THE COURT OF APPEAL

Court of Appeal Record No.: 2023 106
Neutral Citation No.: [2024] IECA 126

Faherty J.
Ní Raifeartaigh
Binchy J.

BETWEEN/

BILLY MONAHAN, JONATHAN CONCANNON AND PHIL MCCARTHY

APPLICANTS
(BILLY MONAHAN SOLE APPELLANT)

- AND -

THE MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of the Court delivered on the 28th day of May 2024

1. The applicants in these proceedings were, at the relevant time, recruits in training with the Defence Forces. On 9th November 2021, they obtained an order for leave to apply by way of application for judicial review quashing the decision of the first named respondent to discontinue the training of the applicants and to suspend their graduation or "passing out" from their completed stage of training, pending an investigation by the Military Police. Thereafter, statements of grounds and grounding affidavits were served upon the respondents. There followed an exchange of affidavits in the usual way, and on 10th March 2022, the applicants applied for leave to amend the statements of grounds. Those applications came on for hearing before Phelan J. in the High Court on 31st March 2023, when she delivered an *ex tempore* judgment declining the reliefs sought in each case. While

each of the applicants initially filed an appeal from the orders of Phelan J., the appeals of Mr. Concannon and Mr. McCarthy did not proceed (although this only became apparent on the morning of the appeal), and this judgment is concerned only with the appeal brought by Mr. Monahan (the "Appellant").

Background

2. The applicants enlisted as recruits in the Defence Forces and commenced training on 17th May 2021 with 163 Platoon, B Company, 12th Infantry Battalion at Sarsfield Barracks Limerick. All going well, the applicants would have been due to graduate from Private Grade 1 Star to Private Grade 2 Star on 25th August 2021. Unfortunately, however, the applicants were involved in an incident involving another recruit, Recruit Canty, on 18th July 2021. We should stress however that the extent of their involvement or what precisely occurred on this occasion is a matter of significant dispute, and the Appellant denies any wrongdoing.

3. In an affidavit sworn in reply to the grounding affidavit of the Appellant, Commandant Niall Murray, then the Company Commander of 163 Platoon, B Company, averred that the applicants were told on 19th July 2021 that the incident the day before was sufficiently serious such as to require an investigation by the Military Police. In replying affidavits, each of the applicants denied being so informed on that date. They claim that the first they became aware of any involvement of the Military Police was on 20th August 2021. While that is in dispute, it is common case that on 20th August 2021, Commandant Murray spoke with the applicants individually and explained to each of them that a decision had been taken that the applicants could not be "passed out" owing to the ongoing investigation by the Military Police. Thus, the applicants did not graduate as they expected to do from the first stage of their training on 25th August 2021.

Application for Judicial Review

4. The application for judicial review first came before Meenan J. on 28th October 2021, *ex parte*, when he directed that the respondents should be put on notice of the application. It was then made returnable for 9th November 2021 on which date it was ordered, by consent, that the applicants should have leave to apply for judicial review for, *inter alia*, the following reliefs:

(1) An order of *certiorari* quashing the decision of the respondents to discontinue the training of the applicants;

(2) A declaration that the failure to allow the applicants to graduate on 25th August 2021 was made in breach of their rights to natural justice, and in particular of the principle of *audi alteram partem*;

(3) A declaration that the suspension of the applicants and the failure to allow them to graduate from the first stage of their training on 25th August 2021 amounted to the imposition of a severe penalty in breach of the principles of natural and constitutional justice carrying significant financial and career implications as well as exposing the applicants to humiliation which was disproportionate to any legitimate purpose of the respondents;

(4) A declaration that the suspension of the applicants from further training on the grounds of a pending investigation by the Military Police was an irregular procedure not mandated by the Defence Acts 1954 – 2020 and the regulations made thereunder and was made in breach of the applicants' rights to a fair hearing including the right to confront and cross-examine their accuser; and

(5) A declaration that the applicants were not accorded fair procedures in accordance with their constitutional rights and their rights under the Defence Act, 1954 (as amended) and the European Convention on Human Rights Act, 2003 and the

European Convention for the Protection of Human Rights and Fundamental Freedoms;

Other reliefs sought are not relevant for present purposes.

