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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY ANTHONY LANCASTER FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE CIVIL LEGAL SERVICES APPEAL PANEL

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Karen Quinlivan KC and Leona Askin (instructed by Madden & Finucane Solicitors) for the Applicant
Mr Aidan Sands KC (instructed by the Departmental Solicitor's Office) for the proposed Respondent

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COSTS RULING

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COLTON J

Introduction

[1] The applicant is a Registered Terrorist Offender ("RTO"). He challenged, by way of judicial review, the additional notification requirements imposed on RTOs which were introduced by the Counter Terrorism and Border Security Act 2019. The application was dismissed by Mr Justice Scoffield on 17 February 2023. The application was heard together with two other similar challenges brought by Anthony McDonnell and Sharon Rafferty which were also dismissed.

[2] On 7 March 2023, the applicant applied for legal aid to appeal the judgment of Mr Justice Scoffield to the Court of Appeal. That application was refused in a letter dated 16 March 2023 which set out the reasons for the refusal.

[3] On 14 April 2023, the applicant appealed to the Civil Legal Services Appeal Panel (CLSAP). As was the case with the initial application, an opinion from senior

counsel was provided in support. The opinion addressed every reason provided by the Legal Services Agency ("LSA") in the decision refusing legal aid.

[4] In appealing the decision, the applicant requested an oral hearing before the CLSAP. Reasons for that request were addressed in the opinion submitted in support of the application.

[5] On 3 May 2023, the LSA informed the applicant that the presiding member of CLSAP had determined it was not necessary to receive oral representations as he was not satisfied that the requirements of Regulation 26 of the Civil Legal Services Appeal (Regulations) (Northern Ireland) 2015 had been met.

[6] On receipt of this indication the applicant submitted further submissions to the LSA and CLSAP on this issue.

[7] The CLSAP refused the applicant's appeal from the refusal of legal aid on 10 May 2023.

[8] Importantly, the applicant contends that in refusing the appeal the reasons given by CLSAP were different in significant respects from the reasons which had been given by the LSA for refusing legal aid and which had been addressed by the applicant in a second opinion provided in support of the appeal. Specifically, CLSAP stated that it "concluded that the test to be applied in determining the Convention compatibility of the legislation is whether it causes an unjustified interference with Convention rights in all or almost all cases" and that this "key point was not adequately addressed by the applicant in their submissions."

[9] The applicant focuses on this issue because the "key point" referred to by CLSAP had not been argued before the High Court; was not addressed by Scoffield J and, importantly, did not feature in the LSA's reasons for refusing legal aid initially. Accordingly, there was no reason why the applicant would have expressly addressed this issue in his appeal from the initial refusal of legal aid.

[10] The applicant also draws attention to similar applications brought by the other unsuccessful parties in the original litigation.

[11] In particular, the applicant says that Mr McDonnell also issued a notice of appeal in respect of Scoffield J's judgment after Mr Lancaster. Similarly, Mr McDonnell applied for legal aid after Mr Lancaster. He too was refused.

[12] Both Mr Lancaster and Mr McDonnell appealed the refusal of legal aid, and both requested oral hearings.

[13] It is the applicant's understanding that Mr McDonnell was granted an oral hearing by CLSAP after the issue of pre-action correspondence from Mr Lancaster challenging the CLSAP decision in his case, and after these proceedings were issued.

[14] Furthermore, Mr McDonnell was granted an oral hearing and at that oral hearing he was granted legal aid.

[15] The applicant argues that this was in circumstances where one or more appeal panels applied the same criteria to what were essentially identical legal and factual situations arising out of the same judgment and came to different conclusions in terms of whether legal aid should be granted.

History of the proceedings

[16] The applicant sent a pre-action protocol letter to the proposed respondent on 23 May 2023 challenging the refusal to grant the applicant an oral hearing and the decision to refuse the applicant legal aid to pursue his appeal.

[17] A pre-action reply was sent on 14 June 2023.

