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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **24/08/11**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Conway (Brendan) and Hutchinson's (Eamon) Application [2011] NIQB 68

AN APPLICATION BY BRENDAN CONWAY & EAMON HUTCHINSON FOR JUDICIAL REVIEW

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TREACY J

Introduction

[1] The applicants are both defendants in the Crown Court facing charges of kidnapping, robbery, carrying a firearm with criminal intent and false imprisonment. When proceedings were issued the first applicant had been in custody. He has since been granted bail and both applicants were, at the time of the application, on bail.

[2] These proceedings are concerned with the question whether the applicants' current legal aid certificates require payment to their representatives under the Legal Aid (Crown Court Proceedings) (Costs) Rules (NI) 2005 ("the 2005 Rules") or Legal Aid (Crown Court Proceedings) (Costs) (Amendment) Rules (NI) 2011 ("the 2011 Rules"). The significance of the answer to this question, which is ultimately about rates of payment, can be gauged by the fact that the applicants' legal advisers, whilst prepared to act under the former payment regime i.e. the 2005 Rules are not prepared to act under the recently introduced regime under the 2011 Rules.

[3] Following an *inter partes* leave hearing in this matter the applicants' solicitors wrote to the Judicial Review Office by letter dated 6 July 2011 in the following terms:

> **"Dear Sirs**
>
> **Re: Brendan Conway & Eamon Hutchinson v Legal Services Commission - ICOS Ref: 11/73089/01**

We confirm that we have lodged, as directed, an amended Order 53 Statement. We have further lodged proceedings on behalf of John Finucane, these proceedings cover the same territory as the case on behalf of Brendan Conway and Eamon Hutchinson and in our submission should be listed with that application. In support of Mr Finucane's judicial review application we rely on the pleadings lodged and the oral submissions made on behalf of Messrs Conway and Hutchinson and would invite the Court to determine leave in that case on the papers and if leave is granted thereafter to list this case alongside that of Conway and Hutchinson.

In view of the fact that proceedings have now been lodged on behalf of Mr Finucane, covering the same territory as the proceedings issued by Messrs Conway and Hutchinson we confirm that the Legal Services Commission will not be held responsible for any costs incurred on foot of Messrs Conway and Hutchinson's legal aid certificate. Moreover, reliance will not be placed on the certificate in order to defeat an application for costs by the Legal Services Commission, and any costs incurred will now be the responsibility of Mr Finucane, as a non-legally aided Applicant in these proceedings. Without prejudice to the entitlement of Messrs Conway and Hutchinson to legal aid, no claim will be made against the Legal Services Commission for fees incurred by them to date, save if costs are obtained against the Legal Services Commission.
Yours faithfully"

[4] The grounds upon which relief is sought in the judicial review brought by John Finucane are stated as follows:

"(i) The Defendants were each granted a criminal legal aid certificate which assigned solicitor and two counsel on the 11th March 2010. On the 20th May 2011 the Defendants applied for a 'transfer of legal aid' in effect a change in the solicitor assigned under their original legal aid certificate. The Legal Services Commission has stated that because of the change in the identity of the firm of solicitors, albeit not the solicitor, they will no longer fund solicitor, or counsel (whose identities remain unchanged), under the Legal Aid (Crown Court

Proceedings) (Costs) Rules (NI) 2005 (hereinafter "the 2005 Rules") as they were prior to the 2011 Amendment Rules insisting instead that the Applicants' legal representatives will be funded under the provisions of the 2011 Amendment Rules. In circumstances where the legal aid certificate is that of the Defendants and was granted at a time when the 2005 Rules were in force, the decision is unlawful.

(ii) Contrary to the Respondent's contention, a 'transfer of legal aid', the assigning of a new solicitor and or new counsel to represent criminal defendants, does not constitute the issue of a fresh certificate. Consequently Rule 3(1) of the 2011 Amendment Rules is not applicable in the instant case.

(iii) In the alternative, by virtue of Rule 3(2) of the 2011 Amendment Rules the 2005 Rules continue to apply reply [sic] because the Defendants are persons in respect of whom a criminal legal aid certificate was granted under Article 29 of the Legal Aid, Advice and Assistance (Northern Ireland) Order before the 13th April 2011."

