IILA
IRISH IMMIGRATION LAWYERS ASSOCIATION

AMENDING STATEMENTS OF GROUNDS AND JUDGES RAISING POINTS

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Amending the statement of grounds when applying for leave *ex parte*

1. Order 84 rule 20(4) of the Rules of the Superior Courts (as amended) provides:

> The Court hearing an application for leave may, on such terms, if any, as it thinks fit:
>
> (a) allow the applicant's statement to be amended, whether by specifying different or additional grounds of relief or otherwise,
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> (b) where it thinks fit, require the applicant's statement to be amended by setting out further and better particulars of the grounds on which any relief is sought.

2. It's very straightforward to amend a statement of grounds when applying for leave *ex parte*. This can arise where the applicant wishes to amend the statement of grounds after it was filed in the Central Office. When seeking leave, the applicant can simply give the judge an unfiled amended statement of grounds and request that leave is granted on the amended statement.

Test for amending statements of grounds

3. Subsequent to the grant of leave, an applicant may wish to amend the statement of grounds. Or, at the substantive hearing, a matter may arise in the course of argument beyond the scope of a particular ground on which leave was granted; in this case, leave to amend should be sought to permit any extended or new ground to be argued: see *AP v. DPP* [2011] IESC 2, [2011] 1 I.R. 729, per Murray C.J.

4. Traditionally, a strict approach to amendments prevailed: see, e.g., *Muresan v. Minister for Justice* [2004] 2 I.L.R.M. 364. That was a case taken when the leave application was required to be made on notice to the respondents, by virtue of the original terms of s. 5 of the Illegal Immigrants (Trafficking) Act 2000. Ms Justice Finlay Geoghegan stated at p. 371:

> I agree with the reasoning of Kelly J. in *Ní Eilí v Environmental Protection Agency* [1997] 2 I.L.R.M. 458. Applying that reasoning to the provisions of s.5 of the Act of 2000, notwithstanding the discretion conferred by Ord.84, r.20(3), it 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, . . . 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 within which the application shall be made in accordance with s.5(2)(a) of the Act of 2000.
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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. The express requirement in s.5(2)(b) of the Act of 2000 that the application be made by motion grounded in the manner specified in Ord.84 which itself requires a statement of grounds setting out the grounds relied upon indicates that the Oireachtas intended not only that any decisions covered by s.5(1) be challenged within a short space of time but also that the applicant be obliged to set out the grounds of challenge within such short space of time. Accordingly if an applicant seeks to amend so as to introduce an entirely new ground of challenge the intention of s.5(2) of the Act of 2000 appears to be that he or she must satisfy the High Court that there is good and sufficient reason for extending the period within which such new challenge may be made.

5. The High Court judgment in *Muresan* was appealed to the Supreme Court and the Supreme Court upheld the High Court judgment. No copy of the Supreme Court's judgment or ruling is available, or at least, commonly available.

6. An approach possibly more liberal than that which previously prevailed to amendment of a statement of grounds *after* leave has been granted was adopted by the Supreme Court in *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29, [2012] 2 I.R. 570. Supreme Court allowed an amendment which was stated in affidavit to be due to applicant's legal team oversight.

7. In *B.W. v. Refugee Appeals Tribunal (No.1)* [2015] IEHC 725, Humphreys J. helpfully summarised the *Keegan* test at para. 4:

