THE HIGH COURT

[2017 No. 300 J.R.]

BETWEEN

MAGDALENA VONKOVA

APPLICANT

AND

CRIMINAL INJURIES COMPENSATION TRIBUNAL, MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Allen delivered on the 21st day of January, 2019

1. On 21st July, 2008, Nicola Vonkova, a Czech national, was murdered by Jakub Fidler, also a Czech national, in a house An Cartur Leathan, Inverin, Co. Galway. For about a year before her death, Ms. Vonkova had been living in the house with Michael Coleman. Mr. Fidler was living, or at least staying, in the house at the same time.

2. Ms. Vonkova's mother, the applicant, made an application to the Criminal Injuries Compensation Tribunal for compensation. This was refused by the single panel member and on appeal on the ground that article 10 of the scheme excluded cases where the offender and the victim were living together as members of the same household. The appeal to the Criminal Injuries Compensation Tribunal was determined on 9th January, 2017.

3. On 8th May, 2017, the High Court (Noonan J.) gave liberty to the applicant to apply by way of an application for judicial review for an order quashing the decision of 9th January, 2017, on the grounds that it was unsupported by the evidence and based on a misconstruction of article 10 of the scheme.

4. The applicant was also given leave to apply for declarations:-

> (a) that the first respondent did not adhere to fair procedures in failing to provide assistance to the applicant in circumstances in which she was a foreign national with little English and limited means, and in not advising the applicant that she could have made her application for compensation in the Czech Republic under the rules made there to implement the European Convention on the Compensation of Victims of Violent Crimes of 24th November, 1983;
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> (b) that the Criminal Injuries Compensation Scheme is not compatible with the requirements of Council Directive 2004/80/EC of 29th April, 2004, because it did not create a system of cooperation between the authorities of Member States to facilitate access to compensation, which system of cooperation would have directed the applicant to the availability to her of the scheme in the Czech Republic which did not have the same or similar exclusion to that in article 10 of the Irish scheme;
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> (c) that the Criminal Injuries Compensation Scheme is incompatible with European Convention on Human Rights
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> and for damages for breach of the applicant's constitutional rights, European Convention on Human Rights rights, and for breach of Council Directive 2004/80/EC.

5. The applicant's notice of motion was issued on 11th May, 2017, originally returnable for 27th June, 2017. Opposition papers were filed on 9th March, 2018.

6. In May 2018, senior counsel was instructed on behalf of the applicant. Senior counsel thought that there was another ground on which the Criminal Injuries Compensation Scheme could be challenged, namely that it is incompatible with the right to an effective remedy guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union and/or in breach of the principle of effectiveness of European Union law in failing to provide for a guarantee of fair and appropriate compensation to the victims of violent international crimes committed in the State, as required by Article 12 of Directive 2004/80/EC, and the principle of effectiveness of European Union law.

7. By letter dated 7th June, 2018, the applicant's solicitors wrote to the respondents' solicitor enclosing a draft amended statement of grounds and seeking consent to amend. By letter dated 18th June, 2018, the respondents' solicitor refused to consent and this motion seeking leave to amend was issued on 19th June, 2018, originally returnable for 10th July, 2018.

8. The affidavit of the applicant's solicitor grounding this motion deposes that senior counsel advised that the statement of grounds be broadened in the terms I have already set out. He says that the proposed amendments are just and necessary for the purpose of determining the real questions in controversy and that the respondent will not be prejudiced.

9. In an affidavit sworn on 4th October, 2018, the secretary of the first respondent, Mr. Charles G. O'Connell, points out that the request for amendment came upwards of a year after the proceedings issued and eighteen months after the decision under review was delivered. He suggests that the applicant wishes to add a completely new ground, well outside the time limits prescribed by the Rules of the Superior Courts.

10. In the affidavit grounding this application the applicant's solicitor sought to invoke the power of amendment in O. 28 of the Rules of the Superior Courts and many of the cases included in the book of authorities were concerned with the exercise of this power, but senior counsel for the applicant in argument acknowledged (as counsel for the respondents had argued in their written submissions) that this reliance was misplaced. On the authority of *O'Leary v. Minister for Transport, Energy and Communications* [2000] 1 I.L.R.M. 39, the test on an application for leave to amend grounds for seeking judicial review is much more stringent than that applicable to pleadings generally.

11. Counsel for the applicant argues that on an application to add grounds the court is concerned with three issues: (1) arguability, (2) explanation, and (3) prejudice. It is conceded that the proposed new ground is arguable. The explanation, it is said, is simply that the new ground did not occur to junior counsel who moved the leave application. And, it is said, since the proposed new ground is a

legal argument only, the respondents cannot be prejudiced.

