[2019] IEHC 785

**THE HIGH COURT**
**JUDICIAL REVIEW**

**[2019 No. 199 J.R.]**

**BETWEEN**

**JIKU BANIK AND SUMAYYA BINTA SOLAYMAN**

**APPLICANTS**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY AND THE COMMISSIONER OF AN GARDA SÍOCHÁNA**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 22nd day of October, 2019**

1. The first-named applicant is a national of Bangladesh who was granted a permission to remain in the State on 8th March, 2018. There is a clear conflict on affidavit between the first-named applicant and Garda Deering on behalf of the respondents as to what information was conveyed in exchanges between them on 8th March, 2018 when the permission was granted. That permission was subsequently revoked and the primary relief sought in the present proceedings is *certiorari* of the revocation. The first-named applicant was also originally seeking to reinstate the permission of 8th March, 2018, although that is no longer being pursued. The applicants seek an order giving liberty to cross-examine Garda Deering in order to resolve the conflict of fact, and on that application I have received helpful submissions from Mr. Gavin Keogh B.L. for the applicants and from Ms. Helen-Claire O'Hanlon B.L. (with Mr. David Conlan Smyth S.C.) for the respondents.

2. Ms. O'Hanlon raised a series of objections to the order for cross-examination sought, which I can summarise as follows.

3. Firstly it is submitted that allowing cross-examination involves a balancing act between the impact on State resources and the needs of the litigation, and that to allow cross-examination of a busy immigration officer and member of the Garda Síochána would be unduly disruptive. But requiring Garda Deering to attend would not automatically be unduly disruptive and the court can facilitate such attendance at an appropriate time, not necessarily the date of the hearing itself, if that is more convenient to her. More generally though, as a matter of principle, administrative inconvenience does not in itself have huge weight to be balanced against the requirements of justice. If cross-examination is required for the just disposition of a case then it is generally to be ordered, administrative inconvenience or not.

4. Secondly it is submitted that the conflict does not go to the heart of the proceedings and is not in itself dispositive of them. The decision of 8th March, 2018 is not as such under challenge, although that is hardly surprising because it was in favour of the first-named applicant. Furthermore Ms. O'Hanlon stresses that the first-named applicant is no longer seeking restoration of that permission. That is all well and good but the respondents specifically plead discretion and non-disclosure in the statement of opposition, so at least

on the discretionary point, the first-named applicant's conduct and degree of disclosure on 8th March, 2018 is relevant to the proceedings on the pleadings.

5. Thirdly, it is submitted that the court can disregard evidence in an affidavit where there is conflict with evidence in another affidavit, so cross-examination is not necessary. That appears to misunderstand the normal procedure for resolving evidential disputes. Sure, if one party makes wild and unsubstantiated allegations of an outlandish kind and the other party simply denies them, a court may feel that the appropriate threshold has not been met in relation to those allegations irrespective of who carries the overall burden of proof, but the normal means of resolving a relevant evidential conflict on affidavit is cross-examination.

6. Next, Ms. O'Hanlon submits that the only thing Garda Deering could say would be to reiterate her affidavit, so therefore cross-examination would not add anything. But that is a counsel of despair. Conflicts may look intractable on paper but, once cross-examination takes place, it may become a lot clearer as to what actually happened. Hardiman J. has set out in *Maguire v. Ardagh* [2002] IESC 21 [2002] 1 I.R. 385 the classic modern statement on the essential role of cross-examination as a means of discovering truth that would not be otherwise apparent from documentary materials.

7. Further, Ms. O'Hanlon submits that where a challenge is against an administrative decision, cross-examination could go behind that in a way that involves a consideration of merits rather than of the decision-making process itself. That is certainly a concern that has some weight, but nonetheless it does not in fact add anything to the question already dealt with earlier, which is whether the conflict relates to an issue on the pleadings. If the matter to which the conflict of evidence relates is one that properly and relevantly arises on the pleadings, then in principle the court should lean in favour of cross-examination; while bearing in mind of course that the contours of the court's role in judicial review are determined by what is an issue on the pleadings within the terms of the order granting leave (subject, I suppose one has to add, to the ongoing possibility of amendment of pleadings, but that is not an issue here).