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

8. See also *Waters v. Commissioner of an Garda Síochána* [2021] IEHC 552 (Unreported, Simons J., 25 August 2021).

9. In *B.W. (No. 1)*, Humphreys J. stated at paras. 10-11:

> 10. There is a human aspect to this issue which I feel has not been altogether brought to the foreground in some of the pre-*Keegan* caselaw. For any person intent on performing a public competitive task to the best of his or her ability, the intense coming into focus in the run-up to the decisive performance, the accentuation of concentration, resolve and exertion, the exclusion of all other concerns from the mind of the participant, the physical and mental pressure of the public spectacle on an important stage and an important occasion, the commitment and irreversibility involved in entering a crucial stage of contest, the face-to-face confrontation with opponent and referee, and the sheer human drama and theatre of the event, make it all but inevitable that the most effective contribution that the person can make will come to the forefront on the day itself in a way that simply cannot be replicated in advance. To fail to fully understand this is to fail to do full justice to the deeply human nature of any social endeavour, including the legal endeavour.
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> 11. In the specifically legal context, there are of course very many cases which ultimately turn on tactical decisions made long in advance of the trial following careful consideration of the issues. Such advance preparation is crucial. But the immersive experience which begins its critical phase at the latest on the day before the hearing, and continues until the hearing is over, whereby the advocate sets aside all other considerations and focuses intently and exclusively on the imminent preparation and conduct of the actual hearing of a particular case, will bring into focus in that person's mind the best statement of his or her case in a way that no leisurely preparation further in advance, critical though that is, can quite achieve. Within that intense personal immersion lie some of the deepest satisfactions of the art of the advocate. That this will involve some change to the way the case is worded on the pleadings or in written submissions is all but inevitable. Sometimes that change can be a pruning back, or the astute concession of a subsidiary point. Sometimes it may be a recalibration, an elaboration, a particularisation or a development of a point, which may well not require amendment in any event. But at some point, elaboration crosses over into novelty and an amendment may be called for. Judicial approaches to requests for such amendments should reflect the human reality of the process, and respond to that process in a tolerant and understanding way, the primary issues being, not arid technicality and procedure, but a sympathetic concern for where the interests of justice lie and for the vindication of the rights of the parties to access to the court and to an effective remedy, and for ensuring that the real issues in dispute are addressed.

10. The Court of Appeal upheld the decision of Humphreys J. on amending the proceedings in *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296, [2018] 2 I.L.R.M. 56. However, the Court of Appeal emphasised that the case had involved a

"telescoped hearing". The case had been commenced before the Illegal Immigrants (Trafficking) Act 2000 had been amended to its current state, so that the leave application in that case had been on notice to the respondents and hadn't come before the Court until the telescoped hearing before Humphreys J. A telescoped hearing is where, when dealing with an on-notice leave application, the Court considers within the one hearing whether to grant leave, and if granting leave, whether to grant substantive relief. The Court of Appeal stated at para. 73 that, where an applicant seeks to amend the statement of grounds after leave has been granted, the original time limit for seeking leave applies and the applicant will have to show good reason for why the amendments sought to be made could not have been pleaded at the outset.

11. It is implicit in the recent decision of *Casey v. Minister for Housing* [2021] IESC 42 (Unreported, Supreme Court, 16 July 2021), that an applicant seeking to amend the statement of grounds post-leave must address the issue of the delay in raising the point. It would now seem beyond doubt that where it is sought to amend a statement of grounds post-leave, the applicant will have to show good reason for the delay in pleading the amended terms.

The current procedure for amending statements of grounds

12. The procedure for amending statements of grounds is dealt with in Practice Direction HC81 ("the Practice Direction"). Where it is proposed to amend the statement of grounds post-leave, the provisions of para. 9(1) apply—they apply to all interim, interlocutory or procedural applications. Under para. 9(1)(b), it is not necessary to serve a formal notice of motion in making an application to amend, save where the court in a particular case directs that a motion be brought. Accordingly, the applicant's solicitor can simply email a draft amended statement of grounds to the CSSO, stating that it is proposed to apply for leave to amend.

13. Para. 9(1)(c) of the Practice Direction provides that it is unnecessary to deliver written submissions for interim, interlocutory or procedural applications, such as amendment applications, but any party may apply to the court for directions in that regard. If the applicant's counsel have an appetite for preparing written submissions for an amendment application, it is important to raise this with the court so that the court can direct the preparation of submissions. Otherwise, there may well be a difficulty recovering costs for voluntarily-prepared submissions, on the basis that they were not necessarily-incurred, and therefore, not a valid party-and-party expense. If, for whatever reason, submissions were delivered that hasn't been directed in advance by the court, it would be wise to ask the court specifically to state in the costs order that the applicant is to recover the costs of the submissions.

14. Para. 9(1)(d) of the Practice Direction states:

> Such an application does not require to be grounded upon a separate affidavit where the factual matters relied on are already averred to in the Grounding Affidavit or otherwise, or where the application is dependent on legal submission rather than factual contention.

15. Given that the Asylum, immigration and citizenship list ("the Asylum List") is being subsumed into the Judicial Review List, it is expected that there a new practice direction will issue that removes many of the specific procedural rules that at present apply only in the Asylum List. It is quite likely that the default position of it being unnecessary to seek leave to amend by formal notice of motion will change and that where an applicant seeks to amend post-leave, it will be generally appropriate to do so by motion.

