



THE HIGH COURT
JUDICIAL REVIEW

[2026] IEHC 513

Record No. 2023 865 JR

BETWEEN

Z. M.

APPLICANT

AND

THE MINISTER FOR JUSTICE, HOME AFFAIRS AND MIGRATION

RESPONDENT

**RULING of Ms. Justice Siobhán Phelan, delivered on the 23rd day of July,
2026**

INTRODUCTION

1. By Notice of Motion returnable to the 10th of July, 2026, the Respondent seeks an order pursuant to Order 41 Rule 1 of the Rules of the Superior Courts (RSC) permitting cross-

examination of the Applicant in relation to the contents of affidavits filed herein and requiring attendance for this purpose.

BACKGROUND

2. The Applicant is a national of Pakistan who travelled to Ireland in August, 2018, on foot of a student visa. Following the expiry of his student permission, the Applicant was issued in September, 2021 with a notice of a proposal to deport. In this letter, it was stated that the Applicant had the right to leave the State before a final decision was made in his case but it was further stated:

“Except in very exceptional circumstances, if you exercise this option, a Deportation Order will not be made in respect of you, thus allowing you to seek to legally enter the State (e.g. on a tourist visa, a work permit, etc.) at some point in the future.”

3. Almost two years later the Applicant was served with a deportation order pursuant to s. 3 of the Immigration Act, 1999 (as amended) (the “1999 Act”) by letter dated the 23rd of June, 2023.
4. By *ex parte* order made on the 31st of July, 2023 (Hyland J.), it was directed that the application for leave to proceed by way of judicial review to challenge the lawfulness of both the notice issued under s. 3(3)(a) of the 1999 Act made almost two years previously and the recent deportation order be brought on notice to the Minister. The challenge to the notice was advanced on the basis that it the power to make a deportation order against someone who has left the State contended for in the letter rendered the notice unlawful because s. 3(4) of the 1999 Act does not provide for a power to make a deportation order in the case of a person who has left the State on foot of a notice received under s. 3(3).
5. The case made is that in compliance with s.3(4) of the 1999 Act, a notice under s. 3(3) should contain a statement that the person concerned may make representations in writing to the Minister within 15 working days, a statement that the person may leave

the State before the Minister decides the matter and requiring the person to so inform the Minister in writing and to furnish the Minister with information concerning his or her arrangements for leaving and a statement that the person may consent to the making of the deportation order within 15 working days of the sending to him or her of the notification and that the Minister shall thereupon arrange for the removal of the person from the State as soon as practicable. The Applicant contends that by reserving the right to make a deportation order in circumstances where a person has a right to voluntarily depart without such an order being made, the Minister acted *ultra vires*.

6. The leave submissions filed in support of the application refer to the fact that reserved judgment was then awaited from Bolger J. in respect of the issues arising. Judgment in *KA v. Minister for Justice* [2023] IEHC 556 was subsequently delivered in October, 2023.
7. A replying affidavit was sworn by one Eileen O'Reilly, Officer in the Department of Justice, on the 1st of February, 2024, opposing the grant of leave. She relied, *inter alia*, on the 28-day time limit which had long since passed in the case of the 2021 notification. She pointed out that the Applicant had replied to the September, 2021 letter to make submissions as to why a deportation order should not issue and did not intimate any intention to depart voluntarily. She confirmed that the s. 3 notification letter was in the standard template form which only changed following the decision of Bolger J. in *KA v. Minister for Justice*. She set out that it was evident from the legal submissions filed at leave stage that the Applicant would try to rely upon the decision in *KA* to revisit the s. 3 notification letter even though no issue with its form was raised at the time the notification letter was received. This was in distinction from the facts in *KA* where issues with the form of the letter were raised shortly after the notification letter was received.
8. Ms. O'Reilly set out her belief that the objection to the form of the three options letter was an attempt to revisit the lawfulness of a notice issued more than two years previously based on an intervening favourable decision in someone else's case, piggybacking on the decision even though the Applicant had not previously indicated any difficulty understanding the notice letter.

