

APPROVED

[2024] IEHC 341



THE HIGH COURT
JUDICIAL REVIEW

2022 733 JR

BETWEEN

AHMED ABDELAATTI

APPLICANT

AND

COLLEGE OF ANAESTHESIOLOGISTS OF IRELAND
MEDICAL COUNCIL
MINISTER FOR HEALTH
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 6 June 2024

INTRODUCTION

1. This judgment is delivered in respect of an interlocutory application seeking directions as to the form or mode of the substantive hearing of these judicial review proceedings. The principal relief sought in the notice of motion is an order directing a plenary hearing; in the alternative, leave is sought to cross-examine the deponents who have sworn affidavits on behalf of the respondents.

NO REDACTION REQUIRED

2. It would appear from the written legal submissions filed on behalf of the respondents that there was a concern on their part that the application was for the purpose of converting the judicial review proceedings to private law proceedings. This was a cause of concern to the respondents in circumstances where, in their opposition papers, they had raised issues in relation to the three month time-limit and standing (*locus standi*) requirement which are peculiar to judicial review proceedings. These procedural objections would be superseded were the proceedings to be converted into private law proceedings. To understand these concerns properly, it is necessary to consider the provisions of Order 84 of the Rules of the Superior Courts.

ORDER 84

3. It is important to distinguish between two distinct concepts as follows. The first relates to the procedural rules governing public law proceedings. The second relates to the detail of the form in which the proceedings should be heard, i.e. on affidavit alone, on affidavit with cross-examination, or on oral evidence as a witness action.
4. Special procedural rules apply to public law proceedings. These procedural rules are prescribed under Order 84. The principal points relevant to the present proceedings are as follows. First, it is necessary to obtain the prior leave of the court to institute the proceedings. This is intended as a safeguard to protect public authorities from frivolous or vexatious actions. Secondly, the proceedings must normally be instituted within a three month time-limit. This is a much shorter time-limit than that governing conventional proceedings: the time-limits under the Statute of Limitations are measured in years not months.

Thirdly, an applicant is required to establish that they have a “*sufficient interest*” in the subject matter of the proceedings. Finally, the pleadings must be more precise than in conventional proceedings.

5. The dividing line between public law and private law proceedings is more flexible here than in the neighbouring jurisdiction of England and Wales. The concept of procedural exclusivity does not apply with the same force in our jurisdiction. See *Shell E & P Ireland Ltd v. McGrath* [2013] IESC 1, [2013] 1 I.R. 247 (at paragraphs 45 to 47 of the reported judgment).
6. The detail of the form in which judicial review proceedings should be heard is a separate question. The general position is that judicial review proceedings are heard on affidavit evidence only. This reflects the practical reality that in most judicial review proceedings there will be no controversy on the facts. Rather, the dispute between the parties will centre, instead, on legal issues.
7. It should be emphasised, however, that this practical reality should not be mistaken as being predicated upon a principle, with canonical status, that judicial review proceedings are *different*, and that cross-examination or oral evidence are to be avoided. This is not correct.
8. This point is pithily made as follows by the High Court (Humphreys J.) in *Banik v. Minister for Justice and Equality* [2019] IEHC 785 (at paragraph 14):

“To summarise, to say that cross-examination in judicial review arises in exceptional circumstances is an empirical description based on the general nature of judicial review cases, not the articulation of an independent rule of law. There is no basis in logic or justice for such an alleged rule. Where, as here, there is a clear conflict of fact between deponents from opposite sides, relevant to at least one of the issues on the pleadings, the court should lean in favour of cross-examination. That is not rocket science; and applying that here, the appropriate order is to allow cross-examination [...], limited to the specific conflict of fact that has been identified above in this judgment.”

