



APPROVED

[2026] IEHC 415

**THE HIGH COURT
PLANNING & ENVIRONMENT**

Record No: 2025 / 1596JR

Between:

**FRIENDS OF THE IRISH ENVIRONMENT CLG, ELAINE EAGAR AND DANIEL
O'SHEA**

Applicants

-and-

ENVIRONMENTAL PROTECTION AGENCY

Respondent

-and-

**UISCE ÉIREANN and
HEALTH SERVICE EXECUTIVE**

Notice Parties

EX TEMORE judgment of Ms. Justice Emily Farrell delivered the 24th June 2026

1. This is an application by the Applicants for liberty to cross-examine Prof. John Fawell who has sworn two affidavits on behalf of Uisce Éireann, the first notice party. The Notice of Motion was filed on 18th June 2026, and the application was heard on Monday, 22nd June 2026. The proceedings are listed for hearing on Wednesday 1st July 2026.

Delay

2. Whilst the application for cross-examination could and ought to have been brought sooner, I do not consider that the delay in this case disentitles the Applicants to the order sought. It was submitted that the application could, and should, have been brought once the opposition papers had been filed. Opposition papers, including the first affidavit of Prof. Fawell had been served on 2nd April 2026, and the Agency's opposition papers were delivered on or about 27th April 2026.

3. It was not necessary for the Applicants to wait for the replying affidavit of Prof. Fawell, sworn on 12th June 2026 in response to the supplemental affidavit of Prof. Scally on 3rd June 2026, to decide whether or not an application should be brought for cross-examination. The replying affidavit was served in draft form on 8th June 2026 and the Applicants' solicitor wrote on 10th June 2026 setting out the basis on which they considered cross-examination to be necessary. It was not necessary to wait to see if Prof. Fawell confirmed or "doubled down" on the opinion expressed in his first affidavit or would alter it in light of the supplemental affidavit of Prof. Scally.
4. Cross-examination if permitted would not derail the hearing, as the court was informed that both Prof. Scally and Prof. Fawell can make themselves available on 1st and 2nd July, when these proceedings are listed for hearing, if this application is granted. If cross-examination is necessary for the court to be able to resolve conflicts in the evidence, in order to determine the issues in dispute in these proceedings, the court would ensure that there is sufficient time for cross-examination to occur and for oral submissions to be made. In that event, the court would expect and is confident that the parties would cooperate in the efficient running of the case and in so doing, to make themselves available for an additional day, should that be necessary to ensure that justice may be done between the parties.

Cross-examination in Judicial Review

5. I have considered the submissions made and the authorities which have been opened to the court. I am satisfied, having regard to the authorities opened to the Court, in particular *RAS Medical v. RCSI* [2019] IESC 4; [2019] 1 I.R. 63; [2019] 2 I.L.R.M. 273, *Hegarty v. Commissioner of An Garda Siochana* [2021] IECA 328 and *Salmon Watch Ireland CLG v. Aquaculture Licences Appeals Board* [2023] IEHC 129 that "where a conflict of evidence on affidavit requires that the evidence of one witness be preferred to that of another, it is unfair to prefer the evidence of the one to the evidence of the other without giving the other an opportunity, under cross-examination, to respond to the evidence of the one and to explain any matters which might suggest that his/hers should be preferred" as Holland J. stated in *Salmon Watch* at para. 5. (emphasis added)

6. The authorities also demonstrate that cross-examination in judicial review proceedings is rare and rarely appropriate, but it is appropriate where there is a dispute in the evidence which it is necessary for the court to resolve in order to determine a material issue in the proceedings.

7. In *Hegarty v. Commissioner of An Garda Siochana* [2021] IECA 328 Noonan J. held:

“35 To the extent that the public body concerned may dispute the facts alleged by an applicant for judicial review, if the court cannot adjudicate on the question of law raised without first resolving the dispute of fact, then cross-examination may not only be appropriate but essential. There must however be a genuine dispute of fact arising. It is not sufficient for the applicant to merely swear that he or she does not accept a particular state of affairs without putting alternative facts before the court which the applicant says are the true facts.