[18] The applicant issued proceedings seeking leave to apply for judicial review on 16 June 2023 and sought expedition on the grounds that the hearing before the Court of Appeal had already been listed for 26 and 27 September 2023.

[19] This court directed that a "rolled-up" hearing be listed on 7 September 2023.

[20] In the interim the applicant made a second application for legal aid on 6 June 2023 which specifically addressed the reasons CLSAP had given for refusing the appeal.

[21] On 8 June 2023, the LSA refused this second application, referring to the reasons given in the original refusal letter and stating that there was nothing new of significance in the applicant's second application for legal aid. The applicant sent pre-action correspondence in respect of this decision and made a third application for legal aid on the basis that the LSA had not properly considered the second application for legal aid and, therefore, had not properly considered the reasons given for refusal by CLSAP in the first application.

[22] On or about 29 June 2023, the LSA indicated that it had granted legal aid in respect of the third application for legal aid.

[23] In light of this development, the applicant accepted that these proceedings were now academic and there was no requirement for the court to determine the legal issues relating to the merits of the application.

[24] The court issued case management directions on 14 July 2023, as a result of which the parties agreed that the only outstanding issue related to costs. The proposed respondent objected to the applicant's application for costs.

[25] In accordance with the court's directions the parties provided written submissions on the issue of costs and a short oral hearing was arranged on this discrete issue.

[26] The court is obliged to the written and oral submissions made on behalf of the parties from Karen Quinlivan KC and Leona Askin on behalf of the applicant instructed by Madden & Finucane Solicitors and from Mr Aidan Sands KC on behalf of the proposed respondent instructed by the Departmental Solicitor's Office.

Consideration

[27] The award of costs is always in the discretion of the court and must be addressed on a case-by-case basis.

[28] The starting point is RCJ Order 62, rule 3(3) which provides as follows:

> "If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

[29] In the context of judicial review this order has been the subject matter of considerable judicial consideration from which clear principles emerge. For many years the courts in this jurisdiction applied what are referred to as the "*Boxall*" principles deriving from a decision in *R(Boxall) v Waltham Forest LBC* [2001] 4 CCLR 258, which set out six principles to be applied in circumstances where leave to apply for judicial review had been granted but a substantive hearing was not required as the challenge had been rendered academic by intervening developments.

[30] The decision in *Boxall* has been affirmed and extended by two decisions of the English Court of Appeal, namely *R(Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 985 and *M v London Borough of Croydon* [2012] EWCA Civ 595.

[31] These decisions have been comprehensively analysed and applied in the context of the Northern Ireland judicial review procedure by McCloskey LJ in *YPK and others v Secretary of State for the Home Department* [2018] NIQB 1 and in turn by Scoffield J in *Re Glass (Costs)* [2023] NIKB 22.

[32] The facts of this case do not fit easily into the factual circumstances considered in the cases quoted above.

[33] This is because the matter has not become academic because the applicant obtained the relief sought as a result of these proceedings or as a result of a change of approach by the respondent. The applicant obtained legal aid as a result of

separate applications and was ultimately successful before a different appeal panel. There has been no successful or unsuccessful party.

[34] In exercising the court's discretion on costs the primary aim is to do justice between the parties.

[35] Generally speaking, having regard to the authorities the practice of the judicial review court in this jurisdiction has been to adopt a "fallback" position and make no order as to costs in circumstances where leave has not been granted and the court has not had an opportunity to consider the substantive issues raised in the application, unless there is good reason to do so.

[36] In the circumstances of this application the only potential good reason would be if the court was satisfied that it was tolerably clear that the applicant would succeed.

[37] In this regard, it is contended that the applicant should have been granted an oral hearing and should have been granted legal aid.

[38] In relation to whether the applicant should have been granted an oral hearing I do not consider that it is tolerably clear that he would have succeeded on this point.

