Neutral Citation: [2015] IEHC 725

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 335 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996, AS AMENDED, AND

IN THE MATTER OF THE IMMIGRATION ACT 1999, AND

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000, AND

IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003, SECTION 3(1)

BETWEEN

B.W.

APPLICANT

AND

REFUGEE APPEALS TRIBUNAL, MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

(No. 1)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 17th day of November, 2015

1. In any application to amend proceedings, it is clear that the interests of justice and the protection of the applicant's right of access to the courts are of paramount importance, as is the need for the court to ensure that the real issues in dispute are determined (see *Keegan v. Garda Siochána Ombudsman Commission* [2012] 2 I.R. 580; [2012] IESC 29 per Fennelly J. at paras. 29 and 47 and *O'Neill v. Applebe* [2014] IESC 31 *per* O'Donnell J. at para. 14). In addition, the right of access to the court is supplemented by the right to an effective remedy pursuant to Article 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union.

2. In the Keegan case, the Supreme Court gave leave to amend judicial review proceedings to include a legal point that was simply *"overlooked"* by the applicant's lawyers prior to the application for the amendment (para. 39). The amendment was *"an entirely new ground in law"* which *"substantively enlarge[d]"* the application (para. 38). The amendment was sought well outside the time period for application for judicial review. Nonetheless, the Court held that *"[t]he appellant should not, without good reason, be deprived of the right to argue a very significant point of law"* (para. 46).

3. O'Donnell J. in O'Neill at para. 14 emphasised that:

> *"The High Court, and this Court on appeal, has a very extensive power of amendment where it is necessary to permit the real issues in dispute to be determined. There is nothing which prevents the court from re-amending proceedings, even if that re-amendment would reintroduce a claim that had previously been removed by amendment"*

4. It would appear that on the basis of Keegan, there are three elements that an applicant should address. Firstly, that the point should be arguable (para. 38), secondly, that there be an *"explanation"* for the point not having been pleaded (para. 39), and thirdly, that the other party should not be unfairly prejudiced (see para. 32), which I consider, given the court's power to remedy any unfairness, would in practice amount to a test that he or she should not be irremediably prejudiced.

Arguability

5. The first test, arguability, is self-explanatory, and in contexts such as planning and asylum, should of course be read as a test requiring substantial grounds for the amendment sought.

Explanation

6. The second test, that an explanation (or good reason) be offered for the amendment, must, having regard to the actual result in *Keegan*, be viewed as being a very light threshold particularly in a case where the need for the amendment arises from an oversight by the applicant's lawyers. Regard also needs to be had to the already-cited conclusion in Keegan that good reason needs to exist for a party to be *deprived* of the opportunity to raise an important point. In addition the Supreme Court decision in *O'Neill* would seem to militate against a high threshold under this heading that would interfere with the court's ability to deal with the real issues in the case.

7. Oversight can take many forms. One can simply overlook a point, or one can wrongly or even carelessly take the view that the point is already covered in one's pleadings and only have it brought home to one at a later stage that this may not be the case.

8. As compared with some of the case law which preceded it, *Keegan* appears to me to strike a more tolerant note regarding the approach to the amendment of proceedings, and in particular of judicial review proceedings and a more central focus on the balance of the interests of justice.

9. A mistake whereby something is overlooked completely is clearly a more fundamental mistake than one whereby the applicant's lawyers incorrectly think that the impugned point is a permissible elaboration or particularisation of something which they think is already latent in the pleadings. Therefore, if the court is to be forgiving and understanding of oversight by way of complete omission,

as it was in *Keegan*, the court should be even more receptive to arguments based on a misconception that the point was within existing pleadings.

10. There is a human aspect to this issue which I feel has not been altogether brought to the foreground in some of the pre-*Keegan* caselaw. For any person intent on performing a public competitive task to the best of his or her ability, the intense coming into focus in the run-up to the decisive performance, the accentuation of concentration, resolve and exertion, the exclusion of all other concerns from the mind of the participant, the physical and mental pressure of the public spectacle on an important stage and an important occasion, the commitment and irreversibility involved in entering a crucial stage of contest, the face-to-face confrontation with opponent and referee, and the sheer human drama and theatre of the event, make it all but inevitable that the most effective contribution that the person can make will come to the forefront on the day itself in a way that simply cannot be replicated in advance. To fail to fully understand this is to fail to do full justice to the deeply human nature of any social endeavour, including the legal endeavour.