9. It is perfectly possible for proceedings to retain their character as judicial review proceedings, with all of the procedural safeguards identified above, and still be heard on oral evidence.
10. It should be explained that some confusion can arise as a result of the use of the term “*plenary summons*” in a number of different senses under Order 84. Insofar as relevant to the present case, the following two meanings are potentially engaged.
11. First, the term “*plenary summons*” is used to describe private law proceedings. This is the sense in which it is used under Order 84, rule 27(5). This rule allows the court to order proceedings to continue as if they had been begun by plenary summons. The purpose of this rule is to allow for a midcourse correction to be made where a party has, mistakenly, instituted what are in substance private law proceedings by way of an application for judicial review. The court can reorient the proceedings as private law proceedings.
12. The second sense in which the term “*plenary summons*” is used is as a shorthand for a plenary action, i.e. an action to be heard by reference to formal pleadings and oral evidence. This is the sense in which the term is used under Order 84, rule 22(1):

“An application for judicial review shall be made by originating notice of motion save in a case to which rule 24(2) applies or where the Court directs that the application shall be made by plenary summons.”
13. This rule allows the court to direct the form in which the judicial review proceedings will be pleaded out and heard. The proceedings will retain their character as public law proceedings but will be heard as a witness action on oral evidence.

14. It should be observed that Order 84 envisages that the decision on whether or not to direct a plenary summons will be made in the context of the application for leave to apply for judicial review (“*leave application*”). Normally, the leave application is heard on an *ex parte* basis, i.e. in the absence of the intended respondents. The leave application will, generally, be based on the statement of grounds and such affidavits as have been filed by the applicant alone. This implies that the decision on whether to direct a plenary action will, normally, be made in the absence of any affidavits from the respondents. It follows, therefore, that Order 84 does not envisage that the existence of *disputed facts* is a condition precedent to a decision to direct a plenary action. Rather, the court must be entitled to have regard to a broader range of considerations. These would include, *inter alia*, whether a large number of witnesses may be required; whether the evidence is technical or complex, such that it would be better received by oral testimony; whether the applicant may require to *subpoena* witnesses who might not be prepared to provide affidavit evidence voluntarily; and whether the discovery of documents is likely to be required. This indicative list is not intended to be exhaustive.

THE APPLICATION IN THE PRESENT CASE

15. This matter comes before the court by way of a notice of motion dated 4 January 2024. Counsel on behalf of the applicant confirmed, in answer to a direct question from the court, that his side is not seeking to convert these proceedings into private law proceedings. Rather, the object is to seek to have the proceedings heard on oral evidence. Counsel further explained that his side proposes that the existing statement of grounds and opposition papers should

be treated as the “*pleadings*” in the proceedings; that the existing affidavits be treated as the evidence-in-chief of the respective deponents; that the parties would have liberty to cross-examine each other’s deponents; and that the parties would be at liberty to adduce oral evidence from *additional* witnesses, i.e. in addition to those individuals who have already provided affidavit evidence.

16. In the present case, the applicant accepts that a challenge to the decision to refuse to issue a certificate of satisfactory completion of specialist training must be brought by way of public law proceedings. Similarly, the challenge to the compatibility of the training regime with the underlying EU Directive and the Constitution of Ireland must be brought by way of public law proceedings. (cf. *Galvin v. Director of Public Prosecutions* [2020] IECA 319).
17. The applicant does not shirk the obligation to comply with the procedural safeguards under Order 84. This is important. The respondents have sought to argue, variously, that the proceedings are time-barred, and that the applicant lacks the requisite “*sufficient interest*” under Order 84, rule 20 to pursue the proceedings. The applicant does not seek to avoid these arguments by saying, belatedly, that the proceedings are *private law* proceedings. Rather, he accepts that even if the matter is now to be heard by way of an oral hearing, it is open, in principle, to the respondents to pursue these objections and he will have to reply to same.
18. At the invitation of the court, counsel on behalf of each of the respondents was asked to indicate their stance in light of the clarification of the precise directions now being sought by the applicant. Counsel on behalf of the College of Anaesthesiologists of Ireland (“*the College*”) indicated that her side was

prepared to take a pragmatic approach and not to object to a hearing of the type proposed. Counsel did, however, expressly reserve her position in relation to the costs of the motion. Counsel also suggested that it would be helpful were the applicant required to clarify the precise issues arising in the proceedings. Counsel agreed, with a suggestion from the court, that the proceedings would benefit from case management.

