. The current version of O.84, r.21 was inserted into the Rules by S.I. 691 of 2011. It is in the following terms:-

> *"21. (1)An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose."*

[…]

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

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

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

(i) *were outside the control of, or*

(ii) *could not reasonably have been anticipated by*

the applicant for such extension."

Submissions of counsel on the time issue

17. It was submitted on behalf of the applicant, that his application was not out of time due to the fact that there had been a delay on the part of the first respondent in furnishing reasons as to why he should be tried before the Special Criminal Court, rather than before the ordinary courts and that in these circumstances, where the applicant was considering whether he would have to bring a judicial review application in respect of the failure of the DPP to give reasons, he was not out of time to bring the application, as the delay had been caused by virtue of the fact that the applicant's solicitor had allowed the first respondent considerable time within which to furnish her reasons, which had only been furnished by letter dated 19th June, 2020.

18. In the event that the court were to hold that the applicant was out of time to bring his challenge to the decision communicated to him on 26th March, 2020, it was submitted that in the circumstances of the case, the applicant came within the provisions of O.84, r.21(3). It was submitted that there had been good and sufficient reason why the applicant had not lodged his application within three months of the making of that decision and that the circumstances that resulted in his failure to do so were outside his control and/or could not reasonably have been anticipated by him.

19. In this regard, counsel pointed to the fact that in 2020 the country was in the grip of a global pandemic. The normal facilities for consultation between solicitor and client were not available. It was necessary for solicitors to book a time slot whereby they could consult with their client via a video call.

20. In this case, that impediment had been further exacerbated by virtue of the fact that the consultation arranged for 16th July, 2020 had had to be cancelled by the prison authorities at very short notice due to "*logistical issues*". While the applicant's solicitor had rearranged the consultation, that had not taken place until 11th August, 2020. The application for leave to proceed by way of judicial review was made very shortly thereafter on 14th August, 2020.

21. Counsel submitted that these were very unusual, if not unique circumstances, which provided good and sufficient reason for the failure of the applicant to make his application herein within the relevant three-month period.

22. A further ground relied upon as constituting a good and sufficient reason why the application had not been made within time and which demonstrated that such circumstances were beyond the control of the applicant, was the fact that despite a request for a statement of reasons being made on behalf of the applicant of the first respondent on 17th April, 2020 and despite reminders thereafter, it was not until 19th June, 2020 that reasons were actually furnished by the first respondent. It was submitted that up to the time when the first respondent delivered the reasons, she had acted in clear breach of her duty to state reasons as provided for in *Murphy v. Ireland* [2014] 1 I.R. 198.

23. It was submitted that where the first respondent had delayed for an unreasonable length of time in furnishing reasons, the applicant and his legal advisers had had to consider the necessity of bringing the necessary proceedings to compel the delivery of such reasons. Such proceedings had been threatened in the email sent by the applicant's solicitor on 3rd June, 2020. It was submitted that where there was a realistic possibility that the applicant may have had to bring two judicial review proceedings against the same party, being the first respondent, and arising out of the same set of circumstances; it was reasonable that he would hold off issuing proceedings until it had been determined whether it was necessary to proceed with the second limb of the proceedings.

24. Counsel submitted that the rule in *Henderson v. Henderson* (1843) 3 Hare 100, provided that if a person had a cause of action, it was necessary to bring all such causes of action in the one set of proceedings against the same defendant or respondent.

25. Counsel stated that while the general principle in judicial review was that such proceedings had to be brought promptly, that was understandable in the area of judicial review where the beneficiary of a decision may have acted on foot of the decision being valid and may have incurred considerable expense in so doing. In such circumstances it was understandable that the time limits would be strictly enforced, so that parties would be aware when the decision was free from challenge. However, no such considerations arose in this case. Similarly, the rationale for the strict application of the time limit in judicial review proceedings, often arose due to the fact that third parties may also have acted on the basis that the particular decision in question was valid. Again, it was submitted that no such considerations arose in this case.