5. The grounds upon which leave was granted are those set out at paragraph E of the statement of grounds, and are divided under two headings: grounds relating to the declaratory reliefs sought and grounds relating to the relief sought by way of *certiorari*. In the particular circumstances of this case it is necessary to set out the grounds in full:

Grounds related to Declaratory Reliefs

(i) *The applicants had a legitimate expectation that having competed their program of training they would be allowed to graduate or "pass out" in due course with the rest of their training platoon.*

(ii) *The decision to suspend the further training of the applicants and to refuse to allow them to graduate or pass out was an arbitrary and capricious decision made in breach of the applicants' rights to natural justice and in particular the principle of audi alteram partem given that this decision was announced to the applicants as a fait accompli with no right of appeal.*

(iii) *The applicants were not charged with any offence nor indeed told the substance of the allegations against them nor given any opportunity to make representations prior to the decision to suspend their training and refusal to allow them to graduate or pass out. The applicants were told on 25th (sic) August 2021 that they would not be allowed to graduate or pass out but were not interviewed by the Military Police until 14th, 15th and 16th September 2021 which was the first time they were told the substance of the allegations.*

(iv) *The applicants were not told the substance of the allegations and invited to comment until several weeks after the decision to suspend their further training*

and refusal to allow them graduate or pass out was made nor given any opportunity to obtain exculpatory evidence for approximately eight weeks after the date of the alleged incident by which time any witness evidence may be unobtainable or unreliable.

(v) *The respondents have failed to provide adequate reasons for the decision to refuse to pass out the applicants.*

Grounds relating to Relief by way of *Certiorari*

The grounds set out in paragraph (e)(i), (ii), (iii), (iv) and (v) are repeated mutatis mutandis in support of the reliefs sought herein.

(vi) *The imposition of severe sanctions pending an investigation is in breach of the presumption of innocence and the refusal to allow the applicants to graduate or pass out exposed them to public humiliation as neither they nor their family members could attend the passing out ceremony and their absence from same would have been a matter of adverse comment amongst their comrades.*

(vii) *The suspension of the applicants further training and consequent severe financial loss, and stalling of their careers was disproportionate and unjustified. The applicants did not progress as expected from Private Grade 1 at a wage of €408.99 to Private [Grade 2] to start at a wage of €497.46 as expected. As a result of not being appointed to the grade of Private 2 Star the applicants cannot participate in the current ten week course of training leading to appointment as Private 3 Star at a wage of €514.60.*

(viii) *The respondents have failed to provide adequate reasons for the decision to refuse to pass out the applicants.*

(ix) *In the circumstances the applicants have been subject to an oppressive work regime that is contrary to the principles of natural justice and/or constitutional*

justice in that the defendants have failed to afford the plaintiffs (sic) due process in a timely manner.

6. Each of the applicants swore a grounding affidavit on 26th October 2021. From this point onwards, however, this judgment will refer only to the affidavits completed by the Appellant, and to the case made by him in this application. The Appellant refers to his satisfactory performance during his recruit training. He avers that in his final assessment on 20th August 2021, he was informed by Commandant Murray that, while he was one of the top members of the Platoon, he would not be passed out owing to an ongoing Military Police investigation. The Appellant avers that he was shocked at this development. He avers that he was humiliated and that he did not progress to Private 2 Star with the result that his pay did not increase from €408.99 to €497.46 as expected.

7. The Appellant avers that subsequent to the passing out of the other members of the Platoon on 25th August 2021, he was required to present himself for interview with the Military Police in Collins Barracks, Cork (on an unspecified date) in September 2021. He was cautioned and advised that he had a right to legal advice, but he agreed to assist the interview and waived that entitlement. The Military Police then informed him that Recruit Canty made an allegation that on or about 21st July 2021, he, the Appellant, had bullied and intimidated Recruit Canty. The Appellant avers that this was the first time that any allegation had been put to him and that he denied the allegation. He avers that by this time some eight weeks had passed since the alleged incident and he could not recall who might have been in the vicinity of the incident at the time it was alleged to have occurred.

8. The Appellant further avers that as a result of his suspension, he was not undergoing any training and he was confined to Barracks from Monday to Friday. He avers that he was prevented from progressing in his military career.

9. The Appellant also avers that he had not been afforded an opportunity to vindicate his good name and to protect his reputation, and that the decision to prevent him from passing out was in no way proportionate or reasonable.

Statement of Opposition and Replying Affidavit

10. A statement of opposition was delivered on behalf of the respondents on 3rd December 2021. This is substantially a traverse of the statement of grounds and does not require any elaboration.

11. On 20th January 2022, Commandant Murray swore two affidavits, the first being an affidavit verifying the statement of opposition, and the second being an affidavit in reply to the grounding affidavit of the Appellant. In his second affidavit, Commandant Murray describes the incident involving Recruit Canty which involved intimidation and assault resulting in injuries. Commandant Murray describes how the entire platoon was "*paraded or assembled together without Recruit Canty on the 19th of July*". He avers that the platoon was asked about the incident and also informed that it was a sufficiently serious incident such as to require the involvement of the Military Police and an investigation. He describes how a Sergeant Gleeson asked for those involved in the incident to step forward, and the applicants came forward. They denied the assault and claimed they had only spoken to Recruit Canty.

