

Neutral Citation No: [2012] NIQB 76

Ref: TRE8618

Judgment: approved by the Court for handing down

Delivered: 16/10/12

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

Drinan's (Padraigin) Application [2012] NIQB 76

**IN THE MATTER OF APPLICATION BY PADRAIGIN DRINAN
(A SOLICITOR) FOR JUDICIAL REVIEW**

and

**IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND LEGAL
SERVICES COMMISSION COMMUNICATED TO THE APPLICANT
ON 15 NOVEMBER 2011**

TREACY J

Introduction

[1] The applicant is a qualified solicitor who, in partnership with another qualified solicitor, operates a practice in Belfast which specialises in immigration law. By this application for judicial review, the applicant seeks to challenge a decision of the Northern Ireland Legal Services Commission (the "respondent") to refuse to pay fees for work undertaken by the applicant in an immigration case. The respondent's decision on this issue was communicated to the applicant on 15 November 2011.

[2] This case involves important issues of law, policy and practice regarding rights to remuneration, in immigration cases, in respect of work done in part by a solicitor and in part by unqualified staff employed in the solicitor's office

Factual Background

[3] The applicant employs two non-legally qualified staff, one of which is Ms Barbara Muldoon. She has been employed by the applicant since 2002 and has appeared before Immigration Tribunals for many years in numerous appeals. In

October 2009 she was accepted as a trainee solicitor under the Solicitors Admission and Training Regulations (1988).

[4] The respondent's scheme to fund legal representation for cases before the Immigration and Asylum Chamber of the First Tier Tribunal (the "Tribunal") was published to members of the profession by LSC Circular 09/06 on 5 August 2009. This scheme provides a fixed fee remuneration structure which is:

"intended to cover the work carried out by a solicitor and/or counsel...in AIT Tribunals and Onward Appeals."

[5] The applicant contacted the respondent to inquire about payment of fees in legally aided cases where work was carried out by non-legally qualified staff. She exchanged correspondence with Mr Paul Andrews, the Chief Executive of the Legal Services Commission. In response to Mr Andrews letter dated 3 June 2010, the applicant's letter dated 29 June 2010, urged the respondent to fund immigration work by non-legally qualified staff. The applicant explained that her firm employed Ms Muldoon and another individual to conduct immigration work and that Ms Muldoon had been accepted as a trainee solicitor. The applicant stated:

"Both Ms Muldoon and Dr Currie are entitled to provide legal advice and assistance, including representation before the Tribunal, by virtue of S. 84(2)(e) of the Immigration and Asylum Act 1999. They conduct this work under the supervision of myself, the Principal of the firm. Both members of staff have been here for a number of years."

[6] Mr Andrew's response, dated 25 August 2010, indicated the respondent could not fund work by non-legally qualified staff under the terms of the legal aid legislation and the immigration scheme:

"The Commission's concern is that it must operate within the terms of the relevant legal aid legislation. The Commission's view is that, as the relevant proceedings fall within the scope of the proceedings which may be funded under the full legal aid scheme, the grant of legal aid entitled the funded party to the services of a solicitor to act for them...In the immediate context, the Commission cannot move outside the terms of the legal aid scheme to

fund someone other than a solicitor directly providing the service to which legal aid has been granted...I have reviewed the matter and am content that, while Ms Muldoon and Mr Currie may indeed be qualified to appear before the Tribunal, they cannot be remunerated under the legal aid scheme as they are not solicitors or barristers."

[7] Mr Yusuf Bashir Osman instructed the applicant to represent him in an entry level clearance appeal before the Tribunal. On 26 July 2010 the respondent granted Mr Osman a legal aid certificate for him "*to be represented in proceedings before the Immigration and Asylum Chamber of the First Tier Tribunal Appeal.*" The Legal Aid Certificate identified Ms Patricia Drinan as Mr Osman's solicitor and stated it was granted "*in accordance with the above-mentioned Order and the Regulations and the Scheme made thereunder*" (where such Order and Regulations are specified to be the 1981 Order and the Legal Aid (General) Regulations (Northern Ireland) 1965, as amended).

[8] The applicant and Ms Muldoon both aver the work in this case was partially carried out in the office under the supervision of the applicant but that appearances and representation before the Tribunal were carried out by Ms Muldoon alone. Para10 of the applicant's grounding affidavit dated 14 February 2012 summarises the allocation of work on the case, as follows:

"10. The preparatory work in this particular case was completed by me, the principal of the firm, and Barbara Muldoon. All work was directed and supervised by me although Ms Muldoon appeared before the Tribunal."

[9] The respondent does not dispute that preparatory work which was carried out in the office under the applicant's supervision was within the terms of the scheme.

[10] Ms Muldoon appeared before the Tribunal on 26 August 2010 and 4 November 2010. The appeal was successful and following the conclusion of Mr Osman's appeal, the applicant submitted her fee in accordance with the amounts prescribed in the scheme in LSC Circular 09/06. On 15 November 2011, the respondent informed the applicant no fees would be paid for the work undertaken in this case as a non-qualified member of the applicant's staff appeared at the Tribunal.