[5] I granted leave today (17 August 2011) and have directed an early hearing on 8 September 2011 because of the impact the unresolved dispute is having on the criminal trial process. I also understand from Mr Finucane that there are approximately 7 other similar cases (of which he was aware) in which the same point will arise.

[6] I refused leave in the proceedings brought by these applicants because I do not consider, for the reasons given below, that they have standing to bring this judicial review. In any event the point at issue will now be litigated since the judicial review commenced by Mr Finucane covers the same territory as the present case.

Parties' Submissions on Standing

[7] Mr Scoffield, on behalf of the Legal Services Commission ("the Commission") and Mr Coppel, on behalf of the Department of Justice ("the DoJ"), opposed leave *inter alia* on the ground that the applicants' did not have sufficient standing for the present challenge. Whilst it was acknowledged that the legal representatives had an obvious interest it was submitted that it was difficult to see what interest the applicants have in the narrow issue involved in the challenge.

[8] The DoJ submitted that the real interest being pursued by these proceedings is the financial interests of the applicants' legal representatives. It was asserted that the applicants' interests have been satisfied by the grant to them of criminal legal aid and that they can have no legitimate justiciable interest in seeking to ensure that their legal representatives of choice secure a particular level of payment from the public purse.

[9] Ms Quinlivan contended, on behalf of the applicants, that they did have sufficient interest not least because the decision has had the effect that they are being denied their representatives of choice. The Commission and the DoJ countered that the applicants had no absolute right to particular representatives and that the Court should not permit their representatives to create *locus standi* for the applicants by means of their voluntary decision not to accept instructions for the rates of payment in the 2011 Rules.

General Approach to Standing

[10] Section 18(4) of the Judicature Act provides:

> **"The Court shall not grant any relief on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates".**

[11] Order 53 Rule 5 RSC repeats the requirement of sufficient interest providing:

> **"The Court shall not, having regard to Section 18(4) of the Act, grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."**

[12] Save in straightforward cases the question of standing should be considered in its full factual and legal context and thus in conjunction with the merits of the case as a whole (see Supperstone & Goudie "Judicial Review" 4th Ed at para18.5.1 and ***IRC v National Federation of Self-Employed and Small Businesses*** **[1982] AC 617**).

[13] The question of standing is dealt with in two stages. At the permission stage the Court should take a preliminary view as to whether or not the claimant has standing. If its preliminary view is in the applicant's favour permission should be granted. The purpose of the requirement is to identify hopeless cases and accordingly permission should only be refused where the lack of sufficient interest is clear. If permission is granted the question of standing can be reconsidered at the full hearing in the light of all the evidence (see Supperstone & Goudie at para 18.5.2).

[14] In ***Re D's Application*** **[2003] NI 295** the Court of Appeal listed four "generally valid" propositions about the current judicial approach to standing. Delivering the judgment of the Court of Appeal Carswell LCJ stated:

> **"[15] There has been much discussion of the topic of standing in textbooks and legal periodicals and examples abound in the reported cases, yet it is difficult to pin down any authoritative statement of the principles to be applied by a court in determining the question. It appears to be incontestable that the courts have tended in recent years to take a more liberal attitude to matters of standing. We would tentatively suggest that the following propositions may now be generally valid:**
>
> **(a) Standing is a relative concept, to be deployed according to the potency of the public interest content of the case.**
>
> **(b) Accordingly, the greater the amount of public importance that is involved in the issue brought before the court, the more ready it may be to hold that the applicant has the necessary standing.**
>
> **(c) The modern cases show that the focus of the courts is more upon the existence of a default or abuse on the part of a public authority than the involvement of a personal right or interest on the part of the applicant.**
>
> **(d) The absence of another responsible challenger is frequently a significant factor, so that a matter of public interest or concern is not left unexamined."**

Discussion

[15] The factual context of the present case and indeed the nature of the remedies sought emphasise that what this case is really about is whether the 2011 Rules rather than the 2005 Rules govern funding under the relevant legal aid certificate. The conclusion as to which Rules apply does not affect the existence of the certificate or the right of the applicants to free legal aid for their assigned legal representatives in the conduct of their criminal defence. The sole consequence of the impugned decision (as opposed to the legal representatives' response to it) is that the legal representatives will be paid less.