12. Commandant Murray further avers that because of the seriousness of the allegations it was decided that the applicants could not be passed out with the remainder of the platoon in August, and he avers that he informed the applicants of this decision on 20th August 2021. He further avers that the applicants were informed that a decision had been made to extend the time for their final approval until 17th November 2021, and that no final decision would be made until completion of the investigation by the Military Police.

13. Commandant Murray further avers that a Lieutenant Walsh also spoke with the applicants on 20th August 2021, in the presence of Sergeant Gleeson, reiterating what had been said to the applicants earlier that day by Commandant Murray i.e. that they could "*not be signed-off for final approval until the ongoing investigation had concluded and until they had been cleared of any alleged wrongdoing*". Commandant Murray further avers that Lieutenant Walsh also encouraged the applicants not to lose interest in returning to military training. Commandant Murray exhibited a written memorandum prepared by Lieutenant Walsh of his account of this discussion.

14. Commandant Murray denied that the applicants were confined to Barracks. He avers that the refusal to allow them to pass out is proportionate and reasonable. He avers that they will have an ample opportunity to vindicate their names and reputations during the course of the Military Police investigation, and he refers to the offer of legal representation which all of the applicants had rejected when being interviewed in September 2021.

The Application to Amend

15. On 10th March 2022, the Appellant issued a motion seeking leave to amend the statement of grounds. This was grounded on a further affidavit of the Appellant of 9th March 2022. In this affidavit, the Appellant takes issue with a number of matters of fact as deposed to by Commandant Murray. He says that the conversation of 19th July 2021 referred to by Commandant Murray did not occur as described. He says that there was no conversation at all with Lieutenant Walsh. He claims that under Defence Forces Regulations, he should have been finally approved or discharged by 17th August 2021, unless the Deputy Chief of Staff had extended his time for service for a further period of three months, and there had been no mention of his being withheld from passing out before 20th August 2021. He says it was only explained to him verbally that he would not be passed out because of an ongoing Military Police investigation, and that he was not told and nor was he aware of the allegations

against him. He says that there was no mention of the date of 17th November 2021, and that nothing had occurred then or since regarding any review of the decision.

16. He claims that by withholding him from passing out, the respondents have acted contrary to the presumption of innocence, and that even if, following an investigation, he had been found guilty of an offence, he would still have been entitled to advance in grade from Private Grade 1 Star to Private Grade 2 Star unless he was discharged completely from the Defence Forces. In this regard he relies upon Defence Force Regulation DFR A10 ("DFR A10"). He claims that ever since August 2021, he has been performing menial tasks and has been unable to advance his career. As a result, he claims, he may miss key benchmarks in his career progression which may have permanent consequences for his continuance in service. He avers that it is clear that the impact upon his career was not considered by Commandant Murray. He also avers that until he read the affidavit of Commandant Murray, he did not know who had made the decision to suspend his training, nor what factors were considered.

17. Finally, the Appellant avers that he has read the proposed amended statement of grounds and verifies the facts set out therein. However, what the Appellant does not do in this affidavit is provide any explanation as to why the amendments that he seeks to make to the statement of grounds are necessitated by reason of information coming to light since leave was granted, whether through the affidavit of Commandant Murray or otherwise. As we shall see, this was an issue upon which the motion judge placed significant emphasis.

18. Commandant Murray swore a replying affidavit on 4th July 2022. He takes issue with certain matters of fact averred to by the Appellant, but it is unnecessary to rehearse any further the factual disputes between the parties. While it is really a matter of legal submission, Commandant Murray avers that it is unclear why the proposed additional or amended grounds for application for judicial review were not included at the leave stage of

the process, since, he avers, the Appellant was on notice of the grave allegations against him and possible Military Police involvement as early as 19th July 2021.

19. For convenience, this judgment will, when addressing the judgment of the High Court below, set out in full each of the new grounds sought to be advanced, followed by the reasons given by the judge for rejecting each of those grounds.

Judgment of the High Court

20. Phelan J. delivered an *ex tempore* judgment on 31st March 2023. Having summarised the background to the proceedings, and the grounds upon which leave had already been granted, the judge proceeded to consider the notice of motion of 10th March 2022 and the grounding affidavit in support of the motion. She noted that the only basis given in the grounding affidavit for the application is that given at para. 18 thereof wherein the Appellant avers that, until he read the replying affidavit of Commandant Murray, he did not know who had made the decision to suspend his training, nor what factors were considered. The judge noted that no attempt was made to engage with each of the proposed new grounds in order to identify what had occurred to warrant an amendment application. Furthermore, the judge noted, that in his affidavit in reply to this application, Commandant Murray had referred to the failure on the part of the Appellant to address why the amendments to the grounds are required, and why the now proposed grounds were not included previously. The judge continued:

> *"Despite the fact that this affidavit [i.e. the replying affidavit of Commandant Murray] was sworn in July 2022 identifying the failures to engage on a factual basis with the application to amend, the applicants have not remedied their flagged failure to engage with the factual basis for requiring the amendment and why the application should be permitted. I consider this failure a fundamental problem with this*

application as the Court requires an evidential basis upon which to consider the exercise of a discretion to amend."

