THE HIGH COURT

2018 No. 418 JR

Between:

MUHAMMAD NADEEM

Applicant

– and –

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL (2)

Respondents

JUDGMENT of Mr Justice Max Barrett delivered on 5th March, 2019.

1. Introduction. The court refers to its judgment in *Nadeem v. MJE* [2019] IEHC 37. In the last paragraph of its judgment, the court observed that having dealt with the two issues identified therein "[t]*hat leaves the question…whether Mr Nadeem should now be allowed to adduce oral testimony to show that there has been, as he claims, a material error of facts sufficient to merit a quashing of the Decision*." The reason why it is sought to adduce that evidence and the issue that now arises in this context is stated in the following terms in the written submissions of counsel for Mr Nadeem:

> "*The desirability of oral evidence relates to the Respondent's rejection of certain documentation/ information provided by the Applicant to the Respondent and the Respondents finding that the Applicant had provided documents that were 'false and misleading as to a material fact'. The acceptance or rejection of the rationality of that conclusion is crucial for the purposes of adjudicating on the question of whether the Applicant is a) entitled to certiorari of the impugned decision and b) the question of whether the Respondent was entitled to apply the deportation procedure to the Applicant as opposed to the removal procedure mandated by the Directive/ Regulations….*

2. Statement of Grounds and Leave Granted. If one returns to the statement of grounds and indeed to the order of leave of 11.06.2018, the factual findings made by the Minister in the Decision were not challenged, nor was the case made that they were unsustainable and/or unreasonable. That, in truth, is the beginning and end of the within application. It is not open to the court to grant the order sought because the evidence which it is sought to adduce falls outside the scope of the leave sought and granted.

3. Other Points Arising. It is appropriate that the court should treat with various other issues that arose at the hearing of this application.

4. *(a) Order 84*. These being judicial review proceedings, the applicable procedure is that provided for by O.84 RSC. However, O.84 is of little assistance as regards the present application: it is silent as to whether the court can/should hear oral evidence of the type that it is now sought to adduce. One rule of note is O.84, r.27(5). This provides that: "*Where the relief sought is a declaration…and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in a civil action against any respondent…begun by plenary summons…the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by plenary summons*". This rule is of note because among the reliefs sought by Mr Nadeem is a "*Declaration that the Applicant is entitled to the application of the EU regime as regards any lawful removal from the State and not under the provisions of the Immigration Act 1999, as amended*". Counsel for the Minister contended that on its own terms O.84, r.27(5) must be read as applying only to the outset of the proceedings. For the following reasons, the court respectfully does not accept that this is so: (1) there is no such restriction in the express terms of O.84, r.27(5); (2) there is no obvious reason in logic why such a restriction should apply; (3) it would be a remarkably farsighted court which could identify the prospect, let alone reach an informed conclusion, at the outset of proceedings, that a particular declaration would better have been sought in plenary proceedings and that the proceedings before it should be reconstructed accordingly; (4) if anything, O.84, r.27(5) with its focus on the form of relief to be provided seems likely often to become a provision of relevance relatively late in proceedings. But be the foregoing as it may, the court does not see that O.84, r.27(5) is in any event of any avail to Mr Nadeem as there is no reason why the declaration sought could not be provided in these judicial review proceedings if it fell to be ordered. Order 84, rule 27(5) on its own terms does not apply to the seeking of an order of *certiorari*.

5. *(b) Application for Leave to Cross-Examine*. This is not a case in which a notice to cross-examine has been served by either party. Counsel for the Minister contended that when it comes to an inherent jurisdiction to allow oral evidence of the type which it is now sought to admit, "*it is nevertheless instructive to have regard to the limited circumstances where cross-examination is ordered in judicial review*". For three reasons, the court respectfully does not see that this is so: (1) there is no authority to suggest that the inherent jurisdiction which the court enjoys in this regard falls to be formulated within the penumbra of the rules concerning leave to cross-examine; (2) there is no compelling reason in logic why the court would constrain its inherent jurisdiction so; (3) in *Somague Engenharia SA and anor v. Transport Infrastructure Ireland* [2015] IEHC 723, a case on which counsel for the Minister placed no little reliance (it focuses on O.84A but seems of relevance to the present context also) Baker J., at para.23, (a) clearly recognises that admissibility of oral evidence generally is not the same as allowing cross-examination on affidavit evidence, (b) never suggests that the two are analogous, and (c) leaves open the issue as to the admissibility of oral evidence more generally.

6. *(c) Inherent Jurisdiction of the Court*. Counsel for the Minister contended (and counsel for Mr Nadeem did not demur) that there is a dearth of case-law as to when the court may invoke its inherent jurisdiction to allow the admission of oral evidence in the course of judicial review proceedings. As to the existence of such an inherent jurisdiction, the court, in *Dunnes Stores v. Dublin City Council & ors* [2016] IEHC 724, has previously approved the reasoning of Neuberger M.R. in *Bubb v. Wandsworth London Borough Council* [2012] P.T.S.R. 1011, 1018, where, in giving judgment in an appeal from what "*was effectively a judicial review*", he stated, *inter alia*, that "*I accept…it is, as a matter of principle, open to a judge, hearing a judicial review application, to permit one or more parties to adduce oral evidence….However, for reasons of both principle and practice, such a course should only be taken in the most exceptional case*." Rather than seek to predict when such an exceptional case might present, the court confines itself to observing that it does not see an exceptional case to present in the circumstances of this case, *i.e.* where (a) leave was sought and granted on a particular basis, (b) application could thereafter have been made to amend the grounds and was not, (c) there appears to be no reason presenting why the evidence which it is sought to adduce orally could not have been reduced to affidavit, enabling the respondent to take stock of same and swear up a replying affidavit or take such other step as it deemed appropriate, and (d) there is nothing that renders the refusal of the application now made otherwise unconscionable given (I) that the form and substance of these proceedings was shaped by Mr Nadeem, acting with the benefit of legal representation, and (II) the factors referenced by the court in para.8 below.

7. *(d) Right to be Heard*. Counsel for Mr Nadeem contended that for the court not to accede to the within application would breach Mr Nadeem's right to be heard. Any such right only extends to being heard on such case as he has brought; in this regard the court refers to para.2 above.

8. *(e) Fresh Application*. At one point in these proceedings the court referenced the potential life-changing consequences for Mr Nadeem were the court to get its decision wrong, assuming a deportation order then followed. The Minister (a) contends that such consequences need not present, pointing (b) to the potential for Mr Nadeem at this time to make fresh application under the EC (Free Movement of Persons) Regulations 2015 to remain in Ireland, and (c) to the fact that whether or not that application is successful will not be impacted by the Minister's finding in the Decision that the documents submitted in the course of the application which preceded same were "*false and misleading as to a material fact*". The court accepts the contention and points made by the Minister in this regard. The court accepts also that the potential for fresh application does not address the affront which Mr Nadeem is said to feel that the just-mentioned finding was made in the Decision; again, however, the court can but note its conclusions at para.2 in this regard.

9. Conclusion. For the reasons set out above, the court cannot in these proceedings accede to the application now made. Unless the parties have further argument to make in substantive proceedings, the court proposes now to adjudicate on the points left outstanding by it, pending its adjudication on this application.