THE HIGH COURT

2016 No. 226JR

BETWEEN:

NEIL MOORE

APPLICANT

– AND –

DUBLIN CITY COUNCIL

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 5th May, 2017.

I. Introduction

1. Mr Moore is the separated father of two children. Through an unhappy series of life-events he has unfortunately become homeless and, after a period of 'sleeping rough' on the capital's streets, has been housed in various emergency shelters for homeless people. Dublin City Council has placed him on a housing list as a single person, notwithstanding, it seems, that Mr Moore could have overnight access to his children if he had suitable accommodation. This state of affairs, Mr Moore insists, breaches his rights, *inter alia*, under the Constitution and under the equality legislation, as well being *ultra vires* the Housing Acts.

2. Thus far in the within proceedings, Mr Moore has sought various reliefs, including an order of *certiorari* in respect of a written decision of the Council of 24th March, 2016, which stated, *inter alia*, that "*The client's children are on his application as access children and therefore he would be considered for one-bedroomed accommodation at present*". (The Council contends that this is not a free-standing decision but merely an affirmation of a decision made in October, 2015; however, that is not a matter which the court has to adjudicate upon at this time). The decision, if such it is, of 24th March, 2016, appears to have been chosen as the appropriate decision in respect of which to seek the afore-stated order as it was the first written decision that set out the reasons why Mr Moore would only be considered for a one-bedroom unit.

3. Mr Moore now wishes to seek the further relief of an order of certiorari in respect of a decision of the Council 23rd February, 2016. This earlier decision involves a refusal by the Council of an application made by Mr Moore for a particular unit under a scheme known as the 'Choice-Based Letting Scheme' under which the person first-listed is the person first-accommodated. This decision states that Mr Moore is listed as a single applicant and therefore is "*not eligible to be considered for a two-bedroom vacancy*". The objection taken to this decision, it seems, is that it did not set out the reasons why Mr Moore would not be eligible for a two-bedroom vacancy.

4. Counsel for Mr Moore maintains that there is no prejudice to the Council in seeking the amendment to the reliefs sought as the statement of grounds in its current form already references the decision of 23rd February, 2016. Counsel for Mr Moore also refers in this regard to the provision made in O.84, r.19 of the Rules of the Superior Courts 1986, as amended, which provides that "*On an application for judicial review any relief mentioned in rule 18(1) or (2) [being an order of certiorari, mandamus, prohibition or quo warranto, a declaration or an injunction] may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter and in any event the Court may grant any relief mentioned in rules 18(1) or (2) which it considers appropriate notwithstanding that it has not been specifically claimed*"; counsel for Mr Moore further suggests that there is nothing that the court will be empowered to do by virtue of the amendment now sought which it could not in any event achieve at the end of the day, by reference to O.84, r.19, even on the application as now structured.

5. The Council intends to resist the within proceedings because it considers that its differentiation between homeless persons whose children do have accommodation and those who do not is legally defensible. The Council also objects to the within application for a number of reasons, these being in summary: (1) because of what it maintains is a historical and continuing reluctance on the part of the courts to allow any amendments to statements of grounds; (2) because the reluctance aforesaid applies a *fortiori* where the amendment sought will seek relief in respect of a decision (the decision of 23rd February, 2016) in respect of which no relief was originally sought; (3) that the existence of the decision of 23rd February, 2016, was known and considered at the time that leave to seek judicial review was sought and a decision was made not to seek relief in respect of same; (4) that application for relief in respect of the decision of 23rd February, 2016, falls well outside the applicable timeframe and hits the further difficulty, in the context of the within application, that the need for any extension of time has been expressly disavowed by counsel for Mr Moore; (5) within the overall period of delay referred to at (4) there is a separate period of delay in that Mr Moore's solicitors wrote to the Council in July, 2016 concerning the amendment now sought and the Council indicated by reply that it would not consent to such an amendment, yet the notice of motion grounding the within application did not issue until 17th October, 2016; (6) that the reliance that it is sought to place on O.84, r.19 would, to borrow a phrase, 'ride a coach and horses' through the tightly time-constrained process of judicial review; (7) because the decision, if such it is, of 24th March, 2016, is concerned with a radically different matter from that of 23rd February, 2016, because the earlier decision involves a refusal of an application made by Mr Moore for a particular unit under the Choice-Based Letting Scheme whereas the decision, if such it is, of 23rd March, 2016, concerns Mr Moore's being placed on the one-bedroom list; (8) that the challenge to the decision of February, 2016 is in any event futile for two reasons, viz. (i) someone else has been accommodated in the choice-based accommodation and there is no suggestion by anyone that that person should now be evicted and Mr Moore accommodated in her or his stead; and (ii) as Mr Moore was not the longest-listed person on the choice-based accommodation list, he would never have been granted the choice-based accommodation even if the decision, if such it is, of 23rd February, 2016, is tainted by error.