21. The judge then proceeded to consider the test applicable in cases of applications to amend a statement of grounds as discussed in *Keegan v. Garda Síochána Ombudsman Commission* [2012] IR 570 and *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296. She stated:

"It is clear from these decisions that an applicant for leave to amend must explain his failure to include the proposed new ground in the original application. The proposed new ground must also satisfy the normal test for leave, most particularly the test of arguability. In the case of applications for amendment, it is also necessary to demonstrate no unfair prejudice to the respondent. Further, as identified by de Blacam in the Third Edition of his book, Judicial Review, at para. 48.12:

"Where a new ground is being advanced more than three months after the decision challenged there is a further requirement as there is in any leave application which is not within three months, to provide an evidential basis for the exercise of a jurisdiction to extend time having regard to the requirements of Order 84, specifically that the need for amendment arises from the circumstances outside the applicant's control or which could not reasonably have been anticipated by him."

22. Having thus set out the general principles applicable to such applications, the judge then proceeded to consider each of the proposed amendments, of which there were ten. They are identified in the proposed amended statement of grounds as paras. E(ii), (vii) – (xv) and (xviii), and this judgment will adopt the same numerical sequence, followed by the decision of the trial judge on each ground, as follows:-

23. (ii) *The refusal to allow the applicants to progress to the grade of Private 2 Star was in breach of DFR A10 which states:*

> *"37.(a) A private, Grade I shall be qualified for advancement to Private Two Star or Private Three Star in his particular class when he passes the tests laid down in the relevant Training Instructions issued by the General Staff and in the case of advancement to Private Three Star, whose military conduct merits an assessment of not lower than "GOOD" under the provisions of paragraphs 38 and 40 of Defence Force Regulations A.8, in respect of a period of six months (or in respect of the period of his service in the Permanent Defence Force if such is less than six months) immediately prior to the completion of the tests."*

The judge records that in argument before her, counsel for the applicants argued that this plea could not have been made previously, because the applicants had not known until the inspection of documents (following upon the granting of leave) that they had passed their training and also because the applicants were unaware of the terms of DFR A10. The trial judge rejected this amendment for several reasons. Firstly, she noted that the applicants had failed to provide any evidential basis for the submission that they did not know that they had already passed their training. Indeed, she noted, the affidavits grounding the proceedings make it clear that the applicants understood that they had completed all elements of their training, and that the only reason that they would not be passing out was because of the Military Police investigation. Moreover, the applicants provided no evidence that they were not aware of or that they could not have been aware of the terms of DFR A10.

Accordingly, the judge was not satisfied that the applicants had provided an explanation on affidavit for the failure to include this new ground in the original application, or that the delay in pleading this ground arose from circumstances beyond their control and accordingly she rejected the application so far as it relates to this ground.

24. (vii) *The applicants' Commanding Officer, Commandant Niall Murray in refusing to advance the applicants to the grade of Private 2 Star failed to have adequate or any regard to the presumption of innocence enjoyed by the applicants.*

The judge rejected this new ground on the basis that it is a reiteration of a plea already contained in the statement of grounds, adding only a refinement to the effect that the decision maker was Commandant Niall Murray. The judge was of the view that this refinement is unnecessary in circumstances where it is already pleaded that the decision breached the presumption of innocence. She also held that no basis in fact had been established for the plea, and that the identity of the individual who made the decision is not a necessary particular in pleadings in order for the applicants to advance the argument that the decision was unlawful by reason of the presumption of innocence.

25. (viii) *The applicants' Commanding Officer, Commandant Niall Murray failed to hear the applicants prior to making the decision to refuse to finally approve the applicants and in refusing to allow them graduate or pass out and presented them with a "fait accompli".*

The judge rejected this ground also on the basis that it is an unnecessary refinement of the existing grounds which already pleaded that the applicants were not afforded an opportunity to make representations and also, in so far as it refers to Commandant Murray, the identity of the decision maker is not material to the nature of the case being made by the applicants.

26. (ix) *The applicants' Commanding Officer failed to advise them, before the expiry of their three month probationary period that he was not minded to finally approve them nor did he at any time advise them that he had sought the consent of the Deputy Chief of Staff to a three month extension of service.*

The judge noted that the three-month probationary period ran from May 2021 to August 2021. She further noted that the applicants were aware well in advance of November 2021, when the leave application was moved, that they were not to be passed out and that the period

within which a decision would be made to approve the applicants or not would be extended and that the probationary period would also be extended pending a decision. She said that the only new factor identified by the applicants is that they were unaware that consent had been sought to the three-month extension of service. However, while this might have had some significance in the decision of the applicants as to whether or not to proceed by way of judicial review, the judge considered that it was unclear how it provided a ground of challenge to the decision to suspend and not to approve the applicants for passing out, which are the decisions under challenge. The judge refused this ground in part because the applicants knew at the time they commenced proceedings that they would not be approved pending conclusion of the investigation, and no explanation had been provided for the failure to include it in the original application, and in part because she was not satisfied that it constitutes an arguable ground with regard to the decision under challenge.