8. Next, Ms. O'Hanlon made an overall point regarding the need for exceptional circumstances, relying on the judgment of Barrett J. in *Dunnes Stores v. Dublin City Council* [2016] IEHC 724 [2016] 3 I.R. 555, to which I will return in a moment. She also said that, if cross-examination of Garda Deering is allowed, she wants to cross-examine the first-named applicant. That would be the natural and appropriate order in such a situation, namely that both parties to any evidential conflict should be made available for cross- examination.

9. In *Dunnes Stores,* Barrett J., relying primarily on limited U.K. authorities, took the view that the court should grant liberty to cross-examine in judicial review only in exceptional circumstances. But his judgment involved something of a misunderstanding of the concept of exceptional circumstances in the judicial review context. In such a context, "exceptional circumstances" is an empirical description, not a legal test. If a conflict of fact on a relevant issue is established, one does not have to go beyond that to say that

there must *also* be exceptional circumstances before there can be cross-examination. There is rarely a conflict of fact on a relevant issue in judicial review so it rarely arises in that context, and that is what is meant by exceptional circumstances; not that there is some other threshold of unknown and indeed illogical origin. As already mentioned, Hardiman J. in *Maguire v. Ardagh* stressed the vital centrality of cross-examination to resolving factual disputes and I would also respectfully adopt the views of O'Donovan J. in *Director of Corporate Enforcement v. Seymour* [2006] IEHC 369 (Unreported, High Court, 20th March, 2007) where he said that: *"It is axiomatic that, when, in the course of applications to the court which are required to be heard and determined on affidavit, … it becomes apparent from the affidavits sworn in those proceedings that there are material conflicts of fact between the deponents of those affidavits, the court must, if requested to do so, consider whether or not to direct a plenary hearing of the proceedings or that one or more of the deponents should be cross examined on his or her affidavit. This is so because it is impossible for a judge to resolve a material conflict of fact disclosed in affidavits. However, while it seems to me that, where it is debatable as to whether or not the cross examination of a deponent on his or her affidavit is either necessary or desirable, the court should tend towards permitting the cross examination".*

10. For reasons that are not altogether clearly apparent, still less totally convincing, Barrett J. did not follow that approach in *Dunnes Stores*. An authority which itself does not give due consideration to, and where appropriate follow, previous caselaw is not one that can be said to have an automatic claim to be followed itself in terms of *stare decisis*. Keane C.J. in *Holland v. Information Commissioner* (Unreported, Supreme Court, 15th December, 2003) declined to allow cross-examination in judicial review because the applicant "*has not in fact identified any factual controversy and that the High Court judge was perfectly correct in concluding that this was not a case in which … cross-examination … would be in any way necessary for disposing of the question of law which will be before the High Court".* Admittedly, strictly speaking, that was a statutory appeal rather than judicial review, but the same point applies. The most natural interpretation of that statement of course is that where there is such a conflict of fact then the question of cross-examination can be considered. While Barrett J. relied on a small selection of UK authorities there are in fact quite a considerable number of authorities, not referred to in *Dunnes Stores*, where cross-examination has been ordered in judicial review; and a list of those is helpfully set out in Michael Fordham Q.C.'s magisterial text book *Judicial Review Handbook,* 6th ed. (Oxford, 2012) at pp. 192 to 193. Particularly helpful is the characteristically insightful (if I may respectfully say so) view of Stanley Burnton L.J. in *R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 2115 (Admin) where he commented at para. 14: *"I acknowledge that cross examination is exceptional in judicial review proceedings. This is largely because the primary facts are often not in dispute, or at least those asserted by the defendant public authority are undisputed. In addition, the defendant public authority may normally (but not invariably) be relied upon to disclose its relevant documents, thus fulfilling its duty of candour in relation to its documents. However, the Court retains a discretion to order or to permit cross examination, and it should do so if cross examination is necessary if the claim is to be determined, and is seen to be determined, fairly and justly."* This same

contextualisation of the limited role of cross-examination in judicial review as an empirical rather than doctrinal matter was noted in Hogan and Morgan, *Administrative Law in Ireland*, 4th ed. (Dublin, 2010) at p. 853 that "'oral evidence … although catered for by the Rules [is] not part of the ordinary stock-in-trade of the prerogative jurisdiction'; *leave to cross-examine deponents in judicial review is in practice confined to a minority of cases, such as where the disputed facts go to a condition precedent as to jurisdiction or affect the bona fides of either party."*