9. In grounding his extension of time within which to challenge the notification letter application, which notification letter was then already almost three years old, the Applicant swore a third affidavit on the 20th of February, 2024, after the replying affidavit of Ms. O'Reilly was sworn, albeit without reference to that affidavit. In it he (at para. 3) said that he found the letter received under s. 3 “*very confusing*” as to how the options would operate. He maintained that notwithstanding these concerns, he instructed his solicitor to make an application for permission to remain on a “*without prejudice*” basis to any proceedings or complaints he had in respect of the notice. He further stated that he was advised and believed that he could not challenge the notification letter at that time due to jurisprudence of the High Court to the effect that any concerns in respect of a notice could be addressed in his permission to remain rather than challenging the notice.
10. In written submissions opposing the grant of leave, the Respondent made clear that he considered that the judicial review proceedings were prompted not by anything which pertaining to the Applicant’s own situation, but rather by subsequent developments in a case in which a third party had successfully advanced a legal challenge, years after the notification had issued and been responded to in his own case.
11. In a later affidavit sworn in May, 2024, the Applicant repeated that he found the s. 3 notification letter which had issued to him in September, 2021, confusing as to how the options would operate and particularly, he had no knowledge as to the exceptional circumstances which would warrant the exercise by the Minister of a power to make a deportation order against him even if he left the State voluntarily. He said that upon receiving the Respondent’s deportation order he felt “*compelled*” to engage with the process and that it was not inevitable that a deportation order would be made and the issue may not have arisen. He added that had there been clarity in the s. 3 notification letter, he would have opted to voluntarily leave the State.
12. It appears that leave on notice was heard before Bolger J. in June, 2024. The Respondent relies in submissions on the fact that in dealing with the time issue at leave stage, Bolger J. observed that the state of the evidence was such that the Applicant’s declared explanation regarding why he did not challenge the notice at the time was

unchallenged and had to be taken at its height for the purposes of considering whether the threshold for leave had been met.

13. In the Statement of Opposition filed in July, 2025, the Minister relied on a *jus tertii* ground of opposition disputing the Applicant's claim to have standing and objecting to his claim which was said to be based on someone else's case and did not arise on the facts of his own case. At paragraph 15 of the Statement of Opposition it is pleaded:

"In light of his subsequent response to the notification letter, the Applicant's declared intention to wish to leave the State, which he asserts was frustrated by the wording of the statutory notification letter he received, is not accepted as a matter of fact. In this same context, it is not accepted by the Respondent that the "without prejudice" stipulation which was noted on the Applicant's response to the Minister dated 12 October, 2021 referred to the "exceptional conditions" reservation and the Applicant is called upon to evidence and prove this assertion and to reliably prove the legal advices and directions to which he himself has referred in his grounding affidavit."

14. It was objected that no good and sufficient reason to justify an extension of time had been set out.

15. In an affidavit grounding the opposition papers filed on the 12th of September, 2025, Ms. O'Reilly referred to the Applicant's averment to the effect that he had consulted with his advisors about the prospect of challenging the *"exceptional conditions"* reservation. She said that had this consultation occurred, she would expect to see some supporting evidence by way of attendance note from this time with a supporting affidavit from his solicitor. She again pointed out the absence of any correspondence raising an issue at the time and the fact that submissions as to why a deportation order should not be made with a view to permitting the Applicant to remain in the State had been made, both of which she claimed undermined the veracity of the Applicant's claim. She emphasised that the Applicant never explained that he would prefer to leave voluntarily rather than be deported and never alluded to a concern with regard to the

notification letter “*in any discernible way*” (at para. 6, Affidavit of Ms. O’Reilly) in correspondence with the Minister.

16. The pleadings are now closed. The Applicant has not sought to introduce any corroborative evidence in relation to the advice he claims he obtained following receipt of the allegedly confusing notification to the effect that he could not challenge it. Written submissions in the substantive action have been exchanged. This application for leave to cross-examine is made in advance of an application for a hearing date and has been supported by outline written and oral submissions.