27. (x) *The applicants' Commanding Officer Niall Murray failed to consider the fact that if they were not "passed out" within six months of enlistment they would be automatically discharged from the Defence Forces on or before 17th November 2021.*

The judge noted that again there is no evidential basis for this plea. At this point, the judge also noted that the applicants placed reliance on the affidavit of Commandant Murray in support of several new grounds on the basis that insofar as Commandant Murray fails to refer to factors which they maintain he should have taken account of, that his failure to do so is evidence that he failed to take into account relevant matters in arriving at the decision to defer the passing out of the applicants. The judge held however that "*the failure to refer to a matter in an affidavit in reply to proceedings in which it is not claimed that a matter has not been considered cannot be construed as evidence that those considerations were not on the mind of the decision-maker. The affidavit is not the decision.*"

The judge refused this ground on the basis that there is no evidential basis for a plea that Commandant Murray failed to consider the fact that if the applicants were not passed out within six months of enlistment, they would automatically be discharged from the Defence Forces on or before 17th November 2021, and she also noted that, in the event, no such automatic discharge had occurred. She also refused this ground on the basis that the decision had already been challenged on the basis that it results in a disproportionate interference with the applicants' rights.

The judge further held, as regards this new ground, that the extent of potential interference with the applicants' rights was known in November 2021, when proceedings were commenced [they were in fact commenced on 28th October 2021, with leave being granted on 9th November, 2021], or if it was not known, the applicants had not provided any evidential basis to this effect.

28. (xi) *The applicants' Commanding Officer Commandant Niall Murray failed to consider the effects on the applicants' careers in circumstances where their engagement with the Defence Forces was for a period of five years and would only be extended if particular criteria such as courses completed and overseas service undergone were met and in refusing to allow them "pass out" and putting them in a limbo position for an extended period of many months would result in their careers being compromised notwithstanding that they may be eventually cleared of any charges which may have been brought.*

The judge rejected this ground for the same reasons as she rejected ground number (x).

29. (xii) *The applicants' Commanding Officer Commandant Niall Murray failed to consider the financial impact on the applicants of not allowing them "pass out" and that there was no mechanism to backdate pay when the applicants are eventually cleared of any charges brought against them.*

Again, the judge rejected this new ground on the basis that there is no evidential basis for a plea that Commandant Murray failed to consider these facts, and that there is already a ground that the decision was disproportionate because of its financial impact on the applicants.

30. (xiii) *The applicants' Commanding Officer Commandant Niall Murray failed to have adequate regard that the Military Police investigation into the alleged incident had not concluded, and that the applicants had continued their recruit training satisfactorily and without incident since the making of the allegations.*

The judge rejected this ground also on the basis that there is no evidential basis for it, and on the basis that a challenge to the reasonableness or proportionality of the decision is already included in the proceedings. Further, she noted, no explanation has been provided for the failure to include a challenge to the decision on this express basis.

31. (xiv) *The applicants' Commanding Officer Commandant Niall Murray failed to have regard to the fact that refusing to "pass out" the applicants had the automatic effect that they would be treated as recruits and confined to barracks, unless excused.*

The judge rejected this ground on the basis that, while there is a contest on the facts as regards whether or not the applicants were confined to barracks, there is no evidential basis for a plea that Commandant Murray failed to consider the issue of confinement to barracks, although he says that it did not occur. Further, the judge noted, insofar as it is already pleaded that the applicants were confined to barracks, no explanation has been provided for the failure to include a challenge to the decision on this basis.

32. (xv) *The applicants' Commanding Officer failed to have regard to the fact that it was most unlikely that a Court Martial would occur within the period between the 20th August 2021 and 17th November 2021 by which time the applicants would have been automatically discharged without having an opportunity to clear their names at trial*.

Again, this ground was rejected on the basis that there was no evidential basis for contending that Commandant Murray was the decision-maker, although the judge notes that he does not deny this in his replying affidavit. The judge said that had the applicants apprehended that they would automatically be discharged in November 2021, then a plea in this regard could have been included in the original application for leave. She held that it is not open to the applicants to introduce a new plea purportedly on the basis that the case made is somehow different because they claim that they now know the identity of the decision maker. Moreover, she continued, insofar as the applicants rely on DFR A10, the applicants should have deposed on affidavit that the provisions of that regulation were unknown to them at the time of the application for leave.