11. At certain points in the judgment in *Dunnes Stores,* Barrett J. offers various reasons for coming to a much narrower view, but those reasons do not appear to stack up and overall are somewhat abstract and academic rather than practical. O'Donovan J.'s views in *Seymour* are partly dismissed at p. 561 on the grounds that: *"the court must admit to some doubt whether it is appropriate to allow cross-examination if the matters in dispute can adequately be dealt with by way of submission."* That seems to involve a confusion of the distinction between evidence and legal submission. If the matter can be dealt with by submission then it is not an evidential conflict so the whole issue doesn't arise (as O'Donovan J. made expressly clear when he referred to "*material conflicts of fact").* At pp. 561 to 562 Barrett J. says: *"it is perhaps notable that* Holland [v. The Information Commissioner] *involves a notably brief* ex tempore *judgment of Keane C.J. for the Supreme Court",* the implication being that brief *ex tempore* judgments are somehow not only of lesser standing than lengthy reserved judgments, but notably so. Unfortunately, that is not necessarily the case. The real question is whether the judgment makes sense. Whether it is *ex tempore* or reserved is in and of itself totally unrelated to that rather more fundamental question.

12. Thirdly, at p. 563 Barrett J. refers to the point quoted from the judgment of Keane C.J. and says: *"This court must admit that it struggles to read into the last- quoted text the establishment of an iron rule by the Supreme Court that so long as one can point to a factual controversy in affidavit evidence then the cross-examination of a deponent is a matter which the court ought to be inclined to favour. All this court sees in* Holland [v. Information Commissioner] *is a finding by the Supreme Court that in the absence of any factual controversy whatsoever, it was not minded to give permission to cross-examine the deponent in that case.*" The reference to "*an iron rule"* is of course a classic straw-man argument, because no one is arguing for an "iron rule". But on almost any view, Barrett J.'s interpretation of the comments of Keane C.J. is literally-minded to an implausible extent. The natural inference to be drawn from the learned Chief Justice's judgment is that in the event of there being a factual controversy of relevance to the proceedings, cross-examination can come into the frame for consideration. At p. 565 Barrett J., having referred to a limited smattering of three U.K. authorities, says that: *"It may be that there is possibly a degree of laxity in the Irish legal system, as compared with that of the neighbouring jurisdiction, which renders the adducing of oral evidence in judicial review proceedings somewhat less than 'exceptional' in practice in Ireland, albeit that no theoretical rationale for such difference, to the extent that it arises, appears to have been offered thus far in the case-law of the Irish Superior Courts."* The reference to "laxity" is of course a pejorative, question-begging, term in the context. As far as the

lack of a theoretical rationale is concerned, it would be more appropriate to say that the shoe is on the other foot and that such advocates as there are of exceptionality as a legal rule as opposed to an empirical description have failed to come forward with a theoretical rationale for that. Justice, in both the doing and the need for it to seen to be done, very much militate in favour of leaning towards cross-examination where there is a clear conflict of fact and one that is relevant to issues raised in the proceedings.

13. On the particular facts in *Dunnes Stores* at p. 566, Barrett J. said that: *"There is an awning structure in existence, there is photographic evidence before the court regarding same; whether the awning is properly described as an overhead, front or side-awning appears to the court to be a matter of interpretation that will not be advanced through the cross-examination."* That is not altogether a self-evident proposition in the sense that that sort of a conflict of fact seems to be classically the kind of matter where the court is hugely assisted by cross-examination. A desk-bound approach such as that which commended itself to Barrett J. in *Dunnes Stores* would logically lead in many cases to doing away with engineering witnesses in plenary actions and asking them to simply post in their photos instead. On such a curveball methodology, any differences in emphasis between written accounts would have to be addressed in submissions. Overall, I far prefer the emphasis on the benefits of cross-examination that comes across from the views of Hardiman J., O'Donovan J. Keane C.J. and Stanley Burnton L.J., to the paper-based approach that would follow from Barrett J.'s judgment and the small selection of English caselaw to which it refers. The important thing is justice, not some notion of exceptionality as a self-propelling rule.

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 of both Garda Deering and the first-named applicant, limited to the specific conflict of fact that has been identified above in this judgment.