TIME LIMITS IN REGULATORY APPEALS: THE RECENT CASE LAW

I. Introduction

1. There are certainly more interesting topics in the world than time limits in appeals from statutory disciplinary tribunals. However, while other mistakes or misjudgements made in the context of disciplinary inquiries are generally capable of remedy, a failure to appeal within time can be fatal. A registrant may be stuck with a sanction or finding of professional misconduct which might fundamentally impact on his or her career, which may have been open to challenge on appeal; depending on the circumstances, the registrant's lawyer may be facing into a costly a professional negligence suit. There may be more exciting areas of professional regulatory law, but few such areas have a sharper edge.

2. Over the past few years, this topic has been afforded significant judicial scrutiny, both in this jurisdiction and in the United Kingdom. This jurisprudence has largely focused on the question of whether apparently mandatory time limits for appeals from disciplinary bodies can ever be subject to judicial extension. There is now relatively settled case law in the United Kingdom whereby the European Convention of Human Rights ("*ECHR*") has been used so as to read a very limited saver into statutory provisions which ostensibly provide for absolute time limits for appeals from disciplinary tribunals.

3. The Irish position on this issue is not wholly clear. However, in the last year there have been two decisions in which the question of time limits has been given detailed consideration.

4. In 2016, in *Law Society v Callanan and Tobin* [2016] IECA 26 ("*Tobin*"), the Court of Appeal held that a 21-day time limit to appeal decisions made by the High Court pursuant to section 8 of the Solicitors Act was directory (and therefore capable extension), rather than mandatory and absolute, in nature. In circumstances, where an appeal is lodged outside of this time limit, the well-known principles set out in *Eire Continental Trading Limited v. Clonmel Foods Limited* [1955] IR 170 ("*Eire*

Continental") may be applied in determining whether an extension of time should be granted.

5. In contrast, in a case which was decided in January of 2017, *Curran v Solicitors Disciplinary Tribunal* [2017] IEHC 2 ("*Curran*"), the High Court (Eagar J) held that section 7 (12) (b) of the Solicitors (Amendment) Act, 1960 Act enacted a mandatory 21-day time limit for an appeal against a finding of the Solicitors Disciplinary Tribunal ("*SDT*") that there was no misconduct/prima facie case of misconduct. This time limited was absolute in nature and therefore not capable of extension.

6. The principal focus of this paper is to discuss these two cases – what they decide, how they are to be reconciled and what questions they leave open. I also want to briefly discuss the approach which has been adopted in the United Kingdom to this issue. At the outset, I think it might be helpful to identify some of the most important statutory provisions which prescribe time limits for appeals from disciplinary bodies.

II. The Time Limits: An Overview

7. As practitioners are well aware, there is significant variation in the legislation which governs the regulation of professionals in this country. While the position varies, the most common structure is that a fitness to practice committee will conduct the substantive disciplinary inquiry and embody any findings of professional misconduct or recommendations as to sanctions in a report. The formal sanctioning power is given to a separate body and all but the most minor infractions require the imprimatur of the High Court.

8. In this conventional structure, the time limit to appeal runs from the date of the decision of the sanctioning body (and the more minor forms of sanction – such as advice/admonishment/censure and are often not subject to any appeal at all). Therefore, the most important time limits in practice are those which govern appeals from the relevant sanctioning body to the High Court.

9. I have attempted to identify some of the most important time limits which practitioners need to be aware of in the **Appendix** to this paper. As is clear from that appendix, like much of this area, there has been an absence of joined-up thinking over the years and there are significant differences in the time limits for appealing decisions.

10. A majority of the relevant legislation provides for a time limit of 21 days from receipt of notification of the relevant decision, however there are notable exceptions: section 51 of the Pharmacy Act 2007 and section 69 of the Health and Social Care Professionals Act, for example, provide for an appeal within 30 days of receipt of notification.

11. Equally, whereas invariably it is the receipt of the notification of a decision which triggers the commencement of the relevant time limit, this is not always the case: under the Dentists Act 1985, the 21-day period to appeal from a decision of the Dental Council (which effects registration) starts from the date of the decision.

12. In addition, in enacting such time limits, it is notable that the language employed by the legislature differs considerably Notwithstanding such variation, the most natural reading of all of these provisions is that the time limits contained therein are absolute and appeals cannot be entertained outside of those time limits. Moreover, none of the legislation expressly contains any express provisions which contain a saver to allow for extensions of time in exceptional circumstances.

III. Law Society v Tobin

13. All of the time limits referred to in the appendix are applicable to appeals from the relevant disciplinary tribunal to the High Court. Notably, while the applicable legislation provides some facility for appealing to the Court of Appeal, in no case does it prescribe a time limit for such appeals.[1] Accordingly, in principle, the time limit for any onward appeals from the High Court is governed by the Rules of Superior Courts. Equally, where such appeals are lodged out of time, applications for extensions of time can, one assumes, be made and assessed by reference to the well-known principles set out in *Eire Continental*.

[1] Such appeals are generally permitted on a point of law only and sometimes only with leave.

14. The Solicitors Acts are unusual insofar as those Acts contain an express statutory time limit applicable to appeals from the High Court to the Court of Appeal. It was that time limit which was an issue in the joined cases of *Tobin* and *Callanan*.