11. In the specifically legal context, there are of course very many cases which ultimately turn on tactical decisions made long in advance of the trial following careful consideration of the issues. Such advance preparation is crucial. But the immersive experience which begins its critical phase at the latest on the day before the hearing, and continues until the hearing is over, whereby the advocate sets aside all other considerations and focuses intently and exclusively on the imminent preparation and conduct of the actual hearing of a particular case, will bring into focus in that person's mind the best statement of his or her case in a way that no leisurely preparation further in advance, critical though that is, can quite achieve. Within that intense personal immersion lie some of the deepest satisfactions of the art of the advocate. That this will involve some change to the way the case is worded on the pleadings or in written submissions is all but inevitable. Sometimes that change can be a pruning back, or the astute concession of a subsidiary point. Sometimes it may be a recalibration, an elaboration, a particularisation or a development of a point, which may well not require amendment in any event. But at some point, elaboration crosses over into novelty and an amendment may be called for. Judicial approaches to requests for such amendments should reflect the human reality of the process, and respond to that process in a tolerant and understanding way, the primary issues being, not arid technicality and procedure, but a sympathetic concern for where the interests of justice lie and for the vindication of the rights of the parties to access to the court and to an effective remedy, and for ensuring that the real issues in dispute are addressed.

12. It is also important to emphasise that there is nothing in the rules or in logic to require that in any particular case, an amendment must be sought by notice of motion grounded on affidavit. Unnecessary formality adds to the cost, delay and inconvenience of litigation and is something to be avoided. Indeed, insofar as a demand for formal motions can sometimes be a reflex response to an application to amend, this rather tends to subvert the goal of saving time and money which a respondent to such an application will normally be relying on in resisting that very amendment.

13. Not every explanation needs to be put on affidavit any more than every fact in a case requires to be laboriously proved by oral or affidavit evidence. Informal concessions, agreed facts, open *inter partes* correspondence, information conveyed by counsel or solicitors that is peculiarly within their knowledge, or, at least where there is no objection, that is legitimately within the knowledge of their clients, certain facts that are in the public domain even if outside the realm of judicial notice proper, information that is included in written submissions without objection, and no doubt other matters where appropriate, all can be properly received by a court and acted on as if formally proved. A statement by an advocate that in effect they overlooked a point, or perhaps wrongly considered it to be a legitimate particularisation of something already pleaded, is something that the court normally can and should receive without insisting on the pointless, inconvenient and empty formality of requiring it to be put on affidavit by the solicitor acting for the party concerned.

Absence of irremediable prejudice

14. The third factor is that of avoidance of unfair prejudice to another party which in practice (given the power of the court to remedy such prejudice with terms, so that it would no longer be unfair) boils down to a test that there be an absence of *irremediable* prejudice. The reference in *Keegan* to the prejudice being *"unfair"* is an acknowledgment that it may be realistically impossible to exclude the possibility that some prejudice would be caused by an amendment. A respondent to such an application will almost always be able to dredge up some allegation of prejudice inherent in the process of dealing with an amendment, and present it, perhaps even loudly, no matter how flimsy it may be in reality.

15. Merely because prejudice is claimed, or an adjournment and costs demanded by an opposing party, does not of course mean that such prejudice exists, or that an adjournment, or any particular adjournment, or costs, are required in the interests of justice. It is for the court to assess the reality of the impact on the other party of any elaboration in or amendment of the grounds being put forward by a party.

16. It is important to focus firstly on the question of whether real and significant prejudice would actually be caused. Under the amended O. 84 r, 22(7) of the Rules of the Superior Courts, judicial review applications normally require advance written submissions. In the asylum context, this is also emphasised in the practice direction H.C. 56 of 19th December, 2011. Where a point is not properly pleaded but is later flagged in submissions, the other party will therefore have advance notice of it, and therefore (even if they file replying submissions strenuously objecting to the point not having been pleaded) any claim of prejudice on foot of a later application for a formal amendment would normally be diluted to vanishing point, and would certainly seem to be non-existent in the case of a purely legal argument that did not trigger a requirement for any further evidence. In any event, the admirable capacity of advocates to deal on the day with new legal points that arrive without advance notice in the course of a hearing should not be underestimated. MacEochaidh J. in *O.I. v. Refugee Appeals Tribunal* [2015] IEHC 408 was of the view that procedural objections by respondents to judicial review applications should be brought to a head rapidly rather than simply being pressed at the hearing. But going somewhat further than that, even if an objection is taken in replying submissions, the very fact that the respondent is thereby on notice of the substantive point is itself capable of destroying any prejudice that might otherwise arise.