II. The Order for Leave

6. Before proceeding to consider some applicable case-law, it is informative to consider the precise terms of the leave granted. Application for leave to seek judicial review was made on 11th April, 2016. If one looks to the order granting the requisite relief, it states that the reliefs sought were (i) those identified in para. (d) of the statement of grounds, which reliefs (ii) were to be sought on the grounds identified in para. (E) of the statement of grounds. The said para. (d) refers to the reliefs being sought as:

> *"1. An order of certiorari quashing the decision of the 24 March 2016 of the Respondent to place the applicant on the Housing List for accommodation of 1 bedroom only.*
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> *2. A declaration by way of judicial review that the Housing Allocation Scheme is ultra vires the Housing (Miscellaneous Provisions) Act 2009 and the Regulations made thereunder.*
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> *3. A declaration by way of judicial review that the Housing Allocation Scheme is inconsistent with the Respondent's obligations under the Constitution and/or the European Convention of Human Rights",*
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> and certain ancillary reliefs.

7. Paragraph (E) of the statement of grounds, entitled "Grounds upon which relief is sought" refers, in the course of giving the historical background to the judicial review application presenting, to the decision of 23rd February, 2016, stating as follows, at sub-paragraph 8:

> *"On the 23 February 2016 the Respondent emailed the applicant and stated, inter alia:*
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> *'I refer to your application under the Choice Based Letting Scheme for two bedroom accommodation in [-] ….Unfortunately as you are listed as a single applicant you are not eligible to be considered for a two bedroom vacancy".*

8. One point that might usefully be made at this juncture, having regard to the above-quoted segments from the statement of grounds, is that the court does not accept that where a decision is referenced in the statement of grounds furnished as part of a leave application but no leave to review same is sought, this has the result that any later application seeking an amendment of reliefs sought is essentially perfunctory in nature and/or not one in respect of which an application for an extension of time need be sought. Statements of grounds often reference, in their recitation of the sequence of events leading to the *ex parte* application being made, a whole array of decisions which could perhaps be open to challenge but which are not being challenged. That does not transform a statement of grounds into a 'trump card' which can be thrown down at a later stage (here a considerably later stage) in proceedings to justify a challenge being brought to a decision that was referenced as a mere historical occurrence in the statement of grounds and in respect of which no relief was sought.

III. Some Case-Law of Relevance

(i) Muresan.

9. In *Muresan v. Minister for Justice, Equality and Law Reform and ors* [2003] IEHC 348, Ms Muresan was a Romanian national who had unsuccessfully claimed asylum in Ireland. On 15th October, 2002, she sought leave to apply for judicial review of the decision of the Minister to issue an order for her deportation. On 30th January, 2003, she sought leave to add further reliefs and grounds to her application for judicial review. Finlay Geoghegan J. ruled that: Ms Muresan was effectively making a fresh application for judicial review and thus had to satisfy the court that there was good and sufficient reason for extending the period within which the application had to be made; the same applied to an application to amend the grounds relied on, where the new grounds, in substance amounted to a new cause of action; in all the circumstances, there was no good and sufficient reason to extend time to allow the proposed amendments to be made. Under the heading "*Issues on application to amend*", Finlay Geoghegan J. observed as follows:

> *"The respondents….rely significantly upon the decision of the High Court (Kelly J.) in Ní Eilí v EPA [1997] 2 I.L.R.M. 458. That case concerned an application to amend a statement of grounds after leave had been granted in judicial review proceedings which were subject to the provisions of…the Environmental Protection Agency Act, 1992….The amendments sought included two additional reliefs effectively seeking declarations of unconstitutionality of the relevant sections of the Act of 1992 under which the challenged decision was made and also sought to add two additional grounds supporting the claim for the declaration of unconstitutionality.*
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> *Kelly J. held that the amendments sought by the applicant amounted to an additional and entirely new case. That being so he concluded that the applicant could not expand her challenge by seeking new reliefs on new grounds outside the statutory time limit. He further concluded that to allow such a thing to occur would run counter to the statute and in effect permit no time bar at all in respect of the additional reliefs sought….*
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> *I agree with the reasoning of Kelly J. in Ní Eilí….[I]t appears to me that where an applicant seeks leave to amend an application for leave to apply for judicial review by adding new reliefs which either seek to challenge a different decision to that already challenged or which may amount to a new cause of action in respect of a decision already challenged, that the applicant is in effect making a new application albeit by way of amendment to an existing application and therefore must satisfy the Court that there is good and sufficient reason for extending the period….*
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> *I have also concluded that the same principle applies to an application to amend the grounds relied upon to challenge a decision in respect of which a claim of invalidity is already made, where the new grounds in substance amount to a new cause of action challenging the validity of the decision."*

10. The decision in *Muresan* was upheld on appeal (see *SM v. Minister for Justice, Equality and Law Reform* [2005] IESC 27). On the facts of the case before her (though, notably, she did not find that this would in all circumstances be so, and it is not difficult to envision circumstances in which an alternative conclusion might be reached) Finlay Geoghegan J. considered that a change of counsel did not amount to the "*good and sufficient reason*" that is a pre-requisite to the granting of an extension of a time limit that is capable, as in the within application, of extension. Finlay Geoghegan J. also considered that, although there was no such clear error in the case before her, "*It may be that on certain facts the clear oversight or errors by lawyers acting for an applicant may amount to a good and sufficient reason for extending…"* a time limit that, as with the time limit before her, was capable of extension. (It is perhaps notable that, at para. 43 of his judgment in *Keegan*, considered further below, when Fennelly J. expresses agreement with the judgment of Finlay Geoghegan J. in *Muresan* in this regard, he drops the reference to "*clear oversight or errors*" and refers simply to mere "*oversight or error*", stating "[Finlay Geoghegan J.] *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.").

11. There is no acknowledgement or contention in the within proceedings that the lawyers for Mr Moore got matters wrong, that they impugned only the decision (if such it is) of 24th March, 2016, when they ought also to have impugned the decision of 23rd February, 2016. Nor does the conclusion that any error occurred on their part fall inevitably to be drawn from the facts as presenting. All that seems to have occurred is that (i) Mr Moore's lawyers, at the time of bringing their leave application, (a) had considered at least two decisions of the Council (one of which the Council maintains is not a decision), and (b) elected in the proper exercise of their professional skills to seek relief in respect of only one decision, and (ii) now consider that (for whatever reason) it would be preferable to seek relief in respect of both.

12. It does not, with every respect, appear to the court that a belated decision by a person's lawyers that it would be desirable to run their case differently offers, at least on the facts of the within proceedings, a "*good and sufficient reason*" for granting the extension of time that the court considers is necessary before it could acquiesce to Mr Moore seeking the new relief that he now wishes to add. In truth, the situation now presenting seems not a million miles removed from the situation in *Muresan* where, upon a change of counsel, it was sought to add additional reliefs and grounds, not because the previous counsel had erred but rather, as Finlay Geoghegan J. herself observes, because "*[i]t is inevitable that different counsel will take a different view of the same case*." In this regard, the only difference between that case and the within application is that here it is the same legal advisors who, for whatever reason, appear to have taken the different view as to how best to proceed.

(iii) Keegan.