19. The position adopted on behalf of the second respondent, the Medical Council, was more nuanced. Counsel submitted that if and insofar as there is any factual dispute in the proceedings, it is one between the applicant and the College alone. Counsel took the court through the limited affidavit evidence filed on behalf of the Medical Council with a view to demonstrating that, in truth, there was no factual disagreement. Indeed, as counsel pointed out, in the latest affidavits filed by the applicant he expressly refers to portions of the Medical Council's deponent's affidavits as consisting of legal submission.
20. Counsel on behalf of the Medical Council also submitted that the criteria relevant to the decision as to whether or not to direct that judicial review proceedings go by way of plenary hearing were similar to those governing the decision on whether or not to allow cross-examination on affidavit. Counsel submitted that it was necessary to identify a relevant factual dispute in respect of which oral evidence was necessary. Counsel further submitted that no such dispute had been identified *viz-a-viz* the applicant and the Medical Council. Counsel also identified practical difficulties which would arise were his deponent required to present for cross-examination. These related to the need to attend at court to hear the evidence of the opposing side and also to a

concern that the length of the hearing would inevitably be increased were the matter to proceed by way of oral evidence.

21. Counsel on behalf of the Minister, Ireland and the Attorney General (“*the State respondents*”) made submissions broadly similar to those made by the Medical Council. It was, again, submitted that the identification of a factual dispute is the principal determinant of whether or not to direct a plenary hearing.
22. It should be noted, however, that the State respondents are, in a sense, bit players in relation to the motion in circumstances where only one affidavit has been filed on their behalf and it is largely a formal affidavit. Therefore, it seems unlikely, irrespective of what form the proceedings take, that there will be any cross-examination of their deponent.

DISCUSSION AND DECISION

23. There is a distinction, in principle, between a decision to direct a plenary action or hearing, and a decision to allow the cross-examination of a deponent on their affidavit. As discussed earlier, Order 84 expressly envisages that a decision on whether or not to direct a plenary action will be made at the stage of the application for leave to apply for judicial review. By definition, the decision will, in almost all cases, be made at a time *prior* to the intended respondents having filed any affidavit evidence. The test cannot, therefore, be the same as that governing an application for leave to cross-examine, i.e. whether there is a factual dispute in existence. Rather, factors of the type identified at paragraph 14 above come into play.
24. In deciding whether or not to direct a plenary action, it is necessary to have regard to the recent case law from the Supreme Court. The judgment of most

immediate relevance is that in *RAS Medical v. Royal College of Surgeons* [2019] IESC 4, [2019] 1 I.R. 63. That judgment reiterates the orthodoxy that factual disputes may only be resolved by way of cross-examination or oral evidence. The judgment goes on to say that if the party who bears the onus of proof fails to seek to cross-examine or otherwise resolve factual disputes by oral evidence then they may be held to have failed to discharge the onus.

25. See, in particular, paragraph 92 of the reported judgment as follows:

“But it is frankly not appropriate for parties to enter into controversy as to the facts contained either in affidavit evidence or in documents which are admitted before the court without successful challenge, without exploring the necessity for at least some oral evidence. If it is suggested that there are facts which are material to the final determination of the proceeding and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact.”

26. The approach advocated for on behalf of the respondents in the present case risks the creation of a Catch-22 situation. To elaborate: an applicant may find themselves in a position whereby they are refused the right to cross-examine, on an interlocutory motion, only to find themselves condemned for failing to discharge the onus of proof at the full hearing. Put otherwise, it must follow, as a corollary, of the imposition upon a party of an obligation to seek cross-examination or oral evidence that such party be allowed cross-examination or oral evidence in an appropriate case.

27. The respondents seek to argue that there is no factual dispute in the present case. With respect, I cannot agree. It is apparent from the extensive affidavits which have been filed in these proceedings that there is a significant factual dispute as to the nature of, and the status of, the training received by non-consultant hospital doctors. The applicant's case is that there is, in fact, a parallel pathway whereby a non-consultant hospital doctor is subject to a form of training and assessment which—on the applicant's argument—is similar to that received by Scheme Anaesthesia Trainees (“SAT”).
28. This supposed parallel pathway is described, in particular, in the affidavit filed by the applicant on 22 March 2024. The applicant places much emphasis on the express provision of advice, supervision and assessment by college tutors which he says he has received in all hospitals in which he has worked. The applicant also attaches significance to the fact that structured reference letters are provided to non-SAT doctors as well as SAT doctors. These are, seemingly, provided in a sealed and stamped envelope without the candidate knowing the content of same. The applicant avers that he was assessed daily and monitored in this fashion during the entire training regime on what he describes as the “*parallel pathway*”.
29. The core of the applicant's case is that it is impermissible for the respondents to provide a dual certification of doctors in the Irish State. It is said that the European Directive on the recognition of professional qualifications (Directive 2005/36/EC) stipulates that the certification of doctors ought to be harmonised and that it is not, therefore, permissible for the Irish State to certify its own doctors with a title and designation of qualification recognised inside the Irish State under the guise of those doctors receiving on-scheme training, and then

separately to certify non-scheme trainees who are, on the applicant's argument, also trained within the Irish State, with a different title and designation of qualification used solely outside of the Irish State.