The application for Judicial Review

[11] The grounds on which the relief is sought are set out in full in the Order 53 Statement dated 14 February 2012. The applicant deals with the below grounds under two broad grounds of challenge: (i) illegality and (ii) irrationality.

- (i) The respondent acted in an unreasonable manner in refusing to pay the applicant for work undertaken in a case which was heard before the Tribunal;
- (ii) The respondent has acted in an unlawful manner in refusing to pay the applicant for work undertaken in a case which was heard before the Tribunal;
- (iii) The respondent has acted in an irrational manner in refusing to pay the applicant for work undertaken in a case which was heard before the Tribunal;
- (iv) The respondent has failed to give any or adequate reasons for its decision to refuse payment to the applicant in the case of Mr Yusuf Osman Bashir, a person in receipt of legal aid;
- (v) The respondent has failed to take into consideration section 84 of the Immigration and Asylum Act 1999 in its refusal to pay the applicant;
- (vi) The respondent has failed to give any or adequate consideration to the fact that the applicant has supervised the work in this case and delegated the task of appearing before the Tribunal to a member of her staff; and
- (vii) The respondent has taken irrelevant and/or immaterial considerations into account (or given them manifestly excessive weight) and in particular improperly took into account:
 - (i) The identity of the individual appearing before the Tribunal, Ms Barbara Muldoon;
 - (ii) The fact that Ms Muldoon is a trainee solicitor;
 - (iii) The fact that Ms Muldoon is a qualified person to appear before the Tribunal by virtue of Section 84 of the Immigration and Asylum Act 1999; and

- (iv) The fact that they have previously paid for a period of many years in respect of work where Ms Muldoon appeared before the Tribunal.

[12] The important issue which arises under the applicant's challenge is how the legal aid legislation should be applied where the client receives representation in part from a qualified solicitor and in part from a non-legally qualified representative. In this regard, in relation to the appearances of Ms Muldoon before the Tribunal, the respondent raises the following questions:

- (i) Whether the applicant was permitted to delegate her function of appearing and representing Mr Osman before the Tribunal to a non-legally qualified person, within the terms of the legal aid scheme; and
- (ii) If not, whether this entitled the respondent to refuse to make any payment to her.

Legal context

Interpretation (Northern Ireland) Act 1954

[13] The respondent refers to s33 of the Interpretation (Northern Ireland) Act 1954 in respect of interpreting the relevant legislative provisions in the present case:

"Expressions in instrument have same meaning as in enactment.

33. Where an enactment confers power to make any statutory instrument or issue any statutory document, expressions used in the instrument or document shall, unless a contrary intention appears, have the same respective meanings as in the enactment."

The 1981 Order

[14] Legal aid was made available for immigration cases under the civil scheme in Part II of the 1981 Order. Art 3 refers to the persons eligible for advice and assistance by reference to financial eligibility thresholds. Art 4 refers to the scope and conditions of advice and assistance and states Art 3 applies to any oral or written advice given by a solicitor or, if and so far as may be necessary, counsel.

[15] Art 5 refers to assistance by way of representation (“ABWOR”). This provision empowers the respondent to establish schemes for funding legal assistance by way of representation. A number of schemes have been established under this provision to fund legal representation in different types of proceedings before various courts or tribunals. Art 5(1) contains the following definition of this form of assistance:

“5.-(1) In this Part “assistance by way of representation” means any assistance given to a person by taking on his behalf any step in the institution or conduct of any proceedings before a court or tribunal, or of any proceedings in connection with a statutory inquiry, whether by representing him in those proceedings or by otherwise taking any step on his behalf (as distinct from assisting him in taking such a step on his own behalf).”

[16] In the present case, the legal aid scheme which is under consideration is a form of civil legal aid established under Arts 9 and 10. Art 9(1) provides legal aid is available to people whose disposable income and disposable capital fall below certain financial thresholds. Art 10 refers to the scope and general conditions of legal aid. Art 10(1) provides legal aid is also available in connection with proceedings before the courts and tribunals identified in Schedule 1. Para6A of Part 1 of Schedule 1 specifies, “[p]roceedings before the Asylum and Immigration Tribunal or the Special Immigration Appeals Commission.” Art 10(3) provides the definition of legal aid:

“(3) Legal aid shall consist of representation, on the terms provided for by this Part, by a solicitor and so far as necessary by counsel, including all such assistance as is usually given by a solicitor or counsel in—

(a) the steps preliminary or incidental to any proceedings; or

(b) in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings.”

[17] Art 11 refers to the financial conditions of legal aid and provides solicitors are prohibited from taking any payment from the legal aid fund other than one permitted by the Order:

“11(1) Where a person receives legal aid in connection with any proceedings:

...

(b) his solicitor and counsel shall not take any payment in respect of the legal aid, except such payment as is directed by the Part to be made out of the legal aid fund.”