17. The extent to which a court should have regard to alleged prejudice may also be diluted if the opposing party has itself been engaged in procedural laxity. As O'Donnell J. observed at para. 11 of *O'Neill: "Errors in legal procedure are rarely the exclusive province of one of the parties."*

18. Even if some tangible significant prejudice can be identified, that is not a reason for refusing the amendment if the prejudice can be addressed in some other way. If the point is one involving legal argument only as opposed to requiring further evidence, it is very hard to see how the prejudice (assuming it exists) cannot normally be mitigated by giving time to consider the new point, if time is needed. Even if the point requires further affidavit evidence, it may be possible to mitigate the prejudice by appropriate terms. Where further oral evidence is required on foot of an amendment, there may be more of an argument as to where the balance of justice lies. But overall there is much to be said for the approach of facilitating litigants in making their best case. There is something to the adage *"[l]et the worst be stated against you but, if possible, do not let the worst be proved"* (Richard Harris K.C., *Hints on Advocacy*

(16th ed.) (London, 1926) p. 220).

19. It seems to me, on the basis of the foregoing considerations, that in case of oversight or mistake (including a mistaken failure to appreciate that the point may not have been properly pleaded to begin with) on the part of lawyers for a party, an amendment to allow a new point of law to be argued, at least in a case where this creates no need for additional evidence and no need to adjourn (other than perhaps briefly) a hearing that is actually underway, should presumptively be allowed.

20. As appropriate, the court may then go on to consider whether the opposing party realistically needs time to consider the new point (overnight may often be sufficient) and if so may go on to consider the question of an adjournment and costs. Costs should not be awarded against an applicant for an amendment as a matter of routine, but only where they are necessary to mitigate prejudice or are otherwise proper. In a case where it is appropriate that an amendment should be allowed, costs very often should be awarded against an opposing party if that party has consumed resources of the court in unnecessarily resisting the application instead of simply pragmatically requesting any appropriate terms that are necessary to deal with the amendment.

21. In relation to the question of an explanation for the lack of detail in an original judicial review statement it is not without relevance to point out that prolixity in grounding statements is also something to be avoided. In *Babington v. Minister for Justice* [2012] IESC 65, MacMenamin J. said that what was required under O. 84, r.20 as amended by the Rules of the Superior Courts (Judicial Review) 2011 (S.I. No. 691 of 2011), was *"a succinct statement of the grounds"* (para. 7), thus striking a balance between the need for specificity under O. 84, r.20 and curtailing the length of pleadings.

22. I will enter one caveat immediately in relation to points that are being introduced into a case that would de-rail the hearing altogether and prevent it from being resumed in any orderly or timely manner. For example, where a hearing is actually underway, and a party seeks to amend pleadings to add an entirely new point which has arisen in some other proceedings, and is, in those other proceedings, a point under consideration by the Court of Appeal or the Supreme Court or the subject of a reference to Luxembourg, with the result that the court will not be able to finalise the case at hand pending the conclusion of those developments, a court might be understandably reluctant to permit the proceedings to be de-railed by the side-wind of an amendment. Likewise where an amendment will necessitate the adjournment of a hearing that is actually underway, but the adjourned hearing, by reason of either court listings or the sheer time required to deal with the new point, cannot take place for a period measured in months rather than days or weeks, a court may also be slow to allow the hearing to be pulled up short in this manner. But matters are otherwise in the case of an amendment that will not warrant an adjournment, or perhaps will occasion only a relatively short break in proceedings.

23. If a party wishes to amend proceedings to introduce a point that would involve a long delay in finalisation of the case, that is certainly a category of application that should be brought in advance of the hearing, and would involve at a minimum an application to the judge in charge of the list that a hearing date should not be fixed (or, if already fixed, should be discharged). Such an advance application may be proper in an appropriate case; for example where other cases have built up in an adjourned list behind the case that is under appeal or the subject of a reference, the addition of one more case to that list may not cause any great injustice. However, an application to join such a back-up list loses a great deal of whatever attraction it has if it is only introduced at the hearing of the action.