[16] In ***R v Legal Aid Board, ex parte Bateman*** **[1992] 1 WLR 7111** (Nolan LJ and Jowitt J) the applicant was a legally aided plaintiff in proceedings which resulted in a consent order providing for the applicant's costs to be paid by the defendants, to be taxed in default. The applicant's solicitors were dissatisfied with the taxation and obtained a review pursuant to the relevant legal aid regulations. They remained

dissatisfied and sought authority from the Legal Aid Board under the relevant regulation to apply to a Judge for a further review. On the Board's refusal to grant authority the applicant sought to challenge the Board's decision by way of judicial review notwithstanding that she had no financial interest in the taxation proceedings. Dismissing the application the Court held that the applicant's feelings of gratitude and sympathy for her solicitors did not afford sufficient justification for her, either in her own interest or in the public interest, from taking judicial review proceedings on their behalf – see p716 Letter G – p718 Letter C. At p717 Nolan LJ accepted that the applicant was not a mere busybody and went on to state:

> **"I fully accept that there is a public interest in the administration of justice, and that this interest extends to the proper exercise by the Legal Aid Board of their power to grant or withhold authority under Regulation 114. It by no means follows that any member of the public has a sufficient interest to justify proceedings for judicial review in respect of any exercise of that power. The crucial feature of the present case is that the principal, if not the only party directly affected by the refusal of authority is the firm of Makins. No-one doubts that they are well able to take care of themselves. Why then have they not taken on their own shoulders the burden and the risk of costs involved in bringing forward this application? To this question, raised in correspondence by the Legal Aid Board and raised from an early stage by the Court in this hearing, no satisfactory answer has been given ... The propriety or otherwise of the proceedings being financed by the Legal Aid Fund must not, however, be allowed to obscure the question whether [the applicant] has a sufficient interest in their subject matter. Irrespective of the question whether she should have been granted legal aid for the purpose of bringing them, irrespective of the question whether she could conceivably have authorised them without the benefit of legal aid, the inevitable answer to the question, in my judgment, is 'No'. I accept that a sufficient interest need not be a financial interest: see *ex parte National Federation of Self-Employed and Small Business Ltd* [1982] AC 617, 646B per Lord Fraser ... I fully accept the desirability of the Courts recognising in appropriate cases the right of responsible citizens to enter the lists for the benefit of the public, or of a section of the public, of which they themselves are members: see, for example, *Reg v GLC, ex parte***

> ***Blackburn*** **[1976] 1 WLR 550. I cannot accept that the feelings of gratitude and sympathy which [the applicant] entertains for Mackins afford any sufficient justification for her, either in her own interest or in the public interest to enter the lists on their behalf. It would be inaccurate as well as discourteous to describe her as a busybody, but her attempt to intervene is at best quixotic and cannot be upheld."**

[17] As in ***Bateman*** the principal, if not the only party, directly affected by the impugned decision are the legal representatives. The absence of their legal representation of choice stems from the voluntary response of their lawyers refusing to work the 2011 Rules (a situation, which since the hearing, has now, I understand, been reversed). Thus the real issue of significance raised by the present proceedings is *how much* the lawyers will be paid.

[18] The applicants have been granted legal aid certificates to enable them to defend the criminal proceedings and public funds are available to meet the costs of their chosen legal representatives. They thus have the benefit of legal aid certificates assigning their chosen representatives and are therefore being afforded access to representatives of their choice, at public expense, in order to defend themselves. Therein lies their interest which has been satisfied.

[19] It is the legal representatives who took the view that the (lower) 2011 rates did not amount to reasonable remuneration and who were refusing to act unless the 2005 rates were applicable. The legal representatives could have represented the applicants but made a conscious decision (since reversed) not to by reason of their assessment of the alleged inadequacy of the legal aid rates payable to them under the 2011 rates. I agree with the Commission and the DoJ that the representatives' own decision not to act in return for the payment of a certain rate of remuneration cannot of itself confer standing on the applicants which, in my view, they do not otherwise possess.

Conclusion

[20] I consider that these applicants do not have "sufficient standing" within the meaning of Section 18(4) or Order 53(5) RSC. The legality of the impugned decision will not be left unexamined since a responsible challenger with obvious standing has now brought a judicial review in which the matters at issue will be fully examined.