15. Section 8 (1) of the Solicitors (Amendment) Act 1960 (as substituted by section 18 (1) of the Solicitors (Amendment) Act, 1994) sets out the powers of the High Court following receipt of a report from the SDT who has conducted an inquiry into the conduct of a solicitor. The section vests the High Court with broad range of disciplinary powers, from censure to strike off. Section 12 of the Solicitors (Amendment) Act 1960 (as substituted by s.39 of the Solicitors (Amendment) Act 1994) ("*section 12*") states as follows:

> "*The Society or the solicitor concerned may appeal to the Supreme Court against an order of the High Court made under section 8 (1) (as substituted by the Solicitors (Amendment) Act, 1994) or section 9 or 10 (as amended by the Solicitors (Amendment) Act, 1994) of this Act within a period of 21 days beginning on the date of the order, and unless the High Court or the Supreme Court otherwise orders, the order of the High Court shall have effect pending the determination of such appeal*."

16. When looked at against the backdrop of other statutes governing regulated professionals, section 12 is unusual in at least two respects. Firstly, the scope of the appeal permitted by the section is not limited to an appeal on a specified point of law.[2] Second, very unusually, the provision prescribes a statutory time limit within which an appeal must be made, namely "*21 days beginning on the date of the order."*

17. Prior to the establishment of the Court of Appeal this time limit *largely* mirrored the 21-day period for appeals to the Supreme Court with which practitioners would be well aware of. I say 'largely' because the time period in section 12 is expressed to run from

[2] Pursuant to s. 74 (1) of the Court of Appeal Act 2014, the references in section 12 to the Supreme Court are now to be construed as references to the Court of Appeal. Section 74 (1) of the Court of Appeal Act 2014 provides as follows: "*References (howsoever expressed) to the Supreme Court, in relation to an appeal, including proceedings taken by way of case stated, which lies (or otherwise) to it in any enactment passed or made before the establishment day, shall be construed as references to the Court of Appeal, unless the context otherwise requires."*

"the date of the order", rather than from the perfection thereof, thereby giving rise to the possibility of conflict. This does not, however, appear to have raised an issue in practice prior to the establishment of the Court of Appeal.

18. The time limits for lodging ordinary appeals to the Court of Appeal is now, of course, different: Order 86A, rule 13 (1) provides:

> "*13. (1) Subject to any provision to the contrary in any enactment which applies to the particular category of appeal, and to the provisions of this Order, the notice of appeal shall be lodged for issue and an attested copy of the order of the court below shall be lodged not later than 28 days from the perfecting of the order appealed against*." (emphasis added)

19. Accordingly, it prescribes a 28-day default time limit for the bringing of an appeal, but this is expressly subject to any statutory provision to the contrary.[3]

20. It was largely this change in the Rules which led to two appeals being lodged outside of the 21-day time frame.

21. The facts of the *Tobin* and *Callanan* cases are largely unimportant for present purposes. In broad outline, in *Callanan,* following an inquiry which took place before the SDT over approximately three and a half years, the SDT gave a written decision in which it made number of recommendations relating, in particular, to the restriction of the Mr. Callanan's practicing certificate. Since the sanctions recommended by the SDT effected his practicing certificate, the report of the SDT had to be brought before the High Court pursuant to section 7 of the Solicitors Act 1960. The relevant timeline was as follows:

[3] Parenthetically, Order 86 rule 3 (2) (b) allows the Court to extend or shorten "*any time limit set by these Rules (unless to do so would be contrary to any provision of statute*)."

i. **13 April 2015**: The Motion was heard by the President. In an *ex tempore* judgment given on that date, the President increased the level of sanction which had been recommended by the SDT.

ii. **16 April 2015**: the said Order was perfected.

iii. **On 20 April 2015**: Mr. Callanan's solicitor sought the Law Society's consent to an application for the release of the DAR and indicated that the Appellant wished to appeal the said Order.

iv. Settled appeal papers were furnished one week later.

v. Mr. Callanan's solicitor - operating under the impression that the 28-day time limit now prescribed by Order 86A rule 13 governed the situation, failed to lodge the papers until 13 May 2015, 27 days from the perfection of the Order.

22. In *Tobin,* on 13 February, 2015 an order was made that Mr. Tobin's name be struck from the roll of solicitors. The order was perfected on the 24 February 2015 but a Notice of appeal was lodged until the 23 March 2015.

23. The Law Society subsequently made applications seeking to strike out both appeals on the basis that they were filed outside of the time provided for by section 12.

24. The main issue which the Court of Appeal had to consider was whether section 12 contains an absolute time limit which cannot be extended by the Court, or whether when read in accordance with the Constitution, the Court has some discretion to extend the time within which the appeal can be lodged. If such a discretion exists, the next question was the basis upon which such discretion could be exercised.

25. The Court held that the time limit contained within section 12 is capable of extension and any application for an extension of time should be dealt with on the basis of the principles set out in *Eire Continental* (with one additional feature). The Court held that both appellants had satisfied the Court that an extension should be granted on the basis of those principles.

26. In reaching that conclusion, the Court first set out the new provisions of Article 34.1.1 of the Constitution which provides for the appellate jurisdiction of the Court of Appeal

from decisions of the High Court save "*with such exceptions and subject to such regulations as are prescribed by law.*"

27. The Court made reference to the general principle established in cases such as *People v Conmey* [1975] IR 341 that, given the great importance of the constitutional right to appeal, any law excepting or regulating the Supreme Court's appellate jurisdiction must be clear and unambiguous. A time limit such as that contained within section 12 "*is a limitation by the Oireachtas on the scope of a constitutionally conferred right of litigants to appeal decisions of the High Court to the Supreme Court (and now the Court of Appeal) and as such must be expressed in clear and unambiguous terms" (*at para 12).