26. Counsel further pointed out that the applicant had not sought any stay on his trial proceeding. Indeed, the Special Criminal Court had offered to proceed with the trial, but to hold off issuing their verdict pending the outcome of the within application. It was submitted that even if the applicant was successful in these proceedings, there was nothing to prevent the Government bringing in fresh legislation to establish a new Special Criminal Court, before which the applicant could be tried.

27. Counsel accepted while there was nothing to specifically prevent the applicant bringing his judicial review concerning the legality of the current Special Criminal Court; in reality, it was necessary for him to seek the reasons why he had been sent forward for trial before that court and it was reasonable for him to await those reasons. The first respondent had delayed unreasonably in furnishing reasons. In so doing she had used up six weeks of the applicant's time within which to challenge the decision of March 2020. It was important to note that the applicant had had no control over the delay on the part of the first respondent in furnishing her reasons.

28. It was submitted that those facts, coupled with the difficulty in carrying out a consultation between solicitor and client due to the Covid-19 Pandemic, meant that the court had ample material before it to find that there was good and sufficient reason why the applicant had not made his application within time and that the circumstances that resulted in his failure to make the application within the period so prescribed, had been outside his control and/or could not reasonably have been anticipated by him. It was submitted that in these circumstances it was open to the court to extend the time for the bringing of this application.

29. In response, Mr. Farrell SC submitted that there was nothing relevant to this application in the email correspondence that had been exhibited by Mr. Quinn in relation his requests seeking reasons from the first respondent; nor was there anything in the response actually furnished by the respondent on 19th June, 2020, that was in any way relevant to the subject matter of the proceedings herein. In other words, the reasons set out by the first respondent, did not impact in any way on the challenge that the applicant sought to make in these proceedings to the continued existence of the Special Criminal Court.

30. It was agreed between the parties that the substantive challenge herein turned almost exclusively on a question of the correct statutory interpretation of the relevant provisions of Part V of the 1939 Act. As such, the giving of reasons by the first respondent for her decision to have the matter tried before the Special Criminal Court, and any delay that there may have been on her part in furnishing such reasons, were quite irrelevant to the proceedings. Accordingly, they did not represent any excuse for a delay in bringing the present application before the court.

31. It was submitted that the matters deposed to in the affidavit sworn by Mr. Quinn, had not shown good and sufficient reason why the application had not been made within three months of 26th March, 2020; nor had he complied with the requirements of the second part of sub-rule (3) and shown that such circumstances were outside the applicant's control, or could not have been anticipated by the applicant.

32. It was submitted that the test which the court had to apply in the circumstances of this case had been set down in the judgment of Finlay Ge*oghegan J in MO'S v. Residential Institutions Redress Board & Ors.* [2018] IESC 61, at para. 60. It was submitted that the applicant had not complied with the requirements of that test.

33. It was submitted that the most that the applicant had been able to point to was that at a given point in time, he had been considering taking other judicial review proceedings in relation to the alleged failure of the first respondent to furnish her reasons and that in the events which transpired, namely that reasons were furnished by her, that issue went nowhere. That was not a good reason why the within application had not been moved before the High Court, when the applicant had known on 26th March, 2020 that the first respondent had directed that he should be tried before the Special Criminal Court. If he wished to challenge the lawful existence of that court, his right to do so arose at that time. He did not have to await any further events, or statement of reasons to enable him to mount the case that he had put forward in the within proceedings.

34. Counsel stated that while the applicant had attempted to downplay the significance of his application, by referring to the fact that he was only seeking various declarations, as set out in his notice of motion. That could not disguise the fact that his application was effectively a broad based attack on Part V of the 1939 Act and the current Special Criminal Court established thereunder. If the court were to hold that the proclamation of 1972, as extended, could not be a valid root of title for the current Special Criminal Court, then the first respondent's certificate in respect of the trial of the applicant before the Special Criminal Court would be unlawful and the ongoing operation of the Special Criminal Court in the current circumstances would also be unlawful. Thus, it could not be said that the fact that he was seeking certain declaratory reliefs, did not prevent the action having extensive consequences.

35. In this regard, counsel referred to the decision of Charleton J in *XX v. Minister for Justice* [2019] IESC 59, as authority for the proposition that an applicant could not attempt to by-pass statutory or other limiting provisions by dressing his action up as one for merely declaratory reliefs.