24. I do not think any great weight need be attached to whether the point is merely a modest expansion of the grounds or a major point such as an entirely new head of claim. While there is language in *Keegan* suggestive of a view that a court should be more receptive to minor points, the actual result is very much supportive of the proposition that major points can be accommodated as long as no irremediable prejudice arises. The already quoted passage that *"[t]he appellant should not, without good reason, be deprived of the right to argue a very significant point of law"* (para. 46) is, on the contrary, rather suggestive of the conception that the fact that a point is very significant is in itself a reason for allowing the applicant to pursue it. The real issue, as I read Keegan, is not whether the point is major or minor, but whether there is irremediable prejudice caused by introducing it.

25. Likewise I do not think any particular emphasis should be placed on the lateness of the point in time at which the application is made. An amendment can be made right up to the very end of the case: see *J. K. v. Minister for Justice and Equality* [2011] IEHC 473. In that case the late amendment was made at the instance of the court (Hogan J.), which first came to appreciate the point in the course of preparing judgment, which is an even more unusual situation than on application by a party (although if such realisations can legitimately occur at a late stage to a judge, that surely emphasises the point that they may also legitimately occur at a late stage to advocates). If the court can adjust the pleadings of its own motion in the interests of justice at the eleventh hour, there can be no principled objection to the parties requesting that this be done. Again the issue is not so much when the application is made but whether any real injustice is caused. For instance, a new point may be raised at the hearing in the opening of the case, but the application to amend may not be made until the reply, after hearing the respondent's attitude. The fact that an application is made in a reply is not a reason to reject it.

26. In a related vein, I would consider that delay by an amending party that is actually aware of a new point in seeking the amendment, at least where no adjournment of the hearing would be required by the amendment, is of little weight in this context. For example, a party may come to appreciate a new point, and perhaps flag it in written submissions or correspondence, without particularly focusing on whether or when an application to amend should be made. The responding party may object on a pleadings basis, and time may then pass without the application being formally made until the hearing. Even if it could be said in some absolute sense that a party should have moved sooner with a formal application, what real harm is caused by failing to do so if the amendment does not in any event warrant an adjournment? This is especially so if some form of notice of the point was given, even if it was not expressly signalled at that point that the pleadings would be sought to be amended.

27. Of course if the amendment would require further affidavit or oral evidence, or if an adjournment would be required to consider the issue and the point had not already been signalled in some way (whether by correspondence or submissions), a party who was actually aware of such a possible new point would be expected to move in advance of the hearing, at a minimum by raising it in correspondence to give advance notice. But in any event, even if a party had culpably delayed in giving notice of a new point, that can be addressed by adjournment and terms as to costs, rather than by the coarser option of refusing the amendment.

28. Finally, I would emphasise that judicial time, energies and resources are limited and ideally should be focused on issues of substance. Sterile arguments about what precisely was or was not pleaded (especially if the only matter that turns on the answer is whether a party can advance an additional point by way of legal submission) do not seem to be necessarily the best use of those resources. It seems to me that, in general, arguments about whether particular legal points come within pleadings or not represent a real drain on systemic resources with frequently very little corresponding benefit in terms of the interests of justice. One might hope that parties at the receiving end of such applications will generally take a pragmatic view that will facilitate the real issues being decided (see Babington as to the duty of parties to act reasonably). If not, of course, a court may have to impose appropriate consequences on such opposing parties.

Application of the test in this case

29. For present purposes it is only necessary to set out the procedural history in a very summary manner. This application arose from a claim of asylum made by the applicant which was ultimately rejected by the Refugee Appeals Tribunal in a decision dated 15th March, 2012, under cover of a letter dated 22nd March, 2012. This decision contained a number of adverse findings in relation to the applicant. The two findings that consumed most of the time at the hearing were essentially (i) that the applicant had failed to produce supporting evidence including newspaper evidence for her claim and (ii) that the date of the applicant's husband's death certificate, being the same day as his death, was suspect. The findings were criticised by Mr. Michael Lynn S.C. for the applicant as having been arrived at unfairly and/or as erroneous and/or irrational.