LEGAL PRINCIPLES

17. Leave to cross-examine is rare in judicial review proceedings and will generally only be granted where there is a conflict of fact on affidavit and where it is necessary to resolve that conflict to determine the proceedings or application. The entitlement to leave to cross-examine has also been recognised as necessary where the credibility of a deponent is contested on a question relevant to the issue the court must determine.
18. The burden rests on an applicant for cross-examination who must demonstrate the probable presence of a conflict on the affidavits relevant to the issues to be determined and persuade the court that the issue in the proceedings cannot justly be determined without cross-examination (*Irish Bank Resolution Corporation Ltd v. Moran* [2013] IEHC 295).
19. The governing test for the grant of leave to cross-examine, authoritatively stated in *Ras Medical Ltd. v. The Royal College of Surgeons in Ireland* [2019] IESC 4, is now well settled. If a party wants to impugn the reliability or credibility of sworn evidence (whether by reason of conflicting sworn evidence, documentary evidence or otherwise) they must do so by cross-examination (para. 88, *Ras Medical*). Cross-examination may also be permitted if there is a conflict of evidence (whether arising from affidavits or documents) the resolution of which is material to the final determination of the proceedings (para. 92, *Ras Medical*). Leave to cross-examine will only be granted where there is a clear, genuine and material dispute of fact or a credibility issue that cannot fairly be resolved on affidavit. The dispute must go to an issue central to the

outcome and must be necessary to resolve the issue fairly. It is apparent from the foregoing that central to the application of the test is an identification of the issue the court must decide and any disputed facts pertaining to this issue because it is against this issue that the relevance and necessity for cross examination must be tested.

20. The judgment of the Supreme Court in *RAS Medical* also authoritatively establishes that cross-examination may be ordered to question the credibility of a deponent if there is a sound factual case for doing so. As concluded by Clarke J. in *RAS Medical* (para.112):

“I am also satisfied that it is inappropriate for either a trial court or an appeal court to reject sworn affidavit evidence by reference either to other sworn affidavit evidence or to documentary materials without giving the deponent concerned an opportunity to answer any reasons why the sworn evidence should not be regarded as credible or reliable. The onus is on a party who wishes to urge on a court that sworn affidavit evidence should not be accepted, in respect of any point of fact material to the court’s final determination, to ask the court to take appropriate measures such as granting leave to cross-examine, so that questions concerning the credibility or reliability of the evidence concerned can be put to the witness and the court reach a sustainable conclusion as to the accuracy or otherwise of the evidence concerned.”

21. In applying the guidance apparent in the case-law, the first task of the Court is to identify the issue in dispute and assess whether the disputed factual matters can impact on a decision on this issue.

ANALYSIS AND DECISION

22. The Applicant’s claim is resisted on the basis that it is out of time and he has not established good and sufficient reason for an extension of time under s. 5(2) of the Illegal Immigrants (Trafficking) Act, 2000. The Respondent also makes a clear contention supported by the timing of the proceedings (while judgment was awaited in

KA) and the terms of the averments made to ground proceedings which mirror the language of averments in KA, that the Applicant suffered no prejudice from any confusion created by the language of the s. 3(3)(b) notification but rather is opportunistically seeking to piggyback on successful proceedings brought by a third party. In essence, the contention is that absent genuine confusion impacting on the right to make an informed decision when the notification was sent in September, 2021, the Applicant lacks standing to pursue the complaint made in these proceedings.

23. In terms of standing to maintain these proceedings, the factual matters which the Respondent wishes to explore through cross-examination in this case relate to the Applicant's state of mind when the notification letter was sent to him in circumstances where it is disputed that the Applicant was confused as to his options and would have seriously considered leaving the State voluntarily but could not do so because of a lack of clarity as to the consequences of such a decision. I am referred to paragraph 3 of the Third Affidavit of the Applicant where he states that he found the letter confusing and had no knowledge of the exceptional circumstances in which a deportation order might issue notwithstanding his voluntary return. I note that a similar averment was contained in paragraph 6 of his grounding affidavit sworn in July 2023 (before the decision in KA). Almost identical claims were advanced in KA in relation to confusion and Bolger J. accepted averments to this effect in quashing the notification letter and deportation order in that case, despite the case made on behalf of the Respondent (albeit without cross-examining the Applicant) that the fact of such confusion was not accepted.