Judges raising issues of their own motion

16. *Keegan v. Garda Síochána Ombudsman Commission* [2015] IESC 68 was a later judgment in the same proceedings in which the Supreme Court earlier dealt with the test for amending proceedings. After that earlier Supreme Court judgment, the judicial-review proceedings came before Hedigan J. in the High Court for substantive determination. The High Court decided the case on a ground not pleaded and that didn't appear to have been argued. In the Supreme Court, O'Donnell J. noted at para. 41 that it might be said that this ground was "not very distant from the point upon which leave was granted." O'Donnell J. went on to state at para. 42:

> It is not merely a procedural complaint that the ground upon which the case was decided was not one upon which leave was sought or indeed granted nor was there an appropriate amendment. The purpose of pleadings is to define the issues between the parties, so that each party should know what matters are in issue so as to marshal their evidence on it, and so that the Court may limit evidence to matters which are only relevant to those issues between the parties, and so discovery and other intrusive interlocutory procedures limited to those matters truly in issue between the parties. This is particularly important in judicial review, which is a powerful weapon of review of administrative action. But administrative action is intended to be taken in the public interest, and the commencement of judicial review proceedings may have a chilling effect on that activity, until the issue is resolved one way or another. Because of the impact of such proceedings, it is necessary to obtain leave of the court before commencing proceedings. It is important therefore that the precise issues in respect of which leave is obtained should be known with clarity from the outset. This also contributes to efficiency so that judicial review is a speedy remedy.

17. In the circumstances, it was fundamentally wrong for the High Court to determine the case on the basis of a point not the basis of a properly pleaded and argued ground of review.

18. In *Casey v. Minister for Housing* [2021] IESC 42, the applicant took judicial-review proceedings challenging a decision approving a baseline study and monitoring programme. Carrying out that programme was one of the conditions imposed by a foreshore licence granted to a company for the mechanical harvesting of kelp from Bantry Bay, Co. Cork. The applicant did not challenge the earlier decision to grant the foreshore licence. However, in the High Court, Ms Justice Murphy of her own motion raised an issue—not pleaded—relating to whether the foreshore licence had been

validly granted given that there had been a certain lack of publication.[1] Murphy J. invited the parties to make submissions on this issue.

19. The Supreme Court held that because the point relating to publication of the unchallenged decision to grant the licence was not adopted by either party, in the circumstances of *Casey*, the High Court shouldn't have dealt with it. At para. 34 of her Supreme Court judgment in *Casey*, Baker J. referred to "the difficulty created by the decision of the trial judge to invite submissions on a wholly new ground of challenge to the licence, where leave had not been granted, where neither party sought to advance the argument she had raised, and where no consideration was given, or could have been given, with regard to factors such as delay." Because the point was not adopted by either applicant or respondent, both of whom argued in different ways that the point did not arise.

20. At para. 38, Baker J. stated:

> The adversarial system does not mean that a judge is not actively engaged with the argument and course of the trial, and that the decision of the judge is a syllogism, a logical conclusion arrived at by deduction, and without intelligent questioning and active assessment of law and fact

21. In this regard, the Supreme Court specifically approved the recent observations of Humphreys J. at paras. 41-42 of his judgment in *Rostas v. Director of Public Prosecutions* [2021] IEHC 60, where he stated:

> 41. More fundamentally, there are a number of things a court can do of its own motion, from adjourning the proceedings to referring a case to Luxembourg and everything in between. The Irish legal system, like all common law systems, is structurally adversarial, but that is in the sense of being primarily adversarial rather than dogmatically so. Judges don't have to sit immobile, silent and impassive. They can ask questions, raise or tease out issues, manage the hearing to ensure fairness of procedure as they see it, and so on. Obviously, that needs to be understood as something being done in the interests of justice and not in a partisan spirit. A few examples. In *T.D. v. Minister for Justice, Equality and Law Reform* [2014] IESC 29, [2014] 4 I.R. 277, the Supreme Court noted without apparent disapproval (see judgment of Fennelly J. at para. 2), that Hogan J. in the High Court had of his own motion taken a point as to the validity of legislation in terms of EU law, legislation that hadn't been challenged by the applicant. In *J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473 (Unreported, High Court, 13th December, 2011), Hogan J. took an important point of his own motion, not raised by any of the parties, after having reserved judgment and reconvened the hearing to invite submissions on it. Rakoff J. of the US District Court for the Southern District of New York speaking extracurially said that "[y]es, occasionally, the skilled, imaginative lawyer may raise issues that the

[1] [2020] IEHC 227

judge may not even consider on her own, but this is not nearly as common as a judge raising such issues independently (as a result of having seen the issues raised in similar cases) and then asking the lawyers to address the issues" (www.slate.com, July 2017, "Posner and Rakoff debate whether courtroom lawyers ever make a difference").