[18] Art 13(1) provides a solicitor acting for a legally aided person shall be paid out of the legal aid fund:

“13. – (1) Subject to this Part, a solicitor who has acted for a person receiving legal aid shall be paid for so acting out of the legal aid fund, and any fees paid to counsel for so acting shall also be paid out of the legal aid fund.

(2) Subject to any rules of court made by virtue of Article 12(3)(g) of the Family Law (Northern Ireland) Order 1993, the sums payable under paragraph (1) to a solicitor or counsel shall not exceed those allowed under Schedule 2...”

[19] Schedule 2 refers to remuneration of persons giving legal aid under Part II of the Order. Para2(4) provides:

“(4) The sums allowed to a solicitor in any other case shall be such as may be determined in the prescribed manner.”

[20] Art 15(2A) specifies a practising solicitor is entitled to give advice or assistance or to act for persons receiving legal aid unless excluded under the Solicitors (Northern Ireland) Order 1976:

“(2A) Any practising solicitor shall be entitled to give advice or assistance or to act for persons receiving legal aid unless he is for the time being excluded by an order under Article 51B(1) or (3) of the Solicitors (Northern Ireland) Order 1976 from selection under paragraph (3).”

[21] Art 15A provides legal aid is not to affect normal rules:

“15A. Except as expressly provided by this Part or by regulations made under it—

(a) the fact that the services of counsel or a solicitor are given by way of legal aid does not affect the relationship between or rights of counsel, solicitor and client or any privilege arising out of such a relationship; and

(b) the rights conferred by or under this Part on a person receiving legal aid are not to affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised.”

[22] Art 25(4) provides for the commencement of proceedings against a recipient of legal aid to recover payments in circumstances where that person did not comply with relevant regulations or made a misrepresentation:

“(4) A county court notwithstanding any limitation imposed on the jurisdiction of a county court under any other statutory provision shall have jurisdiction to hear and determine any action brought to recover the loss sustained by the legal aid fund by reason of-

(a) the failure of a person seeking or receiving legal aid, advice or assistance to comply with any such regulations as aforesaid; or

(b) a false statement or false representation made by such a person in furnishing information for the purposes of this Part.”

Immigration and Asylum Act 1999

[23] Part V of the Immigration and Asylum Act 1999 (the “1999 Act”) refers to Immigration Advisers and Immigration Service Providers. S82(1) provides ‘immigration services’ means:

“...the making of representations on behalf of a particular individual—

(a) in civil proceedings before a court, tribunal or adjudicator in the United Kingdom...”

[24] S84(1) states “[n]o person may provide immigration services unless he is a *qualified person*.” S84(2) provides a person is a ‘qualified person’ if:

“(a) he is registered with the Commissioner or is employed by, or works under the supervision of, such a person;

(b) he is a member or employee of a body which is a registered person, or works under the supervision of such a member or employee;

(c) he is authorised by a designated professional body to practice as a member of the profession whose members are regulated by that body, *or works under the supervision of such a person*;

(d) he is registered with, or authorised by, a person in another EEA State responsible for regulating the provision in that EEA State of advice or services corresponding to immigration advice or immigration services or would be required to be so registered or authorised were he not exempt from such a requirement;

(e) he is authorised by a body regulating the legal profession, or any branch of it, in another EEA State to practice as a member of that profession or branch; or

(f) he is employed by a person who falls within paragraph (d) or (e) or works under the supervision of such a person or of an employee of such a person.” [emphasis added]

[25] In the present case, the respondent accepts Ms Barbara Muldoon is a “*qualified person*” for the purposes of providing immigration advice and services within the meaning of s84 of the 1999 Act and that she is, therefore, entitled to appear before the Tribunal.

The Solicitors (Northern Ireland) Order 1976

[26] The Solicitors (Northern Ireland) Order 1976 (the “1976 Order”) contains express provisions regulating certain conduct by persons who are not qualified solicitors. Arts 19–25 include provisions with respect to unqualified persons acting as solicitors. Art 19 contains a prohibition upon non-qualified persons acting as solicitors; Art 20 contains a prohibition upon qualified solicitors acting without a practising certificate; Art 22 states it is a criminal offence if a person “*wilfully pretends*” to be a solicitor; and Arts 23 and 24 contain prohibitions upon non-qualified persons preparing certain instruments, including a prohibition upon a non-qualified person preparing any instrument relating to “legal proceedings”, but there is an exception to acts done by employees acting at the direction and under the supervision of persons who are entitled to prepare such papers (Arts 23(2A) & 24(1A)). Article 25(1) contains an express statutory prohibition upon recovery of costs, where a non-qualified person carries out the work of a solicitor:

“25.—(1) Costs in respect of anything done by a person who acts or purports to act as a solicitor while he is an unqualified person shall not be recoverable in any action, suit or matter by that person or any person claiming through or under him...”