24. At paragraph 19 of her judgment in KA, Bolger J. confirms agreement with the Applicant's submissions that his consent to leave voluntarily must be informed consent and she records the Minister's argument (at para. 20) as follows:

"The Minister says that the applicant has not evidenced any sincere intention to leave the State pursuant to the voluntary option and that his claim is based on the premise of someone else's complaint and should be disposed of by means of a jus tertii objection. The affidavit evidence before me does not establish that the applicant had no sincere intent to leave voluntarily. The applicant explained

why he has not availed of the option to leave the State voluntarily, a position which formed the basis of this application for which leave was granted. The Minister, in effect, challenges the applicant's bona fides and those of his solicitor whom he says has advised him that the letter is unlawful. I accept that the applicant has genuine concerns, arising in part from the legal advice he was given, and that the impugned option offered to him deprived him of the ability to make an informed decision about whether or not to leave the State voluntarily."

25. This acceptance by Bolger J. of the Applicant's genuine concerns is prayed in aid in support of this application for leave to cross-examine in this case. Submissions alone were not sufficient in *KA*, hence the necessity to cross-examine where credibility of the deponent is sought to be impugned. This principled basis for the need for cross-examination is supported by the decision in *RAS Medical* which confirms that it is inappropriate for either a trial court or an appeal court to reject sworn affidavit evidence without giving the deponent concerned an opportunity to answer any reasons why the sworn evidence should not be regarded as credible or reliable. On the other hand, there are important differences between this case and *KA* which mean that it is not inevitable that the Court would similarly accept the veracity of the Applicant's claim to be confused in this case.
26. The most significant difference between the two cases insofar as I can see is that in *KA* the Applicant did not delay in raising the issue and only a short extension of time was required, whereas in this case there is considerable delay. The fact that issues of confusion were not raised contemporaneously with receipt of the notification letter is clearly very material, not only to the time limit issue which arises but also to the basis upon which the credibility of the Applicant's claim to have been confused by the letter and his claim that the advice he received was that the matter could not be challenged, both of which are central to the Court's finding on his standing to maintain these proceedings.
27. In support of the Respondent's application, however, there is a striking similarity between the evidence of the Applicant in *KA* and the position in evidence of the

Applicant in this case. The timing of the application is a further factor given the proximity of the institution of these proceedings to the hearing of the argument in another case. It is also noted, however, that the same counsel appeared for both Applicant and Respondent in *KA* and in this case which may explain a similarity in the pleadings and submissions both as to factual and legal matters in a manner which does not necessarily mean that the Applicant's claim to be confused is not genuine, albeit it does not dispel a suspicion rooted in the timing of the application. In his third affidavit, in support of his claim to have been confused, the Applicant claimed that he had sought legal advice contemporaneously with receipt of the notification. The veracity of this new element introduced belatedly, if accepted, could support the Applicant's claim to have been genuinely confused and deprived of an opportunity to make an informed decision thereby supporting a decision similar to that in *KA* where an averment on affidavit was accepted at face value in the absence of contradictory evidence. It is also potentially capable of supporting the grant of an extension of time.

28. The relevance of the Applicant's claim to have received certain legal advice in respect of the notice is relevant therefore both to the credibility of his claimed confusion on the basis that if he sought advice on this issue, it was because he was confused and also to the second issue to be decided, namely the extension of time issue. Were the Court to treat the fact that the Applicant sought advice contemporaneously with events but was advised that he had no remedy because the notice could not be challenged to constitute good and sufficient reason to extend time, then the veracity of the claim to have sought such advice could be material to the court's decision on the issue of confusion caused by the terms of the notification.
29. Clearly, the delay issue is one which has the potential to be determinative in this case and was not present in the same way in *K.A.* This issue turns, to a very large extent, on the length of delay and the failure to challenge the notification in time but instead proceeded to make submissions without raising any issues with the Minister in respect of confusion. These are objectively ascertainable matters disclosed on the formal record and I agree with the Applicant's submission that it is open to the Respondent to make submissions against the grant of an extension of time based on acceptance or rejection of this evidence, without any necessity for cross-examination.