33. (xviii) *The respondents failed to disclose the identity of the decision maker*.

This new ground was not specifically addressed by the judge.

Notice of Appeal

34. There are nine grounds of appeal:

(1) The trial judge erred in failing to take the Appellant's case at its highest.

(2) The trial judge erred in holding that, since the amendments sought constituted an amplification of the case already made, they should have been pleaded from the outset.

(3) The trial judge erred in fact in holding that the Appellant had not disputed the evidence of Commandant Murray that Lieutenant Walsh had discussed their future careers with the applicants, having advised them that they would not be allowed to pass out or graduate from the initial stage of their training.

(4) The trial judge erred in fact in holding that the Appellant was aware of the significance of the date of 17th November 2021, at the time of making his original application for judicial review.

(5) The trial judge erred in fact and in law in failing to infer from the means of knowledge clause in the affidavit of Commandant Murray sworn on 13th December 2021 that he was the decision maker.

(6) The trial judge erred in fact and in law in holding that whilst the identity of the decision maker was not necessary to make a plea regarding the factors taken into account in arriving at a decision, [she] failed to address the fact that knowledge of the factors taken into account is a prerequisite to such pleading.

(7) The trial judge failed to have regard to the principle that when a proposed amendment does not amount to a new case but simply an amplification of an existing case, the court should allow the amendment (in the absence of prejudice) in order to allow the real issue in controversy to be determined.

(8) The trial judge erred in fact and in law in holding that because an amendment sought could be argued on the basis of the existing pleadings, it should not be permitted in circumstances where the proposed amendment was notified to the respondent before the statement of opposition was delivered.

(9) The trial judge erred in fact and in law in holding that the applicants could argue that they could plead a ground that they were not in a position to prove i.e. that they had passed all tests required to be passed out. The Appellant was not in a position to plead that the refusal to allow him to progress to the grade of Private 2 Star was in breach of DFR A10, until such time as it was established that he had passed all relevant tests.

Respondents' Notice

35. Firstly, the respondents plead some general grounds in reply to the notice of appeal. They say that the trial judge correctly applied the jurisprudence in *Keegan v. Garda Síochána*

Ombudsman Commission, McCormack v. An Garda Síochána Complaints Board [1997] 2 IR 489 and *B.W. v. Refugee Appeals Tribunal.*

36. Secondly, the respondents say that the judge correctly held that most of the new grounds were already covered by the original statement of grounds and/or were simply an amplification of the grounds already pleaded.

37. Thirdly, the respondents observe that the judge correctly held that the explanations as to why matters were not pleaded were not contained in the grounding affidavit of the Appellant, but were contained only in legal submissions. Moreover, by the time the motion to amend was issued, on 10th March 2022, the time limit for seeking leave for judicial review had expired almost eight months previously, and no extension of time was sought within the motion to amend, and for that reason alone, the motion should not be permitted.

38. The respondents deny that the judge erred as asserted in any of the grounds of appeal. They plead that it is incumbent on the Appellant to set out each proposed new ground and then link it to the decision of the trial judge on that ground, explaining why the judge was wrong in law. However, the Appellant has failed to this. Moreover, the respondents submit, the judge was correct in stating that there were no averments in the grounding affidavit of the Appellant to support his application.

39. The respondents dispute that the law is that an amendment should be allowed where it is simply an amplification of an existing ground. Furthermore, in some instances, the trial judge found that the grounds sought were actually a new case and should not be allowed for that reason.

40. The respondents claim that the Appellant has failed to set out or clarify what proposed amendments were notified to the respondents after leave was granted without objection on 9th November 2021 and before the filing of the statement of opposition on 3rd December

2021. In the absence of such clarification, the court could not make any determination on this issue.

Discussion

41. While the Court was referred to several authorities in which the principles governing an application to amend a statement of grounds in judicial review have been considered, there is really no need to look any further than the decision of the Supreme Court (Fennelly J.) in *Keegan v. Garda Síochána Ombudsman Commission* [2012] IR 570, which remains the leading authority on the issue. In his conclusions in *Keegan*, Fennelly J. held at paras. 34 – 37:-

> *(34) "…If [the applicant] applies for an amendment outside the time, he will have to justify the application. He will have to explain his delay, just as in the case of a late applicant. The court will expect him to give reasons to explain his failure to include the new proposed ground in his original application.*
>
> *(35) On the other hand, it is difficult to see why an applicant for an amendment of grounds should have to satisfy a more exacting standard in explaining delay than is imposed on an ordinary late application. He may say that the additional ground is based on material of which he was unaware when he was making his original application. On occasion, the respondent reveals a new ground of argument in its answer to the application, as appears to have occurred in McCormack v. Garda Síochána Complaints Board [1997] 2 IR 489 and Dooner v. Garda Síochána Complaints Board (Unreported, High Court, Finnegan J., 2nd June 2000). The applicant may offer a different explanation. There is no reason, in logic, to impose on an applicant a criterion of newly discovered fact to justify an application to amend, when an application for an extension of time is not subject to any equivalent condition….*