Legal Aid (General) Regulations (Northern Ireland) 1965 (the “1965 Regulations”)

[27] The 1965 Regulations were made under the Legal Aid and Advice (Northern Ireland) Act 1965 (“the 1965 Act”) which was replaced by the 1981 Order. As with the 1981 Order, the 1965 Act introduced a scheme for legal aid which enabled eligible persons to obtain representation by solicitors and barristers. The 1965 Regulations make provision for solicitors to entrust part of their functions to other persons. Reg15(13) provides:

“(13) No solicitor or counsel acting for an assisted person shall entrust the conduct of any part of the case to any other person save to a solicitor or counsel who is a member of an appropriate panel:

Provided that nothing in this paragraph shall prevent a solicitor from entrusting the conduct of any part of the case to a person who is his partner or who is employed in his office.”[emphasis added]

Legal Advice and Assistance Regulations (Northern Ireland) 1981

[28] The extent of delegation permitted under the “Green Form” scheme for providing advice and assistance is governed by the Legal Advice and Assistance Regulations (Northern Ireland) 1981. In particular, Reg14 provides:

“Entrusting functions to others

14. Nothing in these regulations shall prevent a solicitor from entrusting any function under these regulations to a partner of his or to a competent and responsible representative of his employed in his office or otherwise under his immediate supervision.”

Relevant case law

[29] Piper Double Glazing v DC Contract Co [1994] 1 WLR 777 involved an application for the review of a taxation in respect of the costs Piper Double Glazing Ltd incurred in an arbitration against DC Contracts Co. The arbitrator appointed by the president of the Royal Institution of Chartered Surveyors in respect of a dispute between the parties made an award in favour of Piper Double Glazing Ltd and, *inter alia*, ordered the respondent to pay the claimant’s costs. Preliminary issues raised the question of the position of claims consultants employed to act for the claimant in its conduct of the arbitration and the powers of taxing masters in connection with the taxation of the costs of such consultants. For present purposes, the first agreed preliminary issue is of most relevance:

“1. Where in an arbitration conducted in England or Wales in accordance with English Law: (i) a party is represented by a person who is neither a qualified solicitor nor a barrister (“the unqualified person”), but who provides services and performs functions similar to those provided or performed by a solicitor or barrister; and (ii) an award is made by the arbitrator in favour of that party, which includes a direction that another party should pay the first party's costs of the arbitration; and (iii) the award provides for such costs to be taxed in the High Court, if not agreed, as provided for in Order 62 of the Rules of the Supreme Court; and (iv) the arbitration agreement or reference to arbitration contains no provision excluding the recovery of such costs; in proceedings for the taxation of costs pursuant to the award, does the court, on a proper construction of Order 62 and/or Sections 20 to

25 of the Solicitors Act 1974, have power to allow any amount for the costs incurred by the unqualified person in relation to the conduct of the arbitration?"

[30] S25(1) of the Solicitors Act 1974 (the English equivalent of Art 25(1) of the Solicitors (Northern Ireland) Order 1976) provides:

“(1) No costs in respect of anything done by any unqualified person acting as a solicitor shall be recoverable by him, or by any other person, in any action, suit or matter.”

[31] The Court held that where a party is represented in an arbitration by a person who is not qualified as a barrister or solicitor but who provides similar services, and an award is made providing for payment of that party's costs by the other party or for such costs to be taxed in the High Court if not agreed, the court has power under RSC Ord 62, r 2(2) to allow the costs of the unqualified person in relation to the conduct of the arbitration. The prohibition in s25(1) of the Solicitors Act 1974 against the recovery of costs in respect of anything done by any unqualified person 'acting as a solicitor' does not apply to an unqualified person representing a party in an arbitration since an unqualified person does not 'act as a solicitor' within the meaning of s25(1) merely by doing acts of a kind commonly done by solicitors. *Acts prohibited by s25(1) are limited to acts which are lawful only for a qualified solicitor to do and which only a solicitor may perform, or acts purportedly done in that capacity. They do not include acts commonly done by a solicitor but which do not involve a representation that the person so acting is acting as a solicitor.* A person acting as an advocate for a party in arbitration proceedings who is not qualified as a barrister or solicitor and does not hold himself out as such is not acting as a barrister or solicitor and, accordingly, the party employing him is not precluded from entitlement to payment of his costs.

[32] At para186 of Piper Potter J stated:

“So far as I am aware, Knowles [the claims consultants in this case] have not at any stage held themselves out as solicitors, but have at all times acted specifically as 'claims consultants' in relation to their representation of the claimant. Section 25 of the 1974 Act is linked and, in my view, falls to be construed with the sections which precede it. Those sections are penal in nature and relate to unqualified persons acting as solicitors (s 20), pretending to be solicitors (s 21), drawing or preparing instruments of transfer of

charge etc, the drawing of which is limited to solicitors and certain other exempted professions (s 22), and preparing papers for probate etc (s 23). By s 24 those penal provisions are applied to bodies corporate. In these circumstances, it seems clear to me that *the words 'acting as a solicitor' are limited to the doing of acts which only a solicitor may perform and/or the doing of acts by a person pretending or holding himself out to be a solicitor. Such acts are not to be confused with the doing of acts of a kind commonly done by solicitors, but which involve no representation that the actor is acting as such.* On that basis, it seems plain to me that Knowles did not 'act as a solicitor' in conducting the arbitration on behalf of the claimant."