42. Mr. Fitzgerald says that the examples from the Superior Courts are not pertinent because that jurisdiction is wider than that of the District Court. But that isn't the point. The point is that the system is not rigidly adversarial. He also submits that most of the steps that judges take of their own motion don't in and of themselves favour one of the parties, but are procedural in nature. That is a more solid point and, in fairness, amending the pleadings or calling a witness of the court's own motion is a more significant step so needs to be taken with some greater reserve. But in determining whether that is appropriate, one would, among other things, have to consider what the situation would have been without the judicial intervention.

22. At para. 39 of her Supreme Court judgment in *Casey*, Baker J. stated:

> A court can do a number of things of its own motion, and many procedural or interlocutory orders are made by or in the course of judicial engagement with the issues and to achieve fairness, and a judge may for reasons of fairness, and with the intention of arriving at a correct answer, invite submissions on any point not already argued in written or oral submissions or which the judge feels has been incompletely addressed. Not to do so could give rise to a result which is wrong in law, or incomplete or likely to create an unsatisfactory precedent.

23. It is perfectly proper for a court to raise issues of its own motion. However, if doing so, the judge must invite the parties to address the issue or issues. In judicial-review proceedings, if a judge raises a point not pleaded and the applicant then wishes to rely on that point, it is appropriate for the applicant to seek leave to amend and should furnish an amended statement of grounds to the court in that regard. If the point is raised in the course of the hearing, there should be no need for a formal motion. However, it would be appropriate for the applicant to file a supplemental affidavit explaining why the point or points were not raised at the time of seeking leave. If the judge has considered the matter of such potential significance to raise it, the applicant would have a good chance of overcoming the issue of delay. It may simply be that the point didn't occur to the applicant's legal team before it was raised by the court but that it is so relevant to the case that there is good and sufficient reason for allowing the amendment. It may or may not be appropriate for the State to amend the statement of opposition in response to an amended statement of grounds.

24. If neither of the parties adopt the court's point as part of their case, then it would, in general, be wrong for the court nonetheless to decide the case on that point. An exception would be where the point affects the court's jurisdiction.

Relationship between s. 5 of the Illegal Immigrants (Trafficking) Act (as amended) and Order 84 of the Rules of the Superior Courts (as amended)

25. Section 5 of the Illegal Immigrants (Trafficking) Act 2000 (as amended) applies to a wide range of decisions regarding asylum and immigration matters. This provision is a statutory modification of the regular judicial-review procedure under Order 84 of the Rules of the Superior Courts (as amended). Order 84 still applies to judicial review in this area but in a modified way, in a manner similar to modified planning-law judicial review.

26. In *Casey*, the High Court also decided that it hadn't got jurisdiction to determine the judicial-review proceedings on the basis of another issue that the judge raised of her own motion. This was that the application for judicial review had been brought in the standard form provided in Order 84 of the Rules of the Superior Courts and so the proceedings were improperly constituted because they ought to have been commenced pursuant to s. 21B of the Foreshore Act 1933 (as amended many decades after its enactment). Murphy J. regarded the relevant primary-legislative provisions as a new statutory scheme creating new and different procedural requirements from those provided for conventional judicial review under Order 84 RSC (as amended). In the Supreme Court, both parties argued that the trial judge was incorrect that the provisions of s. 21B provide a distinct or complete statutory scheme outside of Order 84, and that she was, therefore, incorrect to find that the proceedings were improperly constituted.

27. At para. 55 of her Supreme Court judgment in *Casey*, Baker J. stated:

> Order 84 RSC is expressly identified in s. 21B(a) as the applicable procedure for challenge, and that seems to me to be a useful starting point, as on a plain reading of the subsection the procedural requirements of O. 84 are incorporated by reference. Further it seems to me to be correct, as is argued on behalf of Mr Casey, that it is difficult to ascertain from the judgment what the trial judge regarded as the material differences between an application under s. 21B and one under O. 84, and which of these material differences the applicant's proceedings have infringed.

28. *Casey* confirms that judicial-review proceedings that are affected by specific legislation that modifies the appropriate procedure in a manner such as s. 5 of the Illegal Immigrants (Trafficking) Act 2000 (as amended) are nonetheless judicial-review proceedings governed by Order 84. Accordingly, Order 84 applies to a s. 5 case insofar as the provisions of Order 84 are not inconsistent with the primary legislation.

David Leonard BL

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