13. In *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29, Garda Sergeant Keegan was granted leave by the High Court to apply on two grounds for judicial review of a decision of the GSOC to launch a particular investigation of him. Subsequently Sergeant Keegan applied for leave to amend the grounds in order to include a third ground. He argued that the omission of this ground was due to an oversight by his legal advisers. It was agreed that the ground was an arguable point of law. The High Court refused to allow the amendment. Sergeant Keegan appealed successfully to the Supreme Court. In the concluding section of his judgment, Fennelly J., at 581, made the following helpful observations:

> *"[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.*
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> *[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.*
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> *[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. 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.*
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> *[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 ILRM 458], or a challenge to a different decision, as in* Muresan [v Minister for Justice, Equality and Law Reform *[2004] 2 ILRM 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.*
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> *[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. 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.*
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> *[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….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. [Fennelly J. then proceeds to recite the relevant facts of that case at some length]….

[42] ….At this point the question of whether the amendment should be permitted depends on whether the lawyers' oversight is a sufficient explanation.

[43] At this point, I find the reasoning of Finlay Geoghegan J 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.

[*44] In the present case, it is clear, contrary to the view of the High Court Judge, that it was an error on the part of the appellant's legal representatives to omit from the statement of grounds for judicial review any ground relating to* [a point which]…[T]*here is no change in the nature of the relief sought. Nor is there any significant prejudice to the respondent, if it has to reply to the new ground, which is a pure question of law….*

[46] In the particular circumstances of the present case, it would be unjust to visit on the appellant the consequences of what his legal representatives frankly admit to have been their error. The appellant should not, without good reason, be deprived of the right to argue a very significant point of law.

[47] The balance of justice weighs clearly in favour of granting the amendment."

14. Before proceeding, the court notes that it has also helpfully been referred by counsel to the still-later decision of the Supreme Court in *Copymoore Limited v. Commissioners of Public Works in Ireland* [2014] IESC 63; however, it does not appear to the court that a consideration of that case, which in any event concerns the somewhat esoteric area of public procurement challenges, adds especially to the principles outlined by Fennelly J. in the above-quoted extract from his judgment in *Keegan*. Turning then to those principles and applying them to the case at hand:

(1) *(by reference to* Keegan*, para. 32) as regards allowing an application outside the permitted time, is the court satisfied that good reason has been provided for the delay arising in this case and that no other party is being adversely or unfairly prejudiced?*

Counsel for Mr Moore contends that no application for extension of time is necessary because the additional decision in respect of which relief is now sought is referenced in the original statement of grounds. As stated above, the court does not accept that because a decision is referenced as a historical event in a statement of grounds furnished in a leave application but no relief is sought in respect of same, this has the result that any later application seeking an amendment of reliefs sought is essentially perfunctory in nature and/or not one in respect of which an application for an extension of time need be sought. In point of fact, the court considers that an application for extension of time did fall to be made in the within application and that good reason for the entirety of the delay from February, 2016, including but not limited to the period of delay from July to October, 2016, comprised therein ought to have been provided. And for the court to grant an extension of time at this very late stage would be greatly and unfairly to prejudice the position of the Council in that it would now have to meet a very different case, an end-result which would run contrary to that key object of the system of judicial review, referenced by Fennelly J. at para. 31 of in his judgment in *Keegan*, being "*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*";

(2) *(by reference to* Keegan*, paras. 34 and 36), is this an application for an amendment of grounds within or without the judicial review time limit and, if the latter, has the delay in seeking the amendment been explained and the application justified?*

This is an application for an amendment of grounds brought outside the applicable time limit. No extension of time is considered necessary by the applicant and hence no justification for the delay arising has been offered.