28. The Court observed that none of the parties had referred the Court to any similar statutory provision. It noted that the historical explanation for this "*unusual provision"* lay in the fact that prior to its amendment the provision unambiguously excluded an appeal, unless the High Court granted leave on a specified point of law. At paragraph 21 of the Court's judgment, the Court stated that:

> *"The submission of the Society in essence seeks to have this Court construe s. 12 of the 1960 Act as if the Oireachtas had provided that "no appeal shall lie to the Supreme Court unless a notice of appeal is lodged within 21 days of the date of the High Court order". The submission is that the Oireachtas in expressly providing for a right to appeal within 21 days must by implication have intended to exclude any appeal outside that time. Were it not for the pre-existing constitutional right to appeal such a construction might be correct. However the constitutional right, and consequent necessity for clear and unambiguous words to limit or exclude it require a different conclusion.*" (my emphasis).

29. The Court noted that the 21-day period was the relevant time period under O. 58 of the Rules of the Superior Courts for appeals to the Supreme Court, which also had a well established jurisdiction to extend such time period. It referred to the fact that "*basic interpretive principles include an assumption that the Oireachtas is fully aware of all relevant law and the interpretive criteria*"(at para 22).

30. Furthermore, the Court noted that "*section 12 by the words used does not expressly exclude the bringing of an appeal after the specified time as do the provisions of the statute of limitations and other statutory provisions with time limits to which we were referred*."(at para 23). Notably, at paragraph 24 of the judgment, the Court justified such a conclusion by reference to basic principles of fairness:

> "*Unless excluded by s.12 the Court has an inherent jurisdiction to consider an application to extend time to pursue an appeal to which s.12 of the 1960 Act applies. Such jurisdiction derives from the implied constitutional principles of basic fairness of procedures which underlie the well known decisions in relation to the court's inherent jurisdiction to dismiss for delay. In this instance, the jurisdiction exists in order that a party who by mistake or other justifiable reason misses the 21 day period, may not be unfairly precluded from pursuing a constitutional right of appeal against an order of the High Court of the type to which s. 12 of the 1960 Act applies. Such orders may interfere with the right of persons to earn a livelihood or viewed from the perspective of the Society, the discharge of its obligations to protect members of the public."*

31. The Court observed that there is a lack of clarity in section 12 as to whether the 21-day period runs from the making of the decision by the High Court or the perfection of the Order, but *(obiter)* expressed the view that the latter is the preferable interpretation *"in order to give practical effect to the provision." (at para 25)*

32. In terms of the applicable test governing extensions of time, the Court held that *Eire Continental* should apply *"subject to one addition"*, namely that the Court "*should consider carefully the extent to which that time period has been exceeded by an applicant"* having regard to the legislative intent in section 12.

IV. Curran v Solicitors Disciplinary Tribunal

33. Ultimately, in *Tobin* the Court of Appeal concluded that s. 12 of the 1960 Act did not clearly and unambiguously preclude a person at least applying to exercise his constitutional right of appeal after 21 days nor did it clearly and unambiguously oust the jurisdiction of the Court of Appeal to consider such an application. On this limited

basis, the Court held that it had jurisdiction to consider an application to extend time to issue a notice of appeal beyond the 21 days specified in s. 12 and that such jurisdiction was exercisable by reference to the principles set out in *Eire Continental.*

34. However, *Tobin* is a judgment which must be considered in the context of its own set of facts and, in particular, the very unusual statutory provision which was before the Court of Appeal. *Tobin* does not articulate any broad principle which has general application to time limits relating to appeals from statutory tribunals to the High Court. This is clear from the very recent decision of Eagar J in *Curran v Solicitors Disciplinary Tribunal* [2017] IEHC 2.

35. Under Order 53, rule 12 (a) of the Rules:

> *"(a) Every appeal to the Court against a finding of the Disciplinary Tribunal, either that there was no prima facie case for inquiry into the conduct of a respondent solicitor or that there was no misconduct on the part of a respondent solicitor in relation to an allegation of misconduct, brought by the Society or by any person other than the Society who made the application in relation to the respondent solicitor to the Disciplinary Tribunal under section 7 (12A)(a) or (b) (as substituted by section 17 of the Act of 1994 and as inserted by section 9(g) of the Act of 2002) of the Act of 1960, shall be brought within the period of 21 days of the receipt by the appellant of written notification from the Tribunal Registrar of such finding and shall be by notice of motion returnable to the President on a date to be assigned by the proper officer in the Central Office and shall be entitled in the matter of the respondent solicitor and in the matter of the Acts."*

36. The 21-day period within which to appeal a decision of the SDT as contained in Order 53 rule 12 (a) of the Rules, reflects a mandatory statutory time limit which is prescribed by section 7 (12) (B) of the Solicitors (Amendment) Act 1960 ("*the 1960 Act*"), as inserted by section 9 of the Solicitors (Amendment) Act 2002. ("*the 2002 Act*").