36. It was submitted that the absence of an application for a stay on the prosecution of the applicant, did not provide any excuse for his failure to apply for judicial review within the time prescribed by the rules. The fact that he was not seeking a stay on his prosecution, did not mean that the time limit did not apply.

37. It was submitted that the fact that the consultation originally scheduled for 16th July, 2020 did not go ahead, due to there being logistical issues on the day of the consultation, was quite irrelevant, because that consultation was outside the three-month period, which had expired on 25th June, 2020.

38. It was submitted that the existence of the global pandemic in 2020 was also irrelevant, because the applicant had not put any evidence before the court to the effect that he or his solicitor had tried to arrange a consultation within the three-month period, but had been prevented from so doing due to restrictions caused by the pandemic.

39. It was submitted that the reference to the delay in furnishing reasons, was irrelevant, as that was a separate issue and did not impact upon the maintainability of the argument which the applicant sought to put forward in these proceedings.

40. In summary, it was submitted that the applicant had not provided any reason, much less a good and sufficient reason, why he had not moved his application for leave to seek judicial review until over four and a half months after the decision had been communicated to him. It was submitted that in such circumstances, the court should not accede to his application to extend time for the bringing of this application.

Conclusions

41. In this case the decision which is the trigger for the within application, was communicated to the applicant on 26th March, 2020. Time expired under the rules for challenging that decision on 25th June, 2020. As the applicant's *ex parte* application was moved on 14th August, 2020, he is therefore outside the time prescribed in the rules for seeking judicial review of that decision. In these circumstances, the applicant requires an order extending the time for the bringing of such application, if his application is to proceed.

42. The principles which the court should apply when considering whether to extend time pursuant to O.84, r.21(3) were considered by Finlay Geoghegan J when delivering the judgment of the Supreme Court in the *MO'S v. Residential Institutions Redress Board* case. Having considered legal authorities in relation to the previous iteration of O.84, r.21, the judge summarised the principles that should be adopted when considering an application to extend time under the current form of the rules at para. 60:-

> *"I have concluded that the case law cited above, insofar as it applies to the extension of the time specified under O. 84 for the bringing of judicial review proceedings, makes clear that the jurisdiction which the Court is to exercise on an application to extend time is a discretionary jurisdiction which must be exercised in accordance with the relevant principles in the interests of justice. It clearly requires an applicant to satisfy the Court of the reasons for which the application was not brought both within the time specified in the rule and also during any subsequent period up to the date upon which the application for leave was brought. It also requires the Court to consider whether the reasons proffered by an applicant objectively explain and justify the failure to apply within the time specified and any subsequent period prior to the application and are sufficient to justify the Court exercising its discretion to extend time. The inclusion of sub-rule (4) indicates expressly that the Court may have regard to the impact of an extension of time on any respondent or notice party. The case law makes clear that the Court must also have regard to all the relevant facts and circumstances, which include the decision sought to be challenged, the nature of the claim made that it is invalid or unlawful and any relevant facts and circumstances pertaining to the parties, and must ultimately determine in accordance with the interests of justice whether or not the extension should be granted. The decision may require the Court to balance rights of an applicant with those of a respondent or notice party. The judgments cited do not, in my view, admit of a bright line principle which precludes a court taking into account a relevant change in the jurisprudence of the courts when deciding whether an applicant has established a good and sufficient reason for an extension of time. Further, the judgments cited above do not envisage any absolute rule in relation to*

what may or may not be taken into account or constitute a good reason or a good and sufficient reason. The Court, in an application for an extension of time, is exercising a discretionary jurisdiction and in the words of Denham J. in de Roiste, '[t]here are no absolutes in the exercise of a discretion. An absolute rule is the antithesis of discretion. The exercise of a discretion is the balancing of factors - a judgment.'"

43. The court is satisfied that in applying these principles to the present application, it is necessary for the court to have regard to all of the circumstances of the case. It is significant that there is no evidence in the affidavit sworn by Mr. Quinn on behalf of the applicant, that either he or the applicant had even considered challenging the continued existence of the Special Criminal Court at any time within the twelve-week period after 26th March, 2020.