30. Indeed, in this regard I note that in the substantive submissions advanced, the Respondent maintains that the reasons which have been offered to extend time have no substance and only one of two possible conclusions arises. Either, the Applicant genuinely did have an issue with the notification letter at the time, in which case he failed to pursue his objection or he did not object to the terms of the notification letter but is seeking to now impermissibly adopt the complaint of another.
31. If the Respondent is correct in this position as advanced in written submissions in the substantive action, it is difficult to see what necessity there is for cross-examination. In neither of the two scenarios is there a basis upon which time could be extended. Whether he obtained legal advice to the effect that he could not bring a challenge in or about September, 2021, is not a central fact which the court is required to determine because either way his complaint is out of time and on the Respondent's case no good reason to extend time has been put forward. Submissions can be made in this case by reference to the nature of the submissions made following receipt of the notification, the failure to raise a concern at that time, the absence of corroborative material confirming that the Applicant sought advice at the time due to his confusion by the notification letter having regard to the distinct features of this case, not present in *K.A.* and distinguishing this case. Submissions as to the weight and effect of documents do not require cross-examination.
32. On the other hand, I do not agree that this case is in the same category of case as *JFM v. The Minister for Justice, Home Affairs and Migration* [2026] IEHC 272 as has been contended on behalf of the Applicant. *JFM* concerned an application for leave to cross-examine in respect of a cost's application, a consequential matter and not a central issue in the proceedings which the court was required to determine. The relevance of cross-examination to an issue in the proceedings is present in this case in a way that it was not in *JFM*. Proportionality considerations are also different because the issues which it is sought to test bear centrally on whether the substantive relief the Court is asked to grant in this case.
33. Unlike in *JFM*, therefore, in this case the application is sought in respect of a factual matter which is potentially determinative of a substantive issue in the proceedings, namely, whether the Applicant has standing to bring the proceedings because it is

established that he was confused as to his rights by the terms of the notification letter thereby depriving him of the opportunity to make an informed decision on whether to leave the State before a deportation order issued or whether he lacks standing because there was no confusion, but instead he now seeks to benefit from success in another case without personally having a legitimate basis for making complaint because he, in fact, had no intention of leaving the State voluntarily without first endeavouring to persuade the Minister not to make a deportation order.

34. Although credibility issues arising are issues which may be advanced on the documents, applying *RAS Medical*, a court at substantive hearing may feel constrained to accept affidavit evidence which has not been contested by cross-examination. Notwithstanding the Respondent's contention in written submissions that the Applicant is out of time whether he obtained advice or not, the fundamental premise for this application is that it is necessary to test whether the Applicant sought and obtained legal advice contemporaneously with his decision not to bring proceedings challenging the notice in September, 2021, or shortly thereafter is an acknowledgement that a court may consider the claim in relation to advice to be a basis for extending time. No matter how weak the Respondent contends the case for an extension of time is, it nonetheless amounts to an acknowledgement that the question of legal advice is "*central to the issue of the extension of time*" and therefore relevant to an issue the court must determine.

35. While the Respondent is able to point to objective matters which undermine the Applicant's otherwise uncorroborated averments, notably the documentary records which include the failure to produce any document evidencing an attendance with a solicitor for advice in respect of the notification, the substantive submissions made to the Minister resisting deportation without raising any concerns regarding the form or meaning of the notice, the intervening period and the fact that judgment was awaited in another case at the time leave was granted, all of which provide a basis for doubting the veracity of the Applicant's account, these factors alone may not be considered enough to reject his credibility. They are, however, factors which are key to my decision on this application. Relying on these documents, the Respondent puts forward an alternative view of what has in fact occurred, namely that the Applicant had no intention of leaving the State and had not noted any issue with the form of the notice when it was received but was seeking to piggyback *ex post facto* on the case later taken by *KA*.