[33] In Pilbrow v Pearless De Rougement & Co [1999] 3 ALL ER 355 P telephoned a firm of solicitors and requested an appointment to see a solicitor about a family matter. P was notified by the receptionist she would arrange an appointment with L but, crucially, did not inform him the latter was not a solicitor. L, who dealt with most of the firm's family matters did not know that P asked to see a solicitor or that the receptionist, on learning he wished to see a solicitor, had referred him to her. Therefore, she did not tell P she was not a solicitor and the firm failed to send L a client care letter or inform him of L's status. Although L handled the matter competently, P lost his case and subsequently refused to pay his bill. The firm sued for its fees, but P, who had by then discovered that L was not a solicitor, sought to have his contract with the firm rescinded on the grounds of misrepresentation. The district judge held that the contract was one to provide legal services, that there had been no implied representation that L was a solicitor and gave judgment for the firm. That decision was upheld by the judge, and P appealed to the Court of Appeal.

[34] The Court of Appeal held that where a firm of solicitors was asked by a client to provide the services of a solicitor, it was not entitled to recover its costs if it provided an adviser who was not a solicitor and failed to inform the client of that fact. Such a situation was not to be characterised as defective performance of a contract for legal services with a term that those should be performed by a solicitor, but rather as non-performance of a contract to provide legal services by a solicitor. It followed that, in the instant case, the firm had failed to perform the contract and P was entitled to regard it as discharged by the firm's breach. Accordingly, the appeal was allowed. At pp359 and 360, Schiemann LJ stated:

"The crucial initial question is whether the contract between Mr Pilbrow and the firm under which the

firm was suing for its fees was a contract to provide legal services or a contract to provide legal services by a solicitor. The fact that he was under the impression that Miss Lee-Haswell was a solicitor and that she did not know this, is entirely attributable to the firm, the way its receptionist acted and the firm's failure to send an appropriate client care letter. The firm must take responsibility for this. In my judgment, in the circumstances of the present case the initial contract was one to provide legal services by a solicitor. The firm did not perform that contract at all. No legal services were provided by any solicitor.

Not until all the legal services had been performed did Mr Pilbrow know that the provider was not a solicitor.

Nothing in the foregoing should be seen as an adverse comment on the widespread practice of solicitors delegating work to others in the firm, be they typists, legal executives or whatever. *The right to delegate that work will, depending on the nature of the work, often be implied. That right however is dependent upon the actual or implied consent of the client. Even a client who expressly asks that everything in his case is to be done by a solicitor would, I suspect, be taken to have agreed that letters dictated by a solicitor could be typed by a typist.* [I interpose the observation that there is no evidence before this court as to whether the client was informed and agreed to being represented before the Immigration tribunal. The fact that Ms Muldoon secured a successful outcome is irrelevant to the existence of delegation. I was however informed by counsel, on instruction, that the client (who is not available to swear an affidavit) was so advised. This was confirmed by the applicant on affidavit].

...

I am satisfied in the present case that the plaintiffs have failed to perform their contract and the defendant is entitled to regard it as discharged by the plaintiffs' breach. This case is not properly to be analysed as a case of defective performance of a

contract for legal services with a term that these should be performed by a solicitor. I categorise it as one of non-performance of a contract to provide legal services by a solicitor. In my judgment a firm of solicitors which is asked for a solicitor *and, without telling the client that the adviser is not a solicitor, provides an adviser who is not a solicitor, should not be entitled to recover anything*. I would come to the same conclusion in relation to a case where a person goes into a doctor's surgery, asks for a doctor and the receptionist refers him to a nurse who thereafter, perfectly competently, handles his problems..."

Applicant's Submissions

[35] The applicant relies on Art 13(1) of the 1981 Order to argue the respondent is under a statutory duty in this case to pay for work undertaken on behalf of legally aided persons.

[36] It is submitted the respondent failed properly to take into consideration all relevant factors in making its decision not to pay fees for work undertaken by the applicant including that Ms Muldoon is a 'qualified person' to provide 'immigration services'. The applicant asserts Parliament has granted a right of audience in immigration tribunals to persons who have not yet acquired a practising certificate. The applicant says it is unreasonable for the respondent to ignore Ms Muldoon's right of audience before the Tribunal and deem her to be 'non-qualified staff'.

[37] The applicant submits the respondent has acted unlawfully due to incorrectly interpreting the terms 'representation' and 'acted' in the 1981 Order. The applicant argues Art 10(3) of the 1981 Order provides legal aid shall consist of representation *and* all such assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings.

[38] The applicant contends Mr Osman was represented at all times by Pdraigin Drinan (including preparation and presentation of the case). It is asserted there was a contribution by the applicant and her employee, Ms Muldoon where the task of advocacy before the Tribunal was delegated to Ms Muldoon but the applicant continued to supervise and direct the work as and when necessary. The applicant argues nothing in the 1981 Order or the 1976 Order prohibits such a course of action.