37. In that regard, section 7 (12) (A) (a), as inserted by the 2002 Act, allows for an appeal mechanism for the Law Society and complainants who wish to appeal against a finding

of the SDT that there is no prima facie case for inquiry into the conduct of the respondent solicitor or against a finding of the SDT that there has been no misconduct on the part of the respondent solicitor in relation to an allegation of misconduct (whether or not there has been a finding by the Disciplinary Tribunal of misconduct in relation to any other such allegation). Pursuant to section 7 (12) (B) *"an appeal against a finding of the Disciplinary Tribunal under subsection (12A) of this section shall be made within 21 days of the receipt by the appellant of notification in writing of the finding."*

38. In *Curran*, Mr. Curran made two separate complaints to the SDT (each containing a large number of allegations) regarding the manner in which his former solicitor had handled a land transaction and subsequent specific performance proceedings which arose out of same. In two separate decisions, the SDT concluded that no *prima facie* case had been made out against the relevant solicitor and therefore refused to send these decisions forward to inquiry stage.

39. Mr. Curran, who was unrepresented and lived in Canada, was notified about these decisions on 10 December 2015. On 28 December 2015, he swore affidavits seeking to appeal both decisions. On 5 January 2016, the Central Office advised Mr. Curran that documents received by the Office on 4 January 2016 were received out of time and were irregular insofar as they did not include a Notice of Motion. Mr. Curran was advised to take legal advice and expressly informed that there was no provision for accepting the documents outside of the 21-day time limit. Mr. Curran waited until 26 April 2016 before bringing a motion seeking to extend time within which to appeal one of the decisions and a similar motion in respect of the second appeal was not issued until 31 May 2016.

40. The High Court (Eagar J.) held that it was not permissible to extend the time limit within which to appeal against a finding of the SDT that there is no *prima facie* case for inquiry into the conduct a solicitor having regard to the provisions of section 7 (12) (B). Further, even if the Court had such permission to extend time by reference to the *Eire Continental* principles, it would not have done so on the facts.

41. The Court held that "*the language in the statute is mandatory and in respect of an appeal against the finding of the Disciplinary Tribunal that there is no prima facie case for enquiring into the conduct of the solicitor this must be made within a period of 21 days of receipt by the notification by the appellant by the order*."(at 29). In reaching this conclusion, the Court stated that in interpreting section 7 (12) (B) the fundamental objective must be to give effect to the intention of the legislature. Eagar J stated (at para 32) that:

> "*This court finds that the wording of the provision is clear. It allows for a period of 21 days beginning on the date of notification of the decision in writing. It does not provide for the extension of a 21 day period of time to appeal. Counsel for the respondent submitted that prior to the enactment of the 2002 Act it was not possible to appeal a decision against a finding of no prima facia case. When the legislature chose to extend the availability of an appeal against the decision of no finding of prima facia case, it expressly chose to limit this wider right of appeal to a strict time frame, without discretion to extend time*."[4]

42. The Court stated that the case was distinguishable from *Tobin*, "*having regard to the fact that this was a decision of the High Court as opposed to a decision of the Solicitor Disciplinary Tribunal* (at para 35). Accordingly, the Court held that it "*has no permission to extend the time limit within which to appeal against the finding of the Disciplinary Tribunal that there is no prima facie case for enquiring into the conduct of a solicitor having regard to the provision of s. 7(12)(B) of the Solicitors (Amendment) Act 1960*." (at 37).

43. Thus, the critical point of distinction drawn by Eagar J between the statutory provisions at issue in *Tobin* and those at issue in *Curran* is the fact that the limit contained in

[4] In *Dolan v O'Hara* [1975] NI 125 Lowry LCJ set out a number of principles in relation to time limits, noting that a time limit is likely to be imperative where no power to extend time is given and where no provision is made of what is to happen if the time limit is exceeded. This approach was followed in this jurisdiction in *Browne v Kerry County Council* [2011] 3 IR 514 involving a time limit provided for under the Planning and Development Act 2000 in which Hedigan J concluded that the relevant section had to be construed as being mandatory in nature noting that as "*to the first of Lowry L.CJ 's principles, it is evident that no power to extend time exists, nor is there any provision to indicate what is to happen if time is exceeded* " (page 521). In *Curran,* the Court expressly endorsed this approach.

section 7 (12) (B) relates to an appeal from a statutory body to the High Court (rather than an appeal from the High Court to the Court of Appeal). This distinction appears to me to be valid, although it might have benefitted from elaboration.

44. There are sound reasons why the reasoning in *Tobin* had no application to the provisions at issue in *Curran*. The Court of Appeal decision in *Tobin* was expressly anchored in constitutional principles relating to the ouster of the appellate jurisdiction of the Court of Appeal, and the principles set out in decisions such as the *People v Comney*. As is clear from paragraph 21 of that decision (which has been set out above), the Court of Appeal would have been inclined to agree with the Law Society's construction of section 12 were it not for the countervailing interpretative principles mandated by the Constitution.

45. Such principles have no application to a statutory appeal from the SDT to the High Court. Since the constitutional right of appeal has no relevance to a statutory appeal such as that at issue in *Curran*, there is, consequently, no requirement to interpret section 7 (12) (B) other than in accordance with its natural and ordinary interpretation.