36 Mere denial or non-acceptance of facts deposed to by a respondent cannot, without more, give rise to a right to cross-examine. Were that to be the position, there would be cross-examination in virtually every case. Even if there is a genuine dispute on the facts in the sense of opposing versions of events being advanced by the parties, cross-examination will in general only be permitted where the resolution of that conflict is essential to the determination of the legal issues that arise.”

8. At para. 43, Noonan J. also stated:

“An applicant for judicial review is not entitled to seek to cross-examine the decision maker with a view to eliciting facts which might then be relied upon as grounds for challenging the decision in issue. That would, in my view, subvert the judicial review process.”

9. I am also satisfied that the purpose of cross-examination in judicial review is not to invite a judge to ask questions in relation to issues which she or he considers might generally be of assistance in determining the proceedings, but is limited to the resolution of conflicts in the evidence, where those conflicts need to be resolved to determine material issues in the proceedings. It is not to fill in gaps in evidence, factual or in an expert opinion, nor to open the door to potentially roving cross-examination.

10. Cross-examination may be granted where the dispute is one of expert evidence, and not only where there is a dispute as to the facts or data which is interpreted by an expert in her or his affidavit. In *Salmon Watch*, Holland J. stated, and I agree,
- “cross-examination is necessary only where facts - or, in the case of expert witnesses, opinions - are genuinely in dispute and resolution of that dispute is material to the determination of the proceedings.”*
11. In a case with expert evidence, the expert’s opinion may be challenged either by challenging the underlying facts which are the subject of expert interpretation, by challenging the methodology applied or by providing a different expert interpretation of undisputed facts, or indeed more than one of these. Uisce Éireann relies on the fact that the Applicants have not disputed the evidence provided by Dr. O’Sullivan in relation to sampling in particular. That is not fatal to this application.
12. Cahill J. summarised the applicable principles as follows in *Ethical Farming Ireland v. Minister for Agriculture & Ors* [2026] IEHC 42:
- “cross-examination is permissible when there is a genuine conflict of fact or when there is a challenge to the credibility or reliability of factual averments (based on documentation or contradictory affidavit evidence, for example), and that conflict or challenge needs to be resolved for the determination of an issue in the proceedings. Bare contradictions or denials of facts do not form a basis for cross-examination, nor do challenges to interpretations of facts, inferences, opinions or submissions made on affidavit.”*
13. Whilst heavy reliance was placed on this *dictum* by Uisce Éireann, Cahill J. had expressly excluded the question whether cross-examination of the expert witnesses should be allowed (para. 8) and she noted that the premise for the application to cross-examine was the existence of conflicts of facts. (para. 9). A court will not rely on submissions contained in affidavits, whether in relation to the law or the inferences which may be drawn from the facts deposed to, or the interpretation thereof. For that reason, challenges to interpretations of facts, inferences, opinions or submissions made in an affidavit as to facts do not form a basis for cross-examination.