[39] In reliance on Piper and Pilbrow it is submitted Art 25 of the 1976 Order is limited to acts which are lawful only for a qualified solicitor to undertake.

[40] The applicant asserts Reg15(13) of the 1965 Regulations expressly countenances the course of action it took in respect of the conduct of the case in question.

[41] It is submitted the respondent acted in an *irrational* manner by deciding no payment was owed to the applicant's firm from the legal aid fund because the final aspect of the case and submissions to the Tribunal were delivered by Ms Muldoon instead of the applicant. Reliance was placed on Art 15(2A) of the 1981 Order to argue the assisted person was represented by Pdraigin Drinan. It is asserted that when a trainee solicitor performs a certain task on behalf of an assisted person under the supervision of their employer, the client does not cease to be represented by a solicitor. The applicant also refers to Art 15A of the 1981 Order to further support the argument a solicitor may delegate a particular task to an employee in circumstances where that employee is qualified to perform the task; is capable of performing the task; and is supervised in the execution of the task.

[42] The applicant further contends the respondent acting irrationally by refusing to make payment in the present case as, in the past, it has paid for work undertaken by staff not holding a practising certificate.

[43] The applicant argues the respondent's refusal to pay for disbursements in Mr Osman's appeal case is so unreasonable that no reasonable authority would reach such a decision. Further, the applicant asserts the respondent's decision not to reimburse the applicant for necessary photocopying on the basis the applicant's employee appeared at the hearing of the case is unsustainable.

Respondent's Submissions

[44] The respondent points out that Arts 10(3), 13 and 15 of the 1981 Order refer only to solicitors and counsel.

[45] In reliance on Pilbrow the respondent submits the Court of Appeal has made it clear a client is not obliged to pay **any** sum in respect of a solicitor's bill of costs where he had an expectation that the work would be carried out by a solicitor but was done by a non-qualified employee. It is asserted the principle applies even where the work has been done entirely competently and in accordance with the instructions of the client.

[46] The respondent refers to Pilbrow and acknowledges the entitlement of a solicitor to delegate part of his functions to another, within the scope of his retainer, is recognised at common law.

[47] The respondent asserts the words “*a person...who is employed in his office*” in Reg15(13) of the 1965 Regulations, properly construed, refer to an employed solicitor or a non-qualified person acting under their supervision. As the Regulation contains a general prohibition upon “*entrusting the conduct of any part of a case*” to a person other than a solicitor or counsel, the respondent contends it is illogical to interpret the proviso to the general prohibition so as to enable delegation not only to solicitors or counsel not on the panel but to persons who are not legally qualified.

[48] The delegation permitted under the Reg15(13) is “*entrusting conduct*” of part of the case. The respondent says this implies the person entrusted with such conduct will have authority to make decisions and to provide advice to the client. It is argued, if an unqualified person was entrusted with conduct of part of the case, this would amount to the unqualified person acting as a solicitor which is a criminal offence

[49] The respondent argues the system for legal aid established by both the Legal Aid and Advice (Northern Ireland) Act 1965 and the 1981 Order was concerned with representation by a solicitor or counsel and, therefore, an interpretation of subordinate legislation authorising representation by non-qualified persons would result in primary and subordinate legislation being in conflict. It is contended, as is consistent with section 33 of the Interpretation Act (Northern Ireland) 1954, the Court should construe the provisions of the subordinate legislation in a consistent fashion with the primary legislation.

[50] It is submitted an interpretation of Reg15(13) which permits unsupervised representation to be carried out by non-legally qualified persons would undermine important policy objectives, being that the purpose of the civil legal aid scheme is to provide members of the public with a service which is not only of high quality but, also, that it will be delivered by persons who are members of regulated professions who abide by publicly acceptable standards of conduct and who are obliged to carry professional indemnity insurance.

[51] The respondent contends its interpretation is, also, consistent with the extent of delegation permitted under the “Green Form” scheme for providing advice and assistance as governed by Regulation 14 of the Legal Advice and Assistance (Northern Ireland) Regulations 1981. It is argued the express reference to ‘supervision’ is essential as it governs the provision of advice and assistance within an office setting as distinct from the provision of representation in court

proceedings. It is asserted the 1965 Regulations had no need for such as express provision as rights of audience in court were limited to qualified solicitors and barristers. The respondent argues the 1965 Regulations reflect the practical reality it is not possible to effect supervision over another person when they are conducting court advocacy

[52] The respondent submits the statutory duty to pay legal expenses under Art 13(1) of the 1981 Order not only expressly provides the duty relates to the payment of fees “to a solicitor” but also includes the proviso that payments must be made in accordance with the other provisions of Part II of the Order. It is asserted such provisions include Art 10(3), under which legal aid consists of “...representation, on the terms provided for by this Part, by a solicitor and so far as necessary by counsel...” Therefore, it is contended Arts 13(1) and 10(3) of the 1981 Order make it clear the grant of legal aid involves the provision of representation by a qualified solicitor or barrister and that the duty to pay for those services is expressly “subject to” that form of representation.