Sufficient basis for justifying a requirement to test his evidence to the contrary by reason of the support for this alternative view is established in my view by reference to these factors, even if they alone might not be enough to persuade the court at full hearing to reject the Applicant's sworn evidence.

36. Having considered this application through the prism of the decision the judge will be required to make at full hearing, it seems to me that it is quite possible that a court would need to look no further than the length of the delay and the nature of the explanation offered to determine the issue against the Applicant on the straightforward basis that the explanation is not good and sufficient, having regard to the length of the delay and the failure to raise the issue in any express way at the time. If the court is persuaded, however, that despite the length of the delay, the explanation provided is sufficient to justify an extension of time, then a litigation prejudice arises for the Respondent if they are not allowed to test the veracity of the Applicant's averments in this regard.

37. Notwithstanding the differences between the facts in this case and *KA*, the fact that the Court accepted untested averments on affidavit in relation to confusion caused in *KA* means that it is possible that a court could take a similar approach in this case. Likewise, where the Court was satisfied to rely on the Applicant's untested evidence in relation to justification for seeking an extension of time at leave stage (on a substantial grounds threshold), this signals a risk that a similar approach might be taken at full hearing. Granted this is not a foregone conclusion as a different test applies at full hearing, but it demonstrates that there is substance to the Respondent's concern.

38. Not without hesitation, but because I am unable to reject the Respondent's concerns that without an opportunity to test the Applicant's account in relation to the basis for seeking an extension of time and the genuineness of his confusion the court may be reluctant to disregard the Applicant's sworn account on matters within his personal knowledge, as groundless, I have decided to grant leave to cross-examine in this case on specific matters. In the absence of cross-examination testing the Applicant's assertions as to his state of mind, there would simply be no other direct testimony to contrary effect before the Court. In such circumstances, it is possible that a court would consider itself bound to accept the Applicant's testimony notwithstanding a real basis

for a concern as to the veracity of his sworn evidence, simply because it has not been tested.

39. In deciding that the Respondent is entitled to the order sought limited to specific matters, I make no finding on whether the legal-advice explanation can constitute good and sufficient reason for an extension of time. It is enough that the explanation is relied upon as a substantive basis for extension of time and may materially influence the trial judge's assessment of both delay and standing. Accordingly, its credibility is a matter which may require testing.

40. Findings as to the sustainability of the Applicant's claim to be confused when he obtained the notice, his claim that he might have voluntarily left the State had the options been clearly and lawfully stated in the s. 3(3)(b) notification letter and the advice he received at that time which led to him not challenging the notification despite his professed confusion, all have a potential relevance to the decision on an extension of time and the entitlement of the Applicant to bring these proceedings not having done so contemporaneously with events and therefore could be central to the issues the Court is required to decide in this case. These issues are not interlocutory or consequential matters but go to the entitlement to substantive relief in the terms sought in the Statement of Grounds and an order granting leave to cross-examine on these specific and discrete issues seems to me to be proportionate to the importance to the interests of justice of the court deciding on the real facts.

CONCLUSION

41. For the reasons set out I will make an order granting leave to cross-examine the Applicant pursuant to Order 41 Rule 1 of the RSC, limited to the Applicant's claimed confusion at the terms of the notification, his contention that had he understood the option to leave voluntarily without a deportation order, he might have taken this option and the claim that he sought legal advice at the time but was told he could not challenge the notification letter.

42. I wish to make clear that in giving leave to cross-examine, I do so without making any findings as to the veracity of the Applicant's account but because I accept that a

sufficient basis has been established to persuade me that fairness requires that the Respondent be afforded an opportunity to test the veracity of the Applicant's evidence by reference to objective facts which have been set out on affidavit by reason of the possibility that its veracity could determine the decision of the court both on the extension of time and, if time is extended, on an entitlement to substantive relief in exercise of the court's discretion by way of judicial review.

43. I will hear the parties as to the form of any final order and any consequential matter.