14. Therefore, I am satisfied that the first question to be determined is whether there are conflicts in the expert opinion evidence of Prof. Scally and Prof. Fawell, bearing in mind the principle that *“It is not sufficient for the applicant to merely swear that he or she does not accept a particular state of affairs without putting alternative facts before the court which the applicant says are the true facts”* and that *“Mere denial or non-acceptance of facts deposed to by a respondent cannot, without more, give rise to a right to cross-examine.”* Similarly, mere statement of disagreement with an expert opinion without more is not sufficient to grant an application for cross examination.
15. If there are genuine disputes in relation to matters of expert evidence, cross-examination should be allowed if the resolution of those disputes is necessary to determine issues capable of influencing the outcome of the proceedings.
16. The Applicants have sought cross-examination on seven issues, which are identified in the Affidavit of Luke McCann by reference to the paragraph numbers of the affidavits of Prof. Scally and Prof. Fawell. Those paragraphs were helpfully set out in a document called ‘Table of Averments’ by Uisce Éireann, which was relied upon at the hearing.
17. No issue arises regarding the expertise of the deponents whose affidavits are the subject of this application. Prof. Scally is a medical doctor and Visiting Professor of Public Health at the University of Bristol in the United Kingdom, and a former Regional Director of Public Health for the Southwest of England. In 2017 he was appointed President of the Epidemiology and Public Health section of the Royal Society of Medicine, is a Fellow of the Royal College of Physicians of London and of the Faculty of Public Health Medicine in the UK. Prof. Fawell is a Chartered Biologist and Visiting Professor of Water Science at Cranfield University Water Science Institute and has worked at the Water Research Centre as a Toxicologist and Head of Toxicology and subsequently as Chief Scientist of the National Centre for Environmental Toxicology.
18. At para. 34 of his first affidavit Prof. Scally concludes that:
“It is my opinion that the repeated exceedances of the 50µg/l value for manganese in drinking water in the catchment served by the Lee Road water treatment plant, and recorded in the sample results which Uisce Éireann has submitted to the EPA results in non-compliance with the parametric values set out in Table C in Schedule 1 of the Drinking Water Regulations for the reasons set out by Dr Castro Castellon in her

Affidavit, and that those exceedances pose a risk to human health. It is my further opinion that, as a result, it is appropriate on a precautionary basis to prohibit or restrict supply of that contaminated water.”

Issue 1

19. In para. 6 of his replying affidavit Prof. Scally states:

“With reference to UE’s advice that the water is safe to drink once it runs clear, this appears to me to clearly imply that it is not safe to drink until it runs clear. This is apart from the fact that it is unreasonable to expect the public to drink discoloured or cloudy water. I should have thought this was sufficient to establish that there is a health risk to the general public. It can hardly be assumed that people will know, before a breach is detected and they are notified of the action they should take, that their water is not safe to drink as it comes from the tap.”

20. The inferences which may or may not be drawn from the wording of a statement by Uisce Éireann in its advice to the public is not a matter of expert opinion. Furthermore, I accept the submission made on behalf of Uisce Éireann that the statement *“I should have thought this was sufficient to establish that there is a health risk to the general public”* amounts to supposition or extrapolation of what Uisce Éireann has said, and does not give rise to the asserted conflict in the expert opinions of the two deponents.

Issue 2

21. I do not accept that the phrase *“whilst not within my area of expertise”* at para. 7 of the second affidavit of Prof. Scally refers to anything other than the cost of rectifying the issue of manganese deposits in the water pipes. However, the averment of para. 7 does not create a conflict with the averments of Prof. Fawell in relation to issues in controversy.

Issue 3

22. The averments at para. 8 of the second affidavit of Prof. Scally are addressed to a significant extent to matters of argument – it will be a matter for legal argument, if indeed there is any dispute, as to whether the WHO Guidelines are legal standards rather than guidelines. The sole opinion expressed at para. 8 is that focus on the WHO Guidelines is

misguided as they are not legal standards but are intended to provide a scientific basis for the development of national standards, which Prof. Fawell notes, the WHO encourages. It would appear to be common case that the Guidelines are simply that, and the Applicants' case is based on exceedances of the 50µg/l standard in the Drinking Water Directive and the European Union (Drinking Water) Regulations 2023.

23. What is meant and required by the precautionary principle is principally a matter of law rather than one for which an expert opinion is required.

Issue 4

24. I am not satisfied that a dispute of expert evidence arises between the averments of Prof. Scally at para. 10 (when read alone or together with the following paragraphs) of his second affidavit, and para. 22 of the first affidavit of Prof. Fawell and para. 10 of his supplemental affidavit. The decision of the EU to set a lower limit than that referred to in the WHO Guidelines is not in issue. Matters relating to the interpretation and application of the Drinking Water Directive are matters for legal submission.