[53] It is argued, to permit or require the respondent to pay for representation by non-legally qualified persons would be contrary to the clear wording of the 1981 Order which only provides for persons who are granted legal aid to be represented by qualified solicitors and barristers.

[54] It is asserted the government made a policy decision to make funding available for representation before the Tribunal through the machinery of the legal aid legislation and the scheme set out in LSC Circular 09/06. It is contended the government has chosen to provide high quality representation using qualified solicitors and barristers, notwithstanding s84 of the 1999 Act which permits other “qualified persons” to appear in the Tribunal or to provide immigration advice. The respondent says to require it to pay for services by non-legally qualified representatives would be to undermine this policy choice.

[55] The respondent submits the delegation to Ms Muldoon of the conduct of the appeal hearings fell far outside the ‘delegation principle’; it was not authorised by the 1981 Order; and it was such a serious departure from the terms of the legal aid scheme that the respondent was entitled to withhold all payment. The respondent makes a number of submissions in this regard:

- (i) Article 9(1) of the 1981 Order provides legal aid under the 1981 Order is granted to the client, not the lawyer.
- (ii) The grant of legal aid is made subject to the provisions of the 1981 Order and the relevant Regulations.

- (iii) An essential feature of the legal aid system is that representation is provided by a solicitor or a barrister subject to the delegation principle in Regulation 15(13).
- (iv) The appearances by Ms Muldoon before the Tribunal were not within the delegation principle as she could not be described as acting under the supervision of the applicant.
- (v) The conduct of the appeal hearing is the fundamental purpose of the grant of representation. A failure to ensure representation at the Tribunal was provided by a solicitor or a barrister amounts to a complete failure to provide the service to which Mr Osman was entitled under the terms of the certificate sought from and granted by the respondent and for which the respondent is requested to pay.
- (vi) In the same way that in Pilbrow the firm was required to provide Mr Pilbrow with representation "*by a solicitor*", in the present case, the applicant agreed to provide Mr Osman with (and the respondent agreed to fund) representation "*in accordance with the...Order and the Regulations and the Scheme*" as per the Legal Aid Certificate. As the Order, Regulations and Scheme only recognise representation by a solicitor or barrister, the applicant failed to provide Mr Osman with the service to which he was entitled. Also, Article 15(A)(a) of the 1981 Order strengthens the analogy with Pilbrow.
- (vii) In accordance with Pilbrow Mr Osman would have been within his rights to refuse to pay the applicant if he had engaged her in a private capacity and Ms Muldoon's qualifications had not been disclosed to him. There is no distinction in principle with the circumstances in the present case.
- (viii) Non-payment of the applicant's fee is consistent with the policy underlying the 1976 Order. In addition to restrictions upon practice as a solicitor without the requisite qualifications, the 1976 Order provides express prohibitions upon any non-qualified person from recovering fees for such work. The applicant is seeking to recover costs for work which could only lawfully have been done by a solicitor but which was done by an unqualified person. This is prohibited by Article 25(1) of the 1976 Order.
- (ix) The failure to pay, in circumstances where the appointed lawyer has not complied with the requirements of the Order, is analogous with

the power of the respondent under Article 25(4) of the 1981 Order to commence proceedings to recover payments in circumstances where the recipient of legal aid did not comply with relevant regulations or made a misrepresentation.

[56] The respondent submits the appearance of Ms Muldoon at the Tribunal hearings fell outside the “delegation principle and that if the respondent has paid fees in the past where representation was provided by unqualified staff, this has not occurred knowingly and such payments were made *ultra vires* its powers. It is asserted this could not require payment in this case.

[57] The respondent contends the refusal of payment was not *Wednesbury* unreasonable in light of the limitations on the powers of the respondent under the 1981 Order and the extent to which the applicant provided legal services to Mr Osman in a manner which departed from the requirements of the 1981 Order.

Conclusions

[58] It is accepted by the respondent that Ms Muldoon was at all material times a “qualified person” for the purposes of providing immigration advice and services including representation before the Immigration Tribunal [see S82(1) and S84(2)(c) of the 1999 Act]. It therefore follows having regard to the definition of a “qualified person” that she at all material times “...work[ed] under the supervision [of a solicitor]” within the meaning of that Act [per S84(1)(c) set out at para 24 above]. Thus the fact that she represented the client (even without the applicant being present) did *not* mean that she ceased to work under the supervision of a solicitor for the purposes of that Act.

[59] Reg.15(13) of the 1965 Regulations [see para 27 above] makes it explicitly clear that in respect of a solicitor acting for an assisted person nothing in para (13) of Reg 15 “shall prevent a solicitor from entrusting the conduct of *any* part of the case to a person...who is employed in his office”. It is clear that work so entrusted is recoverable under the legal aid certificate. (Plainly in those cases where an unqualified person did not enjoy rights of audience before the relevant court it would not be lawful or possible to entrust work in violation of that legal exclusion).