44. Nor is there any evidence that the applicant tried to communicate with his solicitor in the twelve weeks following 26th March, 2020, but was prevented from so doing due to any restrictions on consultations that may have been imposed by the Prison Service due to the Covid-19 pandemic.

45. Similarly, there is no evidence that Mr. Quinn tried to contact the applicant, but was unable to do so within that three-month period. While it was not definitively stated by Mr. Quinn that he did not have any consultation with his client subsequent to 26th March, 2020 and before the consultation that had been arranged for 16th July, 2020; the court will infer from Mr. Quinn's affidavit that no such consultation took place. The court is also prepared to assume that there was no telephone contact permitted between them during that period. However, there is no evidence that either sought to consult with the other during this period.

46. The evidence as set out in Mr. Quinn's affidavit, suggests that having requested a statement of reasons from the first respondent and having allowed a reasonable period for a response, but without any response being provided, the applicant and his legal team had considered taking a legal challenge against the respondent to force her to furnish her reasons. The bringing of such proceedings had been threatened in Mr. Quinn's email of 3rd June, 2020. Thus, insofar as any judicial review application was in contemplation at all, it would appear that it related to the continuing failure of the first respondent to provide reasons for her direction that the applicant should be prosecuted before the Special Criminal Court.

47. It is not stated when the applicant's solicitor made the request of the authorities in Castlerea Prison for a video call conference between him, counsel, and the applicant; however, a date was given for such a call on 16th July, 2020. The fact that that consultation was aborted minutes before it was due to go ahead due to "logistical issues", is irrelevant, because it took place outside the three-month period for challenging the decision made by the respondent to send the applicant forward for trial to the Special Criminal Court, which decision had been communicated to him on 26th March, 2020.

48. Paradoxically, the fact that consultations between lawyers and clients could only be held via video call due to the Covid-19 pandemic, may actually have been to the benefit of the applicant's solicitor and counsel, because it meant that they did not have to travel to Castlerea Prison in county Roscommon to consult with their client in advance of launching the proceedings. They were able to consult with him without leaving their offices in Dublin. While there may have been some delay in obtaining a time slot for the holding of the video call, there has been no evidence that there was in fact any appreciable delay between the lodging of an application for such a call and the call itself taking place. Nor is there any evidence that if it were indicated to the prison authorities that the call had to take place as a matter of urgency, due to the imminent expiry of a limitation period, that such would not have been accommodated.

49. Again, it is not clear when the applicant's solicitor asked for the video call to be rescheduled, but it was in fact held on 11th August, 2020. It appears that at that consultation, the applicant was informed that as reasons had been furnished by the first respondent, there was no prospect of a judicial review challenge on grounds of her failure to provide reasons. It appears that it was in those circumstances that the applicant instructed his solicitor and counsel to mount a challenge to his being sent forward for trial before the Special Criminal Court on the grounds set out in these proceedings. It appears that that was the first time that that ground of challenge was considered.

50. That challenge to the continued existence of the Special Criminal Court was a legal challenge that turned exclusively on the interpretation of Part V of the 1939 Act. It was not dependent on any instructions in relation to factual matters that could only have been given by the client. Accordingly, there is nothing before the court to suggest that the applicants could not have obtained these instructions before the consultation held on 14th August, 2020; nor indeed prior to the expiry of the relevant period on 25th June, 2020. In other words, the mounting of the challenge the subject matter of these proceedings, did not depend on any specific factual instructions, or information that could only have been furnished by the applicant.

51. If it transpired that a decision had been made to proceed with the current judicial review application, but it was not possible to get formal instructions to institute the proceedings from the client, due to a delay in scheduling the video call; I am of the view that the applicant's solicitor would have had authority within his inherent authority as solicitor, to institute the proceedings on behalf of his client to stop the clock running as it were, notwithstanding that he did not actually have formal instructions from his client to proceed. It could have been indicated to the judge at the ex parte stage, that the proceedings were being opened so as to prevent the applicant's application becoming time-barred and that in the event that formal instructions to proceed were not obtained, the matter could easily have been withdrawn prior to service of the notice of motion and therefore no costs would have been incurred.