30. The notice of motion seeking leave is dated 16th April, 2012. Written submissions were delivered by both sides and the matter came on for hearing before me on 3rd and 4th November, 2015. This hearing proceeded on a telescoped basis and therefore amounted to the trial of the action. Following Mr. Lynn's submission, Ms. Silvia Martinez B.L. for the respondents submitted that none of the points relied on at the hearing were properly pleaded, and in addition a great number of them did not come within the written legal submissions. She complained of a "moveable target" in this regard and for good measure suggested that a great number of points raised in the written submissions had simply been abandoned *sub silentio* at the hearing and a new set of points substituted. Having said that, in her reply she prudently went on to engage fully with the substance of all points raised by Mr. Lynn. She also argued that the question of whether these points were properly pleaded should be dealt with first. Mr. Garry O'Halloran B.L. replied on behalf of the applicant and contended in essence that the points were sufficiently pleaded, or, if not, were a legitimate particularisation of what had been pleaded, or failing that he sought an amendment to the statement of grounds.

31. Reflecting on the submissions made I came to the view that, in this case, there was a good deal of merit in Ms. Martinez's submission that this issue should be addressed at an early stage. I therefore informed the parties of my decision on this question on 6th November, 2015, and indicated that I would give reasons later. This judgment gives reasons for my preliminary ruling on the issue.

32. The basis on which the Tribunal decision was challenged at the oral hearing can be summarised in the form of a possible ground along the following lines:

> *The decision should be quashed because (a) it contains findings which were arrived at unfairly and/or were erroneous and/or irrational including in particular finding that the applicant had failed to produce supporting newspaper evidence and the finding regarding the date of the applicant's husband's death certificate and (b) those findings cannot be severed because the decision was cumulative and the tribunal failed to specify the weight to be attached to the elements of that decision.*

33. Comparing this formulation (which Ms. Martinez and Mr. Lynn both accept reflects the substance of what was submitted by the latter at the hearing) with the existing statement of grounds, I think that an examination of that existing statement would show that it falls somewhat short in this regard. I will therefore proceed on the basis that an amendment is required to allow the applicant's submission to be advanced to the full extent that it was in oral submissions. Even if an amendment to this effect were not strictly necessary, it would, all other things being equal, be highly desirable that the point being relied on should appear clearly on the face of the pleadings, particularly given the power of the court under O. 84 r. 20(4)(b) to order that the grounds be particularised (which I would consider to be an exemplification of an inherent power to make such an order even after the grant of leave). The issue therefore is whether the statement should be amended to allow this ground to be expressly included.

34. Applying the three limbs of the Keegan test, as I have set them out above, I find the position to be as follows:

> (i) *Arguability*: In my view having regard to the submissions made on the merits of this issue, there are clearly substantial grounds for arguing this proposition. Whether I ultimately find it to be well-founded or not so as to warrant the grant of substantive relief is a separate matter and does not arise at this point.
>
> (ii) *Explanation*: I did not consider it necessary or appropriate to require the pointless formality of an affidavit setting out the explanation for the amendment and indeed Ms. Martinez quite sensibly made no such request. I discern from what Mr. O'Halloran has said to the court that the essential explanation as to why the point was not pleaded at an earlier stage was a belief by the applicant's lawyers that the existing pleadings were adequate and/or that this was a legitimate particularisation of those pleadings, or alternatively phrased, a mistaken failure by the applicant's lawyers to appreciate that the point was not already adequately set out; in short, oversight or mistake by the applicant's lawyers. I accept this explanation. Such oversight or mistake is clearly capable of constituting good reason for an amendment (Keegan).
>
> (iii) *Absence of irremediable prejudice*: There is no real prejudice to the State that I can see, let alone irremediable prejudice. The amendment is an additional point of law and it does not require any further evidence to be adduced by either side. If there had been prejudice it would have been significantly diluted by (a) the prior furnishing by the applicant of written submissions (which undoubtedly reduced, even if they did not altogether eliminate, the gap between what was pleaded and what was advanced in oral argument) and (b) the fact that in this case the State has not filed a formal statement of opposition but merely delivered an unfiled intended statement, which I have described as a *"pseudo-pleading"* in my decision in *Li v. Minister for Justice and Equality* [2015] IEHC 638. Finally, even if there had been any prejudice requiring an adjournment, it would have been entirely possible and appropriate to allow the amendment but to remedy such prejudice with such terms as might be warranted in the circumstances.

35. Having regard to the foregoing, the balance of justice is clearly overwhelmingly in favour of allowing the applicant to amend her statement to include the new ground set out at para. 32 of this judgment, fixing a time for delivery of the amended statement, and reserving costs; and that is the order that I made on 6th November, 2015.