V. The Application of *Curran* to applications for extension of time by registrants

46. The decision in *Curran*, as far as I am aware, has not been appealed. Assuming the decision is not overturned, it signals the adoption of an extremely strict approach towards time limits in regulatory appeals. The question which is unclear is whether such an approach will be applied to appeals across the board, including in cases where the registrant wishes to appeal to the High Court.

47. It must be recalled that *Curran* involved quite an unusual statutory provision which allows a lay complainant (and the Law Society) to appeal to the High Court in circumstances where the SDT has not made findings of misconduct against a solicitor (either at the *prima facie* stage or at full inquiry stage).

48. This type of provision is uncommon. Usually the only recourse (at least in theory) which a complainant has if his complaint has not been taken up by a statutory body is

to proceed by way of judicial review. It is also unusual for a regulator to be allowed to appeal to the High Court against a decision from the relevant statutory tribunal.

49. While there may be policy reasons in favour of allowing such appeals proceed even when they are lodged out of time, having absolute time limits on appeals taken by regulators or complainants does not obviously raise any potential human rights issues or constitutional concerns. Equally, in terms of interpreting statutory time limits for appeals taken by regulators or complainants, there is no obvious reason why the literal rule of interpretation might be deviated from.

50. This logic does not, or at least does not necessarily apply, to registrants who may find themselves out of time within which to lodge a statutory appeal. Where a restriction on an appeal arises in the context of a statutory code which allows a statutory tribunal to impose draconian restrictions on a professional's right to earn a livelihood, arguably a more flexible approach is warranted if a fair balance is to be struck between the policy objective underpinning the legislative restriction and the rights at issue for the putative appellant.

51. While there are a number of authorities where the constitutionality of time limits and limitation periods prescribed by the Oireactas has been successfully challenged[5], there is no Irish case which concerns the constitutionality of fixed and absolute time limits for registrants challenging decisions of statutory tribunals.

52. In that regard, it is well recognised that the absence of some form of saver to mitigate against the potential unfairness of an inflexible time limit will increase the possibility of constitutional infirmity. Speaking about special time limits imposed by statute or rules of court in the context of judicial review proceedings, *Hogan and Morgan,* at 16-191,[6] state as follows:

> **"***There have been a series of heterogeneous statutory provisions which impose in the interests of legal certainty special and varied time limits on applications for judicial review of particular decisions. In some instances, the time limit is*

[5] *Brady v Donegal County Council* [1989] I.L.R.M. 282; *White v Dublin Corporation* [2004] 2 I.L.R.M. 509.
[6] Hogan and Morgan, Administrative Law in Ireland, (2nd Edition).

imposed by rule of court. Given the constitutional difficulties which would almost certainly ensue if there was an inflexible time limit, there is nearly always a power to extend time, albeit that the circumstances in which time can be extended can vary."

53. Equally, the existence of a saver has been a critical determinant in cases upholding statutory provisions which impose time limits. In *Re Article 26 and ss 5 and 10 of the Illegal Immigrants (Trafficking) Bill, 1999*, the Supreme Court upheld a limitation period of fourteen days, subject to extension for good and sufficient reason, in relation to the taking of judicial review proceedings challenging the validity of certain orders made in respect of asylum-seekers. In upholding the provision, significant emphasis was placed on the existence of the saver.

54. Commenting on this judgment, the authors of Kelly on the Constitution (4th Edition, at 1453) state as follows:

"*The approach of the Supreme Court in the Illegal Immigrants (Trafficking) Bill reference gives considerable latitude to the Oireachtas in prescribing limitation periods. However a failure to confer any discretion on the courts to extend a limitation period for good reason increases the possibility of a successful challenge to its constitutionality."*

55. It remains an open question as to whether such a discretion might be implied into apparently absolute time limits to appeal decisions of regulatory tribunals (at least for registrants), by way of application of the double construction rule or otherwise. *Tobin* did not have to decide that issue, although paragraph 24 of the judgment – in which reference is made to "*implied constitutional principles of basic fairness of procedures"* as a reason for interpreting section 12 as directory – might lend some implicit support to this proposition.

56. Notably, in the past few years, there has been a plethora of judgments from the England and Wales regarding the question of whether a Court is entitled to imply a saver into a statutory provision which creates an apparently absolute statutory time limit within which to appeal from a statutory tribunal. The leading case from England and Wales

considering the question of inflexible statutory time limits within which to appeal is *Pomiechowski v Poland* [2012] UKSC 20; [2012] 1 W.L.R. 1604 (SC).

VI. The Approach in England and Wales

57. In *Pomiechowski* the UK Supreme Court considered four linked appeals which raised a number of points regarding the requirements of, and consequences of, non-compliance with the short and inflexible time limits introduced by the Extradition Act 2003. That Act contains firm rules which mandate the filing and serving of appeals within seven or fourteen days, depending on the procedure. The case of critical relevance to these proceedings involved H, the fourth appellant.

58. H was a British citizen whose extradition was sought by the United States so that he could face allegations of wire fraud and money laundering. The relevant statutory provision provided that "*notice of an appeal must be given in accordance with rules of court*". The time limit provided was "*14 days starting with the day on which the Secretary of State*" informed H of the decision to extradite.

59. Prior to *Pomiechowski*, the leading UK authority on time limits was another extradition case, *Mucelli v Government of Albania* [2009] UKHL 2, [2009] 3 All ER 1035, [2009] 1 WLR 276, in which the House of Lords, without reference to Strasbourg jurisprudence, applied an absolute approach to a statutory time limit -*'must be filed and served before the expiry of 14 days'* -in relation to which there was no express power to extend time.