12. In support of his argument, counsel of the applicant relies on the decision of Humphreys J. in *B.W. v. Refugee Appeals Tribunal* [2015] IEHC 725 (Unreported, High Court, Humphreys J., 17th November, 2015). In that case, Humphreys J. looked at *Keegan v. Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570 and *O'Neill v. Applebe* [2014] IESC 31 and, at para. 4, summarised Keegan as follows:

> *"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 'some 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."*

13. Later in the judgment, at para. 7, Humphreys J. said:

> *"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 case.*
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> *8. As compared with some of the case law which preceeded 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.*
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> *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 proceedings. 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."*

14. Later in the judgment, at para. 13, he said:

> *"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."*

15. As to prejudice, Humphreys J. said:-

> *"17. The extent to which a court should have regard to alleged prejudice may also be diluted if the opposing party has itself being 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.'*
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> *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."*

16. Senior counsel for the respondents argues that the applicant's reliance on *B.W.* is misplaced. That, it is said, was a telescoped hearing in which the application to amend was made within the time limit for an application for leave and what Humphreys J. had to say must be understood in context. I think that counsel for the respondents is correct in that regard, but with the possible caveat that *Keegan* (which was an application to amend out of time) rather does appear to strike a more tolerant note than the previous cases.

17. On behalf of the respondents it is argued that because this is a late application, and because the application to amend is so late, the correct approach is to treat it as if it were a late application for leave. I do not believe that that is correct. Both parties relied on the decision of the Supreme Court in *Keegan v. Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570. Counsel for the respondents submitted, quite correctly, that the applicant, by reference to *B.W. v. Refugee Appeals Tribunal*, a case which was not directly comparable, was seeking to reduce a ten or eleven element consideration to only three. But if that is right, it seems to be a *fortiori* impermissible to try to reduce the consideration to one only, or to conflate an application to amend with a late application for leave.

18. Counsel are, I think, agreed, that the leading authority on the granting of leave to amend an application for judicial review is *Keegan v. Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570.

19. In that case, Fennelly J. (in a judgment in which O'Donnell and McKechnie JJ. concurred) reviewed the authorities and concluded:

> *"30. It is not surprising that there is no comprehensive and exhaustive judicial statement of the circumstances in which a court may permit an applicant for judicial review to amend the grounds for the relief sought. It is equally unsurprising that the courts, using varying language, have expressed themselves reluctant to grant such amendment without good reason.*
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> *31. Persons are permitted to seek review of administrative decisions which affect them within prescribed times and on grounds in law which they propose and which the courts grant them leave to argue. The object of the system is to strike a fair balance between the certainty and security of administrative decisions and the rights of persons affected by them who wish to contest them.*
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> *32. The strict imposition of time limits is mitigated by the power of the court to permit an application outside the permitted time, provided the court is persuaded that there is good reason for the delay and that no other party is adversely or unfairly prejudiced.*
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> *33. Once an applicant has obtained an order granting leave to apply for judicial review, he is confined to the grounds*

permitted. He may not argue any additional grounds without leave of the court.

34. If he applies for an amendment of his grounds within the judicial review time limit, he should, obviously, at least in normal circumstances, have no difficulty obtaining the amendment. If he 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 I.R. 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. This is not to say that the applicant's knowledge of the facts is irrelevant. In some cases, as in McCormack v. Garda Síochána Complaints Board, discovery of new facts may be an explanation for the omission to include a ground. In other cases, the applicant may have been aware at all relevant times of the facts relevant to the new ground and this will weigh in the balance against him, without being necessarily conclusive.

36. None of this is to take away from the fact that an application 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 I.L.R.M. 458, or a challenge to a different decision, as in Muresan v. Minister for Justice, Equality and Law Reform [2004] 2 I.L.R.M. 364. The nature of the decision under attack may also be relevant. If it is one which benefits the public at large or a large section of the public, a challenge may have corresponding disadvantages for a large number of people. This may explain why special and stricter statutory rules have been introduced in cases of public procurement, planning and development, and asylum and immigration. The courts will have regard to the public policy considerations which have prompted the adoption of such rules.

37. Amendment may be more likely to be permitted where, as in O 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. A court might take a different view, if the new ground were likely to give rise to further exchange of affidavits relating to the facts.

38. For the purposes of the present application, it is not in dispute that the proposed new ground meets the test of being arguable. If it were to succeed, it would mean that the respondent had no jurisdiction to initiate the investigation pursuant to s. 102(4) of the [Garda Síochána] Act of 2005. Consequently, the additional ground is a significant one and raises an entirely new ground in law. To that extent it substantially enlarges the original grounds. On the other hand, the appellant would be deprived of a serious argument, if he were prevented from advancing it.

39. It is necessary then to examine the explanation offered on behalf of the appellant for the failure to include this ground in the original application for leave. As stated in the grounding affidavit simply and laconically, it is that the point was overlooked by the legal representatives of the appellant. While the legal point can itself be explained at some length, the failure of lawyers to notice it can only be stated in its starkest terms. They failed to advert to the legal significance of the fact, of which they were aware from February, 2011, that Mr. Seavers' complaint had been ruled to be out of time. In particular, they did not advert to s. 88(1)(c) of the Act of 2005.