(36) None of this is to take away from the fact that an application (sic) for an amendment of his grounds for judicial review must explain his failure to include the proposed new ground in his original application. The cases show that the courts are reluctant to admit new grounds which amount to advancing an entirely new cause of action, as in Ní Eilí v. Environmental Protection Agency [1997] 2 ILRM 458, or a challenge to a different decision, as in Muresan v. Minister for Justice, Equality and Law Reform [2004] 2 ILRM 364. …

(37) Amendment may be more likely to be permitted where, as in Ó'Síodhacháin v. Ireland (Unreported, Supreme Court, 12th February, 2002), it does not involve a significant enlargement of the applicant's case. To the extent that leave has already been granted, the public interest in the certainty of a decision is already under question. An additional ground may not make any significant difference, particularly if it is based, as in the present case, on a pure matter of law. …"

42. Earlier in the same judgment, following a detailed consideration of the authorities, and in particular *The Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, Fennelly J., held, at para. 29:

"It is apparent [from these statements] that the Court regarded the power to extend time for the bringing of applications for judicial review of decisions in that case as being necessary in order to cater for the interests of justice and to protect a constitutional right of access to the court. The same considerations must, in my view, be relevant in the case of an application to amend grounds as in this case."

43. In *B.W. v. Refugee Appeals Tribunal* [2015] IEHC 725, Humphreys J. in the High Court, in applying *Keegan*, expressed the view that an applicant seeking to amend must address three issues to the satisfaction of the Court: (1) the new point(s) must be arguable (2) the applicant must provide an explanation for not having raised the point previously and

(3) the respondent must not be prejudiced by the points. On appeal to this Court, in *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296, Peart J. endorsed that summary at para. 78.

44. It is accepted by the respondents in this case that they are not prejudiced by the proposed amendments. There was no discussion at all as to whether any or all of the proposed amendments are arguable, but given that this is a low threshold, we shall proceed for present purposes on the basis that the grounds are arguable. As to an explanation, as has already been said above, the only explanation offered by the Appellant for the application is that set out at para. 18 of his affidavit grounding this application, which is that until he received the affidavit of Commandant Murray, he did not know who had made the decision to suspend his training, nor what factors had been considered in the making of that decision, which, the Appellant avers, seem to have been solely related to the seriousness of the allegation.

45. Before embarking upon her consideration of each individual proposed amendment, Phelan J. considered this explanation. She observed that notwithstanding that the application to amend involves the proposed introduction of no less than eleven different paragraphs, no attempt is made to engage with each of the paragraphs in order to identify what has occurred (since the grant of leave) to warrant an amendment. The judge further noted that in his replying affidavit to the application, Commandant Murray had referred to this failure of the Appellant to address why the amendments are required and why the grounds were not included in the original application for leave. Despite the issue being flagged, the Appellant took no steps to remedy the omission. The judge said that this failure is a fundamental problem with the application, because the court requires an evidential basis upon which to consider the exercise of a discretion to amend.

46. Notwithstanding that conclusion however, the judge then proceeded to consider each of the proposed amendments individually. That exercise was arguably unnecessary having

regard to the "*fundamental problem*" identified by the judge, from which there is no appeal. In any case, when addressing each of the proposed amendments individually, the judge in each case again expressed her opinion that the Appellant had not provided an explanation on affidavit for the failure to include the proposed new ground in the original application, as well as rejecting each proposed new ground for other reasons. None of the grounds of appeal address the specific conclusions of the trial judge, on each of the individual grounds. Similarly, the submissions of the Appellant, written and oral, were at a high level of generality and did not engage, on a ground-by-ground basis, with the decision of the judge in respect of each ground save only with regard to the amendment concerning the alleged breach of DFR A10 (to which ground this judgment will return to below).

47. Instead, it is submitted generally that the application to amend is a legitimate expansion of the statement of grounds consequent upon the revelation of information not known to the Appellant at the time of the making of his application for leave, and that all of the additional grounds arise from information received after the grant of leave and before the filing of the statement of opposition. However, the Appellant has failed to lay any evidential basis for this assertion by identifying, on affidavit, the information received after the grant of leave upon which he relies in respect of each proposed new ground.