60. In *Pomiechowski*, H was informed of the decision to extradite on 22 December 2010. H's solicitors filed a notice of appeal on 29 December 2010, well within the 14-day time limit for appeals in accordance with section 108 of the 2003 Act. However, his solicitors erred: they failed to serve notice of the appeal on the Crown Prosecution Service before 4 January 2011, which was the apparently inflexible deadline set by the relevant statutory provision. It was not until 5 January 2011 that H's solicitors sent a sealed copy of the notice of appeal to the Crown Prosecution Service; this was received on 6 January 2001. Accordingly, H's appeal, on a literal reading of the section, was out

of time. The only reason for the failure to comply with the statutory time period was a failure by H's then solicitor, who served the papers out of the time prescribed by statute.

61. The CPS brought an application to strike out the appeal. At first instance, a Divisional High Court did just that: the statutory provision was clear and it mattered not a jot that H was blameless or that blame for failing to serve the appeal on time in accordance with the statutory provision lay with the solicitor.

62. H appealed to the Supreme Court relying, *inter alia*, on Article 6(1) of the ECHR. which provides "*[I]n the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*". Although, on its face this provision, appears to be concerned with the trial stage rather than with appeals, and although it does not refer to time limits on limitation periods, it is well-established in the Strasbourg jurisprudence that (i) where a right of appeal is provided, it must be compliant with Article 6 and (ii) the rights enshrined in Article 6 may be subject to limitations, but such limitations must not restrict or reduce the access left to the individual in such a way or to such an extent that "*the very essence of the right is impaired*': *Tolstoy Miloslavsky v UK* (1995) 20 EHRR 442, [1995] ECHR 18139/91, para 59.[7]

63. A unanimous decision was given by the Supreme Court, with Lord Mance giving the leading judgment. Mance LJ stated that it was "*necessary to consider whether the apparently inflexible time limits for appeals in the 2003 Act are subject to any qualification or exception.*" Using section 3 of the Human Rights Act, Mance LJ implied a qualification to the relevant section to the effect that the Court has a discretion in exceptional circumstances to extend time for both filing and service of an appeal.

64. Mance LJ noted that the claim to extradite H did not involve the determination of a criminal charge, or the procedural guarantees which would attend that. However, under Article 6 (1) ECHR, H was entitled to a fair determination as to his common law right to remain within the jurisdiction. Applying the decision of the ECHR in *Tolstoy*

[7] So, in *Tricard v France* (2003) 37 EHRR 388, it was held that the short time limit to appeal was too difficult for the applicant to comply with, taking into account the time it would take for documents to reach his home in Tahiti from the Court in Paris.

Miloslavsky v United Kingdom 20 EHRR 442 Mance LJ stated "*in so far as the proceedings involve under the statute a right of appeal against any extradition decision, article 6.1 also requires that it be free of limitations impairing "the very essence" of the right, pursue a legitimate aim and involve a "reasonable relationship of proportionality between the means employed and the aim sought to be achieved" in accordance with the standard identified in Tolstoy*."

65. Mance LJ held that the apparently inflexible statutory rule set out in the section was not proportionate and the statute was capable of "*generating considerable unfairness in individual cases, unless some further relief is available. More importantly, it is not sufficient under article 6.1 if in most or nearly all cases the right of appeal can be or should be capable of being exercised in time. The "very essence" of the right may be impaired in individual cases and there may still be no "reasonable relationship of proportionality between the means employed and the aim sought to be achieved"." (at para 35).*

66. Turning to the question of whether H should be liable for his solicitor's mistake – sometimes called the "surrogacy principle", Mance LJ cited the Court of Appeal decision in *FP (Iran) v Secretary of State for the Home Department* [2007] Imm AR 450. This case is authority for the proposition that there is no universal surrogacy principle. Any strict application of the surrogacy principle would, so the Court of Appeal held, produce irremediable procedural unfairness because clients would lose the opportunity to be heard through the default of their legal representatives and not through their own fault.

67. Mance LJ stated at paragraph 35:

> "*The position is a fortiori in so far as article 6.1 is directly applicable in Mr Halligen's case. It is clear that the statutory provisions regarding the permitted periods for appeals may in individual cases impair "the very essence of the right" of appeal….. It is no satisfactory answer that a person wrongly extradited for want of an appeal as a result of failings of those assisting him might, perhaps, be able to obtain some monetary compensation at some later stage. Strict application of the surrogacy principle would be potentially unjust. I am*

not persuaded that the interests of finality and certainty outweigh the interests of ensuring proper access to justice by appeal in the limited number of extradition cases where this would otherwise be denied. There would not be "a reasonable relationship of proportionality between the means employed and the aim sought to be achieved". (emphasis added)

68. Mance LJ then turned to the question of whether the Court should make a declaration of incompatibility in respect of the relevant section of the statute. Such an approach would not have helped H but would have guided the law thereafter to the extent that Parliament had followed the lead of the declaration of incompatibility and legislated to remedy it.