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43. At this point, I find the reasoning of Finlay Geoghegan J. [in Muresan v. Minister for Justice, Equality and Law Reform [2003] I.L.R.M.364] helpful. She accepted that an oversight or error by an applicant's lawyers might, depending on the facts, provide a sufficient explanation. In a situation where the client might be significantly prejudiced if he could not explain delay or failure to include a ground by reference to such an error, I believe that she was right. She was also rightly sceptical where new lawyers had merely taken a different view of the law. Not every suggested lawyer's mistake will necessarily justify an amendment."

20. Applying this guidance, it seems to me that while the fact that the application to amend is outside the time limit for an application for leave and, indeed, the lateness of the application, are factors to be considered, an application to amend is not to be approached simply on the same basis as a late application for leave.

21. As to the lateness of the application for leave to amend, I am entitled to take into account the fact that there was a long delay on the part of the respondents in filing the opposition papers. The application for leave was moved formally on 5th April, 2017 and was allowed on 8th May, 2017. The substantive motion was originally returnable for 27th June, 2017 but it was not until 9th March, 2018 that the opposition papers were filed. Thereafter senior counsel was promptly instructed and on 7th June, 2018 the respondents' solicitor was notified of the proposed amendment. While it is true, as Mr. O'Connell has deposed, that upwards of a year elapsed between the granting of leave and the proposal to amend, the responsibility for upwards of nine months of that time cannot fairly be laid at the door of the applicant.

22. The proposal to amend was resisted on the ground *inter alia* that the case was by then ready to be assigned a hearing date. That was true but it seems to me that if the respondents had agreed to the proposed amendment the hearing would have been delayed by a matter of weeks, only. The proposed additional ground is a purely legal point. The suggestion in the affidavit of Mr. O'Connell that further affidavits would be required was abandoned at the hearing before me.

23. The explanation offered for the omission of the proposed new ground from the original application for leave is oversight. Specifically, the explanation is that the point did not occur to junior counsel but was spotted (or the omission of it was spotted) immediately by senior counsel. On the authority of *Muresan*, which was approved by the Supreme Court in Keegan, error or oversight by the applicant's lawyers may, depending on the circumstances, provide a sufficient explanation. I confess that I have struggled to understand what the difference in principle may be between error or oversight on the part of the applicant's lawyers and the situation

where new lawyers might have taken a different view of the law. If the proposed additional point is a good point, I would find it difficult to be more sceptical in a case where it was made by a new legal team than in a case where it had belatedly dawned on the original lawyers. I think that there is certainly a difference between oversight, that is a case in which the lawyers completely missed a point, and error, for example where a decision was made before applying for leave not to raise an issue or where the view was mistakenly taken that the point was covered.

24. This, it seems to me, is a case which is correctly argued as one of oversight. In fact, the source of the proposed additional ground is senior counsel and the explanation for the fact that it was not included at the time leave was sought is that the point did not occur to junior counsel, but I think that I would not be any more or less sceptical of it were the explanation to be have been that the point first occurred to junior counsel when he re-read the case after the opposition papers were filed.

25. The grounds upon which the applicant initially sought and obtained leave were fairly comprehensive. The applicant not only challenged the validity of the decision made in her case but the compatibility of the scheme with the European Convention of 24th November, 1983; the State's obligations under Council Directive 2004/80/EC; and the State's obligations under the European Convention on Human Rights. It seems to me that I am entitled to take into account, and to give significant weight to, the fact that the proposed new ground is an additional European Union law ground.

26. There is no suggestion that what this applicant suggests is a shortcoming in the Criminal Injuries Compensation Scheme has created a similar problem for many other claimants or that any other claimants would be affected by the orders which are sought. The attack in this case is much wider than an attack on the decision in an individual case but extends to the compatibility of scheme as a whole with the State's European and European Union obligations. It seems to me that the public policy in the certainty and security of this administrative scheme has already yielded to some extent to the right of this applicant to challenge it. Moreover, in circumstances in which it is agreed that the proposed new ground is arguable, there is a lot to be said from a policy perspective for allowing the challenge to the scheme on all arguable grounds. If the challenge on the existing grounds only were to fail, the existence of an additional, admittedly arguable, untested ground might to some extent undermine the certainty of the scheme. On the other hand, if the scheme survives a challenge on all arguable grounds, this will serve to buttress it.

27. For these reasons there will be an order pursuant to O. 84, r. 23(2) giving liberty to the applicant to amend the statement of grounds in the terms of the draft exhibited to the affidavit of Mr. Mark O'Kelly sworn on 3rd July, 2018 and marked "MOK9".