30. These are matters in respect of which oral evidence is required. As indicated earlier, it is not simply that there is a factual dispute between the parties as to the nature of the training received by the applicant. There is also the consideration that the evidence required is technical and complex. This is evidence which is much better received by the court (and examined by the other parties) by way of oral evidence. The danger in insisting that the case go by way of affidavit evidence is that the affidavits filed to date are "*lawyered documents*". (I do not mean this in any pejorative sense). The affidavits have been drafted with the assistance of lawyers and lack the clarity and precision which is the hallmark of oral evidence. Had I been the judge dealing with the leave application in this case, I would undoubtedly have directed that this case should be pursued by way of plenary action. This is not a typical case of judicial review. It is much more complicated in terms of its factual matrix. The court adjudicating on the legal issues needs to understand the basis upon which training is provided in hospitals. The court also needs to understand what sort of training the applicant has received, and whether he is correct in his characterisation of same as a "*parallel pathway*", or, whether, alternatively, the respondents are correct in saying that, in fact, it is a different route to certification (referred to in their opposition papers as "*Category E*") and/or that it involves continuous professional development. Those are technical issues. They are critical to an understanding of the legal issues because it is only when the factual issues come into focus that it is possible for the court then to

adjudicate justly on the legal issues. This is a case which would benefit from an oral hearing.

31. What I propose to do is this: I am going to give a general direction that the substantive hearing of this judicial review action be by way of a plenary hearing, in other words, there will be oral evidence. I will adopt the course suggested by counsel for the applicant. In relation to pleadings, there will be no *additional* pleadings. I will treat the statement of grounds and the various statements of opposition as representing the pleadings in the case. I will also treat the affidavit evidence to date as part of the evidence in the case. If and insofar as the parties wish to cross-examine any of the deponents, the witnesses will be treated as having given evidence-in-chief on affidavit. That will be taken as read and they can then be cross-examined. But importantly, I am not limiting any of the parties to the witnesses that they have currently produced on affidavit. It is open to any of the parties to produce a witness in person. They can then give evidence-in-chief in the ordinary way and be cross-examined in the ordinary way. I am doing this because it is essential that whichever judge is hearing the case understands the factual matrix in which the complicated legal issues arise. It is important to understand how the training operates and whether and how it should be characterised by reference to the EU Directive.
32. I will also take up the suggestion of counsel on behalf of the College that this is a case that would benefit from case management. It seems to me that there is always a slight risk in cases where oral evidence is allowed that the case may “*grow legs*” and may be unnecessarily prolonged. I am going to seek to avoid that. It seems to me that this is a case where there should be an issues paper prepared and agreed between the parties before the hearing of the action to

ensure that everybody understands fully what the case is. I suspect that the case may evolve slightly. It may well be, for example, that the applicant wants to adopt a more nuanced approach as to the role of the Medical Council in all of this, given the explanation now provided in the opposition papers of its (seemingly limited) involvement.

POSTSCRIPT

33. Following the delivery of this judgment orally on 6 June 2024, the parties made submissions on case management. The court directed that the applicant should prepare an issues paper and circulate same to the respondents by 4 July 2024. The proceedings will be listed before me for further case management on 12 July 2024 at 10.30 o'clock.

Appearances

John Rogers SC and Dean Regan for the applicant instructed by FH O'Reilly & Co Solicitors

Helen Callanan SC and Conor Duff for the first respondent instructed by Hayes Solicitors LLP

Remy Farrell SC and Caoimhe Daly for the second respondent instructed by DAC Beachcroft

Douglas Clarke SC and Martin Scanlon for the third to fifth respondents instructed by the Chief State Solicitor