[39] As I held in *McCord's Application* [2016] NIQB 19 following the introduction of the new legal aid regulations in 2015 (the Civil Legal Services (Appeal) Regulations (NI) 2015), Regulation 26(1) provides that oral hearings are the exception rather than the rule and will only be granted if the Presiding Member considers it "necessary" to do so (Regulation 26(2)) and that at least one of the criteria in Regulation 26(3) is satisfied. The Presiding Member enjoys a very broad discretion. The fact that McDonnell was granted an oral hearing is not determinative as Presiding Members may simply reach a different conclusion on the necessity test in the exercise of their discretion.

[40] In relation to the latter argument that the applicant should have been granted legal aid, he relies on a procedural argument to the effect that he was not provided with an opportunity to address the grounds upon which the application was refused.

[41] The Civil Legal Services (Appeal) Regulations (NI) 2015 specifically addresses the requirement to give reasons for decisions.

[42] Firstly, where a decision has been made by the LSA that legal aid should be refused the applicant must be informed in writing that there is a right of appeal against that decision and must further be provided with "a written statement of the reason for that decision." (Regulation 6).

[43] In similar vein Regulation 28 imposes an obligation on appeal panels at sub-paragraph (1):

> "(1) Every decision of an appeal panel (including any decision by the presiding member to allow oral representations) shall be recorded by the presiding member, together with the reasons for that decision, and shall be referred to as a decision notice."

[44] In respect of any appeal from an LSA decision Regulation 10 provides that:

> "(10)(2) In respect of an appeal, subject to paragraph (3), the appellant's written representations must fully address the reasons given by the Director for the decision which is the subject of the appeal."

[45] Mr Sands is correct when he points out that the court should be careful not to impose an undue burden on panels giving reasons for their decisions. As Keegan J said in her judgment in *Re Sean Tate's Application* at para [20]:

> "The use of a decision notice reflects the reality that reasons will necessarily be succinct and focused given that this is an administrative process which requires to be managed efficiently to allow for the administration of justice."

[46] That said the court in deciding the substantive issue would have to look at the actual complaint made by the applicant. As explained earlier, the complaint is that CLSAP determined the matter on a basis that was not before the High Court and in respect of which the applicant understandably made no submissions. That failure was the basis for the refusal. It was described as a "key point" and the applicant was criticised for failing to address it adequately.

[47] Of course notwithstanding the comments I made earlier in relation to an oral hearing Ms Quinlivan makes the point that at the oral hearing granted to Mr McDonnell his representatives were able to address the concerns that had not been raised in the original LSA reasons for refusal letter.

[48] On receipt of the different reasons for the refusal given by CLSAP after the appeal the applicant adopted a two-track approach.

[49] Firstly, he sought to challenge the decision of CLSAP via these judicial review proceedings. Secondly, he initiated parallel applications for legal aid addressing the issue that was raised in the refusal notification. Ultimately, the second approach proved successful.

Conclusion

[50] In the court's view the applicant adopted the correct approach in submitting further applications when he received the decision of CLSAP. That in my view was the correct approach to remedy the applicant's complaint.

[51] I am mindful of the fact that the court has not heard the full arguments in the case. Mr Sands indicated that the application would have been resisted. His client has made no concessions on the substance of the application. The fact that a differently constituted panel came to a different conclusion is not determinative of the issue.

[52] In determining the costs issue I take into account the wide discretion enjoyed by expert panels on the granting or refusal of legal aid.

[53] I also bear in mind the obligation to give reasons should not impose an unduly onerous obligation on panels. At this distance I could not be confident of saying that the applicant would have been successful had the matter proceeded to a full hearing. CLSAP may well have been able to persuade the court that its decision was both rational and procedurally fair. That said, I can understand why in the circumstances of this case the applicant felt compelled to issue these proceedings, given the imminence of the Court of Appeal hearing and the requirement of the applicant to secure legal aid to pursue his appeal.

[54] Taking all these matters into account I take the view that the appropriate order in relation to costs in this case is to direct that the proposed respondent pays the outlays incurred by the applicant in issuing the application. I do not propose to make any inter-partes order in relation to the legal costs of solicitor and counsel in relation to the application. Overall, I consider that this does justice between the parties on the issue of costs.