52. The court accepts the argument put forward by Mr. Farrell SC on behalf of the respondent that the email correspondence that was exhibited in Mr. Quinn's affidavit requesting a

statement of reasons from the first respondent and any delay that there was in furnishing those reasons, were not relevant to any decision that had to be made in relation to the bringing of the within proceedings. They were separate and distinct matters. The applicant's ability to mount his present challenge to the Special Criminal Court, was not dependent upon on any statement of reasons that was ultimately furnished by the first respondent on 19th June, 2020.

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

54. It was submitted on behalf of the applicant that, as he was awaiting delivery of reasons by the respondent and after various reminders and the threat of proceedings if reasons were not produced within seven days from 3rd June, 2020; it was reasonable for the applicant to hold off proceeding with his challenge to the decision of the respondent communicated on 26th March, 2020, so that his challenge based on the failure to give reasons, could be encompassed in a single set of judicial review proceedings.

55. The fact that a party may be contemplating a second set of judicial review proceedings on different grounds altogether, albeit against the same party, is not a reason not to apply within time for judicial review in respect of the first decision. Indeed, it is noteworthy that it has not been averred by Mr. Quinn that any decision had been taken by the applicant, or his legal advisers, to mount the within proceedings within three months of the decision, or indeed at any stage prior to the consultation with the applicant held on 11th August, 2020.

56. Where a person and their lawyers are of opinion that there are grounds to seek judicial review against a party in respect of a particular decision, it is incumbent on them to make their application for leave to challenge that decision within three months. If they feel that they may have a separate ground of challenge, which will not crystallise until some subsequent date, it is not appropriate to hold off proceeding in respect of the first decision, until they make up their minds whether they will challenge the second decision or action.

57. The appropriate course to adopt in such circumstances, is to bring an ex parte application seeking leave to challenge the first decision within time and, if necessary, at a later stage, if they want to challenge some further decision, or action (in this case a failure by the respondent to give reasons); they should either apply to amend the first set out proceedings so as to incorporate the second ground of challenge, or they should bring a separate leave application and subsequently apply to have the two sets of judicial review

proceedings consolidated into a single set of proceedings pursuant to O.49, r.6. If that had been done, that would have removed any concerns that the applicant may have had based on the rule in *Henderson v. Henderson*.

58. In cases where there is a possible challenge to a second decision or action (including a failure to act), it is not appropriate to defer taking the necessary steps to challenge the first decision until some future date, when the applicant has decided that he would not in fact bring any further judicial review proceedings in respect of a different matter and then use that decision not to proceed with judicial review proceedings, as a basis for seeking an extension of time within which to challenge the first decision.

59. If the court were to adopt the argument put forward by the applicant, that an applicant could defer instituting judicial review proceedings seeking leave to challenge a particular decision, on the grounds that the applicant was considering taking further judicial review proceedings against the same respondent, but had ultimately decided not to do so, that would effectively mean that the applicable limitation period for challenging such decisions, would in effect become completely open ended. The time period would then become dependent upon the applicant's state of intention in relation to other separate judicial review proceedings. That would mean that an applicant could determine the relevant period for challenging the decision by reference to whatever date it was when he decided not to proceed with other contemplated proceedings; thereby making the relevant period entirely open ended at the behest of the applicant. That would be absurd.

60. While it was argued on behalf of the applicant that as he was merely seeking declaratory relief and as he had not sought a stay on the prosecution against him, there were no third party rights affected by the within proceedings. It seems to the court that this argument is without substance. The court prefers the argument put forward on behalf of the respondents that there are far reaching consequences involved in these proceedings. The fact that the application is framed in the form of seeking declaratory reliefs, does not obscure the fact that it is in effect a full-blown attack on the provisions of Part V of the 1939 Act and more particularly, the current Special Criminal Court established under its provisions. In this regard the court is mindful of the dicta of Charleton J in the XX case; see in particular dicta at paras. 25 and 26 thereof.

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

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

62. The parties will have four weeks from receipt of this judgment to make written submissions as to the form of the final order and on any ancillary matters that may arise.