Issue 5

25. Insofar as there is a divergence or dispute between the averments at para. 21 of the supplemental affidavit of Prof. Scally and para. 23 of the first affidavit of Prof. Fawell, it involves the interpretation of the Drinking Water Directive and whether the precautionary principle must be applied. Similarly, the explanation of the precautionary principle is not a matter of expert evidence amenable to cross-examination. I do not consider that the statement that *“with respect to Prof Fawell’s conclusion that the exposure of formula-fed infants to levels above 120µg/l would have to continue for “at least weeks” for effect to be likely gives me no comfort at all, as a medical practitioner, that effects can be excluded at lower levels”* creates a genuine dispute of expert evidence with para. 23 of the first affidavit of Prof. Fawell.

Issue 6

26. At paras. 21 and 28 of his first affidavit Prof. Scally states:
“21. One of the updates [of the WHO Guidelines] is described as a clarification that: manganese can be a concern in some areas because of the potential extent of exposure at concentrations of human health significance. The standards document devotes

several pages to manganese. It notes that: Several epidemiological studies have also reported neurological effects (including reduced cognitive ability) in adult populations and children following ingestion of manganese contaminated water. The document clearly states that exposure to excessive manganese is particularly worrying in infants and children.

...

28. In Part 2, 4.(1) of the European Union (Drinking Water) Regulations 2023 [S.I. No. 99 of 2023] it is specified that; Subject to any departure granted under Regulation 18, a water supplier shall ensure that all water intended for human consumption supplied by them is- a) wholesome and clean, b) does not present a risk to human health, and c) meets the requirements of these Regulations.”

27. The meaning and effect of the European Union (Drinking Water) Regulations 2023 are a matter of law and not for expert evidence. He submits, that Article 14(6) of the Directive requires that where there is a breach of the limits of Part C, there must be consideration of “whether that non-compliance poses any risk to human health” and remedial action must be taken where it does (para. 14, supplemental affidavit).

28. There is no dispute that there are epidemiological studies which have reported neurological effects in adults and children following ingestion of manganese contaminated water, that exposure to excessive manganese is particularly worrying in infants and children, or that ingestion of excessive manganese presents a risk to human health. However, Prof. Fawell has averred at para. 24, that the level at which human health risks are likely to occur exceeds 120µg/l and he states that a level which would begin to cause detectable adverse effects would be significantly above this with exposure over an extended period. Prof. Scally relies on the level set in the Drinking Water Directive, and the Regulations (elsewhere in his evidence). Save insofar as he says he is unaware of studies which demonstrate that there is no risk from manganese below 80 µg/l (Prof. Fawell does not take issue with the absence of such studies), he does not point to any study or evidence which demonstrates the level at which a risk occurs. Whether the precautionary principle requires evidence to demonstrate that a particular level is safe is a matter for legal argument.

Issue 7

29. The difference between the averments at para. 28 of the supplemental affidavit of Prof. Scally and para. 31 of the first affidavit of Prof. Fawell also relates to the question whether the precautionary principle requires there to be evidence to exclude health impacts below the level of 80µg/l.

Conclusion

30. I am not satisfied that the Applicants have demonstrated that cross-examination is necessary to resolve a dispute in expert opinion which must be resolved in order to determine the issues arising in the proceedings. A number of the matters which are in contention and are relied upon by the Applicants to make this application relate to the interpretation and application of the relevant legal test, in particular the precautionary principle, and legal evaluation. The legal status of the WHO Guidelines is a matter of law, as is the question, what must be done in light of high uncertainty. To an extent these legal issues are intermingled with the interpretation of the underlying facts. For that reason if, in light of my findings on the legal issues, I consider that cross-examination is in fact essential to determine the proceedings, I shall revisit the question whether cross-examination is required to enable me determine the issues in dispute in the proceedings. However, in stating this, I am not inviting a further application.

Emily Farrell