[21] It is the applicants' legal representatives who have the true interest in the issues raised by these proceedings i.e. the rates of remuneration. The applicants understandably wished to be represented by their lawyers of choice and would not have been (if matters had not changed since the hearing) because of their representatives' voluntary decision refusing to accept instructions for the rates of payment under the 2011 Rules. To that extent their cases – involving their defence of

extremely serious charges with, upon conviction, inevitable custody – goes beyond the "feelings of gratitude and sympathy" of the applicant for her lawyers in ***ex parte Bateman.***

[22] The principal, if not the only parties directly affected by the impugned decision are the legal representatives. The applicant's interests have been satisfied by the grant to them of a criminal legal aid certificate authorising solicitor and two Counsel. Neither the Scheme nor the Rules are challenged.

[23] In my view, the applicants have no legitimate justiciable interest, in the circumstances of this case, in ensuring their legal representatives secure a particular level of payment from the public purse.

[24] The absence of their legal representatives of choice arises from their lawyers' conscious decision not to continue to represent them because of their own assessment of the adequacy of the legal aid rates payable to them. It would be strange indeed if the voluntary decision by the applicants' legal representatives could create *locus standi* in the applicants which they would not otherwise enjoy.

[25] This is particularly so when its effects, so clearly inimical to the public interest, would be that the lawyers could pursue their own (legitimate) financial self interest by litigating at public expense via legal aid.

[26] As in ***Bateman*** I have not allowed the propriety or otherwise of the proceedings being financed by the Commission to obscure the question whether the applicant has a sufficient interest in the subject matter. Nonetheless the Commission said it was an open question as to whether the applicants may have been selected as litigants in order to benefit from the grant of legal aid in circumstances where their legal representatives may not be eligible for legal aid thereby avoiding liability for an adverse costs order.

[27] The issue of put-up challengers and legal aid funding abuse has been considered in a number of cases which are summarised in the 4th Edition of Michael Fordham's work on Judicial Review at para 38.2.11.

[28] The position adopted in Northern Ireland appears to be that it is not an abuse of process for proceedings to be undertaken in the name of an applicant selected on the basis of entitlement to legal aid, provided that the applicant has sufficient interest. And that it is a matter for the *legal aid authorities* to determine whether an applicant is entitled to legal aid and whether a proposed applicant represents an abuse of the legal aid system – see ***Re Murphy (a minor)'s Application*** **[2004] NIQB 85 [Unreported, Weatherup J, 20 December 2004] at para 7;** ***Re JS' Application*** **[2006] NIQB 40 [Unreported, Weatherup J, 16 May 2006];** and ***Re M's Application*** **[2004] NIQB 6 [Unreported, Girvan J, 4 February 2004] at para 14; cf** ***Re Anderson (a minor)'s Application*** **[2001] NI 454 [CA at 468E per Carswell LCJ].** This approach is also consistent with that of the Court in ***Bateman*** set out at para 16 above.

[29] This case concerns the financial interest of the applicants' legal representatives. It is they who have the *true* justiciable interest in whether they are paid more, by application of the 2005 Rules. It does not seem appropriate that such a challenge should be pursued, directly or indirectly, via legally aided clients. This is especially so since a case such as the present always has the potential to be pursued on appeal by the unsuccessful party. The legal representatives would thereby enjoy the enviable luxury of litigating their interest at public expense before the Court and possibly on appeal to Court of Appeal/Supreme Court.

[30] Unlike other litigants they would thus be wholly insulated from the risk of an adverse costs order. On the contrary, even if they lost, some of these legal representatives would benefit via legal aid for the substantial professional costs that would be incurred in mounting the judicial review possibly as far as the Supreme Court. In my view such an approach is difficult to justify in the public interest.

[31] Although the respondent said it was an open question as to whether the applicants had been deliberately selected for legal aid reasons this is not now a matter on which it will be necessary for the Court to reach a decision at this time. Had leave been granted it may have become necessary for evidence on this issue to have been filed. This is no longer necessary in view, not only of the refusal of leave but also because of the responsible approach taken by the applicants' solicitor as evidenced by the content of his letter dated 6 July 2011 set out above.

[32] For the above reasons leave is refused.