[60] Where the conduct of any part of a case is lawfully entrusted to an unqualified person (such as a trainee solicitor) employed in the solicitors office fees for the work done are recoverable under a legal aid certificate. Entrusting the conduct of any part of the case to such a person is ordinarily a matter for the professional judgment of the solicitors concerned subject to the actual or implied consent of the client. Where the employee is qualified to perform the

task, capable of performing it and supervised in its execution the solicitor does not cease to represent the client by virtue of such delegation. On this analysis the applicant at all material times acted for a person receiving legal aid within the meaning of Art 13(1) [see para 18 above] and was therefore entitled to be paid for so acting out of the legal aid fund notwithstanding that Ms Muldoon was entrusted to conduct part of the case - including representation before the Tribunal.

[61] It is accepted by the respondent that Ms Muldoon was at all material times a qualified person within the meaning of the 1999 Act. This presupposes, under that Act, that she was working under the supervision of the solicitor. The respondent's contention that Ms Muldoon was not acting under supervision is thus inconsistent with the 1999 Act and its concession that she was a qualified person at all material times.

[62] The degree of supervision required will be fact and case specific depending inter alia on the particular skills and the experience of the employee. Ultimately that is a matter for the professional judgment of the solicitor concerned who remains professionally responsible for the conduct of the case. It is common knowledge that there are many unqualified staff who do a range of tasks of varying degrees of importance and complexity under the supervision of a solicitor. It is not disputed that such work is ordinarily remunerable and recoverable by the solicitor under a legal aid certificate. Representation in the courts is not delegable because as unqualified staff trainee solicitors have no rights of audience. In the context of this case where Ms Muldoon was a qualified person within the meaning of the 1999 Act to provide immigration advice and services including representation before the Tribunal I see no reason why delegation should not extend to provide that service provided the client was aware the person was a trainee solicitor, agreed to that delegation and was aware of his right to insist on a qualified solicitor. There are of course professional risks which may be assumed by adopting that course in the event that something goes wrong. On the other hand suppose a trainee solicitor has specific expertise in the complex field that is immigration law and practice (perhaps equal to or even surpassing that of the solicitor). Why should the solicitor be prevented in the interests of his client and in the discharge of his professional judgment from utilising such a resource? A solicitor with a paying client could make such an arrangement under the existing caselaw. Why should a legally aided client be denied a similar advantage, especially when the plain intention of the 1981 Order [see Art 15A set out at para 21 above] was that the fact that "the services of ... solicitor are given by way of legal aid does not affect the relationship between or rights of counsel, solicitor and client or any privilege arising out of such a relationship".

[63] In a more typical legally aided case there would be no issue about work done by unqualified staff since it will usually be within the office. Indeed but for the fact that Ms Muldoon represented the client before the tribunal no issue would have been taken about paying the solicitor for the work she did in the present case. Apparently if the applicant solicitor had simply turned up and read Ms Muldoon's submissions the applicant's entitlement to remuneration would not have been questioned. Such a narrow approach is unjustified. First it would in my judgement imperil the important policy objectives of the 1999 Act which was to extend the pool of eligible representatives, presumably because of a shortage of lawyers able or willing to undertake such immigration advice and representation. Secondly, contrary to Art 15(A)(a) of the 1981 Order, the fact that the services were being given by way of legal aid would affect, in a fundamental way, the relationship between solicitor and client resulting, in practice, in the client being denied the immigration services of a qualified person within the 1999 Act. Thus a solicitor, subject to compliance with Pilbrow, could contract with client A (fee paying) that Ms Muldoon undertakes the same role as in this case and the solicitor would be entitled to be paid. The solicitor would not in that scenario have ceased to act for the client and would still be professionally responsible. But B (the legally aided client) would not, on the respondent's argument, be able to enter into such an arrangement and at the same time continue to receive legal aid. Even if the solicitor firmly believed on good grounds that the best interests of the client would be served by representation by the in house expert that course would, on the respondent's argument, be incompatible with legal aid.

[64] I am afraid I cannot accept the respondent's argument, in summary, for the following reasons:

- (i) The arguments fail to recognise the scope of delegation which is permissible between solicitor and client and the fact that lawful delegation to an unqualified staff member does not mean that the solicitor ceases to represent the client.
- (ii) The respondent's submissions are inconsistent with the important policy objectives of the 1999 Act implicit in the decision to extend the pool of qualified persons. These policy objectives would be undermined by disincentivising the deployment of relevant immigration expertise in the manner envisaged by parliament.
- (iii) The respondent's submissions are also inconsistent with the legal aid scheme itself which explicitly (in Reg 15A(a)) provided that the fact that the services of a solicitor are being given by legal aid does not affect the relationship between solicitor and client. But as we

have seen in the example above A (fee paying) and B (legally aided) must, on their analysis, be treated differently (and detrimentally) by the same solicitor.

[65] Accordingly the judicial review must be allowed and the respondent is obliged to pay the applicant under the legal aid certificate.