69. Mance LJ eschewed this approach, opting for a solution which was predicated on the Court's interpretative obligations under section 3 of the Human Rights Act 1997. His reasons for doing so merit significant emphasis:

"*the present case, there is no reason to believe that Parliament either foresaw or intended the potential injustice which can result from absolute and inflexible time limits for appeals. It intended short and firm time limits, but can only have done so on the basis that this would in practice suffice to enable anyone wishing to appeal to do so without difficulty in time. In these circumstances, I consider that, in the case of a citizen of the United Kingdom like Mr Halligen, the statutory provisions concerning appeals can and should all be read subject to the qualification that the court must have a discretion in exceptional circumstances to extend time for both filing and service, where such statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under article 6.1 in Tolstoy Miloslavsky . The High Court must have power in any individual case to determine whether the operation of the time limits would have this effect. If and to the extent that it would do so, it must have power to permit and hear an out of time appeal which a litigant personally has done all he can to bring and notify timeously*." (emphasis added)

70. Accordingly H had personally done everything in his power to ensure that his appeal was brought timeously, and was allowed to advance his appeal against his extradition, notwithstanding his solicitor's error.

71. The reasoning of the UK Supreme Court in *Pomiechowski* has been held to have general application to statutes which provide for appeals within a set time frame and which affect rights protected by Article 6(1) ECHR.

72. Specifically, *Pomiechowski* has been held to have application in any case which involves the determination of proceedings which affect a professional's right to practice. This is clear from the leading decision of the Court of Appeal in *R (on the application of Adesina and others) v Nursing and Midwifery Council* [2013] EWCA Civ 818.

73. This case involved two unconnected appeals by two nurses under art 29(9) of the Nursing and Midwifery Order 2001, SI 2002/253, against the decision of a disciplinary hearing by the defendant Nursing and Midwifery Council. In terms of appealing the decision to the High Court the relevant provision stated as follows:

> *'Any such appeal must be brought before the end of the period of 28 days beginning with the date on which notice of the order or decision appealed against is served on the person concerned.'*

74. Notably, there was no express provision permitting the Court to extend time on a discretionary or any other basis.

75. Both appellants lodged appeals outside of the 28-day time limit. One of the appellants blamed the fact that the appeal was lodged out of time on the fact that it took her a lengthy period of time to find a specialist solicitor and to obtain legal aid. The other appellant does not appear to have engaged solicitors at all.

76. Previously, it had been held that this 28-day time limit was absolute: *Mitchell v Nursing and Midwifery* [2009] All ER (D) 29. However, the appellants argued that, following *Pomiechowski*, these authorities could no longer be applied and the Court had

jurisdiction to extend time in exceptional circumstances. In contradistinction, the Nursing and Midwifery Council contended that *Pomiechowski* was an extradition case and its logic did not apply to a disciplinary appeal.

77. The Court of Appeal rejected the Council's argument and applied *Pomiechowski.* Although the Court found on the facts of the cases that there were no exceptional circumstances justifying an extension of time, it held that the Court had a discretion to extend time, notwithstanding the terms in which the relevant provision was drafted.

78. It rejected the proposition that the 28-day time limit was absolute and inflexible. Posing the question of as to whether the difference between extradition appeals and appeals in disciplinary or regulatory cases were such as to justify an inflexible time limit, Kay LJ stated:

> "*In my judgment, they are not. The context, exclusion from a profession, is still one of great importance to an appellant. There is good reason for there to be time limits with a high degree of strictness. However, one only has to consider hypothetical cases to appreciate that, without some margin for discretion, circumstances may cause absolute time limits to impair 'the very essence' of the right of appeal conferred by statute*." (emphasis added)

79. Kay LJ gave the following two examples of such exceptional circumstances (at [14])):

> "*Take, for example, a case in which a person, having received a decision removing him or her from the Register, immediately succumbs to serious illness and remains in intensive care; or a case in which notice of the disciplinary decision has been sent by post but never arrives and time begins to run by reason of deemed service on the day after it was sent … In such cases, the nurse or midwife in question might remain in blameless ignorance of the fact that time was running for the whole of the 28-day period. It seems to me that to take the absolute approach in such circumstances would be to allow the time limit to impair the very essence of the statutory right of appeal*."

80. He held that compliance with the ECHR required adoption of the same approach as that of Lord Mance in *Pomiechowski*, namely that the discretion arises *'in exceptional circumstances'* and where the appellant '*personally has done all he can to bring [the appeal]* timeously' ([2012] 4 All ER 667 at [39], [2012] 1 WLR 1604 at [39]).

81. Indeed, there is no recorded decision of which I am aware where an applicant has succeeded in satisfying that test. In a wide variety of regulatory cases, applications to extend time have been refused by the High Court and Court of Appeal due to the absence of exceptional circumstances.[8]

82. *Daniels v Nursing and Midwifery Council* [2015] EWCA Civ 225 appears to be closest an applicant has come. In that case, D had been a staff nurse against whom disciplinary proceedings had been instigated by the Nursing and Midwifery Council (the NMC). She had been found guilty of professional misconduct and a caution order was made for three years. She was informed that she had 28 days, from 8 February 2014, within which to appeal the Committee's decision. On 7 March, she contacted the counsel who had acted in her appeal. Her counsel advised her to contact her solicitors and began drafting grounds of appeal. On 11 March, Ms. Daniel's solicitors filed an appellant's notice with the Administrative Court which included an application for extension of time. The judge considered the application to extend time as a preliminary issue. She concluded that the respondent's inability to find the sum necessary to pay the court fee in time had constituted a good reason for the delay. Taking into account that the period of delay had been only three days and that the Council had not suffered any particular prejudice, the judge held that there were exceptional circumstances which justified extending the time for appealing to 11 March 2014. The Council appealed, contending