48. While much emphasis is placed upon the claim that the Appellant did not know until he had read the affidavit of Commandant Murray who had made the decision to suspend his training, and while this is referred to in his grounding affidavit, the relevance of the identification of Commandant Murray (as decision maker) to the proposed amendments is not immediately apparent. Nor has the Appellant explained how it is that the grounds now sought to be relied upon could not have been relied upon at the time of the application for leave, simply because the identity of the decision maker was unknown. As the trial judge observed, the affidavit of Commandant Murray is not the decision, and it cannot be relied

upon to justify new grounds asserting that he failed to do certain things, or to have regard to others. On the Appellant's own case, he was informed by Commandant Murray on 20th August 2021 that he "*was one of the top members of the Platoon but [he] would not be passed out due to an ongoing military police investigation*" and on 25th August 2021 he was required to present himself for interview by the Military Police in connection with that investigation. By that date therefore, he had enough information to advance all of the same grounds that he seeks leave to advance now, with the possible exception of that relating to DFR A10. We say "*possible exception*" because there is no evidence as to when the Appellant first became aware of DFR A10.

49. While in his affidavit grounding this application the Appellant says that he did not know, until he received Commandant Murray's replying affidavit, that the period for passing out had been extended to 17th November 2021, the relevance of this is unclear. As the trial judge said, this might have had a bearing upon the decision of the applicants to proceed by way of judicial review, but it is unclear how it provides a ground of challenge to the decision to suspend the passing out of the Appellant, pending investigation, and that is the decision under challenge.

50. As regards proposed amendment (ii), by which the Appellant seeks to place reliance upon DFR A10, it was submitted that the Appellant was unaware of this regulation at the time of the original application for leave, and that Defence Forces Regulations are not publicly available. The problem with this however, is that it is a point made by way of submission only and is not grounded upon any averment of the Appellant. Moreover, it manifestly does not arise out of the replying affidavit of Commandant Murray. Furthermore, if the Appellant was uncertain about the terms of his engagement as a recruit, he could have sought clarity before applying for leave, and if such clarity was not forthcoming on time, he

could have relied on that request in support of an amendment application. But none of this occurred.

51. Counsel for the Appellant submitted that the proposed amendments comprise no more than an elaboration of existing grounds, which could not have been made until Commandant Murray had delivered his replying affidavit in which, for the first time, Commandant Murray was identified as decision maker. Counsel for the Appellant further submitted that the amendments cause the respondents no prejudice and that they should be allowed in the interests of justice. In making these arguments the Appellant relies upon the judgment of Fennelly J. in *Keegan*, and the passages from that judgment cited above.

52. However, none of these submissions overcome the fundamental difficulty identified by the judge at the outset of her decision i.e. that nowhere is it explained why leave was not sought on these grounds from the outset. And while we agree – as indeed the respondents agree – that the amendments are not prejudicial to the respondents, and that with the exception of new ground nos. (x) and (xi), the amendments are an elaboration of the grounds upon which leave has already been granted, those factors do not overcome the absence of any explanation as to why these grounds were not pleaded in the first place. This remains a requirement, even where the amendments sought are not prejudicial, and are an elaboration of the grounds on which leave was granted, and we did not understand the Appellant to argue to the contrary.

53. While the Appellant submitted that the amendments should be permitted in the interests of justice, this submission was made in a general way without any analysis to support such a contention. If accepted, such a submission would, in effect, abolish the requirement for an explanation. In any case, it is not readily apparent why the amendments are required in the interests of justice. These proceedings are fundamentally concerned with whether or not the Appellant was accorded fair procedures appropriate to the decision to

suspend his graduation from Private Grade 1 Star to Private Grade 2 Star. The grounds upon which leave has already been granted will clearly result in the scrutiny of that decision and the procedures leading to it in a degree sufficient to safeguard the interests of justice, and the need to amplify those grounds solely on this basis has not been demonstrated.

Decision

54. The trial judge correctly identified and applied the test applicable to an application to amend a statement of grounds. She was correct in her determination that the Appellant failed to provide any explanation as to why the grounds now sought to be relied upon were not relied upon at the time of the application for leave. Furthermore, the Appellant has not identified any error in the consideration of each individual amendment by the judge. We would therefore dismiss this appeal.

55. However, it is appropriate to note that in the course of the hearing before this Court, counsel for the respondent very fairly acknowledged that, with the exception of grounds (x) and (xi), the proposed amendments are an elaboration of existing grounds, and that the respondents would not intend, at the hearing of the substantive action, to object to reliance being placed upon those of the proposed grounds that constitute an elaboration of a ground in respect of which leave was granted.

Costs

56. Since the respondents have been wholly successful in this appeal, our provisional view is that they are entitled to an order directing the Appellant to pay the costs incurred by the respondents in this appeal. If the Appellant wishes to contend for a different order then he may, within fourteen days of the date of delivery of this judgment, contact the Registrar of the Court for the purpose of requesting a brief hearing for that purpose. In such event, however, if the order ultimately made by the Court in respect of costs is in the same terms as the provisional order as we have indicated above, then the Appellant may be held

responsible for any further costs incurred by the respondents as a result of requesting such a hearing.