(3) *(by reference to* Keegan*, para. 35) is the additional ground based on material of which Mr Moore was aware or unaware when he was making his original application?*

As stated by Fennelly J. in *Keegan*, there is no reason, in logic, to impose on an applicant a criterion of newly discovered fact to justify an application to amend; however, where an applicant has been aware at all relevant times of the facts relevant to the new ground, this will weigh in the balance against him, without being necessarily conclusive. Here, there are no late-discovered facts giving rise to the within application, a point which must weigh in the balance against the applicant, without necessarily being conclusive. In truth, the very fact that is at the kernel of the within application (the fact of the decision on 23rd February, 2016) is expressly mentioned in the statement of grounds as a historical occurrence. However, as touched upon previously above, statements of grounds often reference, in their recitation of the sequence of relevant events a whole array of decisions which could perhaps be open to challenge but in respect of which no relief is sought. That does not suffice to transform a statement of grounds into a 'trump card' which can be thrown down at a later stage (here a considerably later stage) in proceedings to justify relief being sought in respect of a decision that was referenced as a historical event in the statement of grounds but for which no relief was sought.

(4) *(by reference to* Keegan*, para. 36) is this a case in which the applicant is advancing an entirely new cause of action (something to which the courts have traditionally proved adverse)?*

The answer to this question is 'yes'. The decision, if such it is, of 24th March, 2016, to place Mr Moore on the one-

bedroom list, is concerned with a radically different matter to that of 23rd February 2016, which involves a refusal of an application made by Mr Moore for a particular unit under the terms of the Choice-Based Letting Scheme.

(5) *(by reference to* Keegan*, para. 36) does the nature of the decision under attack have especial import?*

This is a 'standard' judicial review application that is not constrained by a specialised statutory régime. As such the process of judicial review comes clothed with that objective referenced at para. 31 of the judgment of Fennelly J. in *Keegan* and quoted elsewhere above.

(6) *(by reference to* Keegan*, para. 37) were the court to acquiesce to the application now made, it would it involve a significant enlargement of the applicant's case?*

The court refers to its answer at (4).

(7) *(by reference to* Keegan*, paras. 38 –39 and 42–44) is this a case in which error is pleaded on the part of Mr Moore's public representatives?*

It is not and thus such factors as are mentioned by Fennelly J. in this regard, as well as those touched upon by Finlay Geoghegan J. in *Muresan*, do not fall to be considered further.

IV. Order 84, rule 19

15. As mentioned, counsel for Mr Moore referred at hearing to O.84, r.19 of the Rules of the Superior Courts 1986, as amended, in particular the reference therein that "*On an application for judicial review any relief mentioned in rule 18(1) or (2)* [being an order of *certiorari*, *mandamus*, prohibition or *quo warranto*, a declaration or an injunction]…*in any event the Court may grant any relief mentioned in rules 18(1) or (2) which it considers appropriate notwithstanding that it has not been specifically claimed*", suggesting that there is nothing that the court will be empowered to do by virtue of the within application which it cannot in any event achieve, on the application as now structured, by reference to O.84, r.19.

16. Three points might be made in this regard. First, this line of contention, if correct, has the result that Mr Moore cannot be prejudiced by the court's refusal to acquiesce to the application now made because the court that hears the substantive motion will be capable of granting, by reference to O.84, r.19, the very relief that it is now sought to add. Second, the power referred to from "*in any event*" onwards (a) appears to the court to be but a reflection of the inherent jurisdiction of the court, and (b) depending on whether one accepts (a) or not, either (I) reflects an acknowledgement of the inherent power of the court, or (II) empowers the court, to grant a relief not initially contemplated or sought. Third, O.84, r. 19 neither confers upon, nor recognises on the part of, the court some 'free-wheeling' jurisdiction to allow out-of-time amendment to the statement of grounds in judicial review applications. That jurisdiction falls to be exercised by reference to the principles identified, *inter alia*, in *Muresan* and *Keegan*, as considered above.

V. Conclusion

17. The scourge of homelessness has afflicted many good people and Mr Moore has the very great sympathy of the court for the predicament in which he finds himself as regards his ongoing quest to secure accommodation other than emergency accommodation that suits his particular family needs. Regrettably, for the reasons stated above, the court is coerced as a matter of law into declining the within application to allow the relief of *certiorari* to be sought in respect of the Council's decision of 23rd February, 2016, and to allow related amendment to the statement of grounds. His existing application can, of course, otherwise continue.