[8] In *Adegbulugbe v Nursing and Midwifery Council* [2013] EWHC 3301 (Admin) an application to extend time was refused by the High Court where an appeal had been lodged one day late by the appellant's solicitors where there was no evidence of any exceptional circumstances. In *Pinto v Nursing and Midwifery Council* [2014] EWHC 403 (Admin) an application to extend time based on the appellant 's ill health was refused. It was held that the appellant had not been so disabled by illness or stress as to prevent her from representing herself before the relevant regulatory proceedings, which were concluded immediately before the period of time in which she had to prepare her notice of appeal. The High Court also found that a lack of legal representation would not amount to exceptional circumstances to justify delay; nor would the failure to bring enough money to pay the fee for lodging the notice of appeal. In *Mahinda v General Medical Council* [2014] EWHC 4754 (Admin) the appellant also relied alleged ill health; the High Court found that the medical evidence did not "*satisfy the high degree of strictness that has been referred to in the authorities."* See also *Parkin v Nursing and Midwifery Council [2014] EWHC 519 (Admin)*

that there had been no exceptional circumstances such as would have enabled the judge to override the statutory time limit, and that, therefore, she did not have the power to make the order that she had.

83. The Court of Appeal allowed the appeal. It held that it appeared that Ms Daniels had not taken any steps towards appealing until the very end of the 28-day period. Had Ms Daniel's contacted her lawyers during February 2014 and set about raising funds then, she would have been able to file her appellant's notice well within time. The Court noted that if she had contacted her lawyers or spoken with the court office during February, she would have had time to apply for, and would probably have obtained, remission of the court fee. Consequently, there had been no proper basis for extending time.

VI. CONCLUSION

84. It remains to be seen whether Irish courts will apply the very strict approach adopted in *Curran* to cases in which registrants are seeking an extension of time within which to appeal from a decision of a statutory tribunal, or whether an approach which permits more flexibility in exceptional circumstances might be entertained.

85. In an era where more and more unrepresented registrants are coming before fitness to practice committees and the High Court, this is an issue which is likely to be tested in the very near future.

86. At all events, lawyers who are acting for parties who wish to appeal a decision of a disciplinary tribunal need to exercise the utmost of caution in ensuring such appeals are lodged timeously.

NATHAN REILLY
15 MARCH 2017

APPENDIX: TIME LIMITS IN REGULATORY APPEALS

Regulatory Body	**Legislation**	**Nature of Appeal to High Court**	**Time Limit**	**Wording**	**Appeal to COA**
The Nursing & Midwifery Board of Ireland	Nurses and Midwives Act 2011, Section 73	Appeal from decision of Board to impose certain sanctions	21 days from receipt of notice	"*A registered nurse or registered midwife the subject of a decision under section 69 to impose a sanction (other than a sanction referred to in section 69 (1)(a) or (2)) may, not later than 21 days after the nurse or midwife received the notice under section 71 (1) of the decision, appeal to the Court against the decision.*"	Point of law
The Veterinary Council of Ireland	Veterinary Practice Act 2005, Section 80(3)	Appeal from decision of Council to remove /suspend from register/attach conditions to registration	21 days from receipt of notification	"*A person who receives a notification under subsection (2) may appeal to the High Court against the decision specified in the notification within a period of 21 days beginning on the date of such receipt.*"	Point of law
The Dental Council of Ireland	Dentists Act 1985, Section 39(3)	Appeal from decision of Council to erase/suspend from register	21 days from date of decision	"*A person to whom a decision under this section relates may, within the period of 21 days, beginning on the date of the decision, apply to the High Court for cancellation of the decision*"	Point of law
The Medical Council	Medical Practitioners Act 2007, Section 75	Appeal from decision of Council to impose certain sanctions	21 days from receipt of notice	"*A registered medical practitioner the subject of a decision under section 71 to impose a sanction (other than a sanction referred to in section 71 (a)) may, not later than 21 days after the practitioner received the notice under section 73*	Point of law

				(1) of the decision, appeal to the Court against the decision."	
The Pharmaceutical Society of Ireland	Pharmacy Act 2007, Section 51	Appeal from decision of Council to impose certain sanctions	30 days from receipt of notification	"*The High Court may, on application by a registered pharmacist or pharmacy owner on whom the Council has imposed a disciplinary sanction (other than an admonishment or a censure), order its cancellation.* *(2) The application must be made within 30 days after receipt of the notification of the decision from the Council*".	Point of law
CORU	Health and Social Care Professionals Act 2005, Section 69	Appeal from decision of Council to impose certain sanctions	30 days from receipt of notification	"1) *A registrant affected by a direction to impose a disciplinary sanction (other than an admonishment or a censure) may apply to the Court for an order cancelling the direction.* *(2) An application for an order under this section must be made within 30 days after the registrant receives from the Council notification of the direction.*"	Point of law
The Teaching Council	Teaching Council Act 2001, Section 44(3)	Appeal from decision of Council to remove/suspend from register/ attach conditions to registration	21 days from date of service of notice	"A registered teacher may, within 21 days of the date of service of a notice under *subsection (2)*, apply to the High Court for annulment of the decision and the Court"	Point of Law