Neutral Citation No: [2013] NIQB 1

Ref: **TRE8713**

Delivered: **16/1/2013**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Family Planning Association of Northern Ireland's Application [2013] NIQB 1

IN THE MATTER OF AN APPLICATION BY THE FAMILY PLANNING ASSOCIATION OF NORTHERN IRELAND FOR JUDICIAL REVIEW

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TREACY J

Introduction

[1] By Summons dated 7 January 2013 the applicant seeks an Order pursuant to Order 24 Rule 3(1) for discovery and inspection of all documents relevant to the present judicial review and without prejudice to the generality of that Order seeks an Order pursuant to Order 24 Rule 7(1) for specific discovery of the documents set out in the attached schedule.

[2] The applicant, by way of letter dated 3 December 2012, sought discovery of the documents set out in the schedule. In the absence of any substantive reply the applicant issued the present Summons and on the following day, 8 January 2013, the Departmental Solicitors Office furnished a substantive reply.

[3] The letter states, *inter alia,* as follows:

> "In paragraph 36 of his affidavit, Sean Holland explained that a number of documents are in existence but which are not exhibited. He has explained that the documents in question refer to the existence and content of legal advice and also *the content of an ongoing process of policy formation within the department*. Since these proceedings are concerned with the non-publication of guidance (as distinct from the content of that guidance), when preparing the

> affidavit, it was not considered to be necessary that these documents be exhibited.
>
> In light of your request, the Department has reconsidered the content of these documents and continues to hold this view. Set out below is a summary of the documents which are in existence and the nature of the documents in question. It is the Department's position that production of these documents is not necessary in the interests of justice for the determination of these proceedings, nor for the saving of costs. While there are portions of some documents which do not touch upon either policy formation or legal advice, it is the Department's view that production of the remainder of the documents following redaction is not necessary for the determination of the proceedings."

Background to these Proceedings

[4] I have taken the background to the proceedings as set out in the Order 53 statement. The applicant obtained a ruling from the Court of Appeal [2004] NICA 38 in October 2004 that required the Department to promulgate Guidance on Termination of Pregnancy. Guidance was duly published in March 2009 and it was subject to a judicial review challenge in which Girvan LJ gave judgment on 30 November 2009. The Court held that the guidance accurately stated the legal position on termination of pregnancy in Northern Ireland but required that two components of the guidance, counselling and conscientious objection, be revised in light of the contents of the judgment. The Department issued interim guidance omitting the sections on counselling and conscientious objection.

[5] On 27 July 2010 the Department withdrew the interim guidance and issued revised guidance for consultation. This guidance was in identical form to the March 2009 guidance save that the sections on counselling and conscientious objection had been redrafted. The consultation period ran for 12 weeks and concluded on 22 October 2010. No guidance issued at the end of the consultation process.

[6] On 22 June 2011 the Chief Medical Officer advised the applicant that publication of the guidance was "under active consideration". On 10 November 2011 the applicant wrote to the Department asking that guidance complying with the Order of the Court of Appeal of 8 October 2004 issue without further delay. On 8 December 2011 the Chief Social Services Officer, Sean Holland, replied and stated that the matter was "with the Minister for consideration" and that he could not advise when the guidance would issue to health professionals.

[7] On 13 January 2012 the Minister advised the Assembly that he had directed his Department to reconsider the revised guidance and that it was not possible to confirm when it would issue. On 15 February 2012 the applicant's solicitors wrote to the Department seeking confirmation that the revised guidance would be referred to the Executive Committee for approval within 7 days. The Department failed to respond to that letter. On 13 March 2012 the applicant sent correspondence in accordance with the pre-action protocol for judicial review to the Department. The pre-action letter invited a response within 14 days – the Department failed to respond to that letter.

Relief Claimed

[8] The applicant seeks the following principal relief in its amended Order 53 Statement:

> "(a) A Declaration that the Department's ongoing failure to publish guidance has breached Article 4 of the Health and Personal Social Services (Northern Ireland) Order 1972 and section 2 of the Health and Social Care (Reform) (Northern Ireland) Act 2009 which required the provision of integrated health and personal social services to women seeking termination of pregnancy in Northern Ireland;
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> (b) An Order of Mandamus compelling the Department to issue the revised Guidance without further delay to ensure compliance with the Order of the Court of Appeal of 8 October 2004 and Article 4 of the 1972 Order;…."

Grounds upon which Relief is Claimed

[9] The grounds relied upon are:

> "(a) The respondent has acted unlawfully and in breach of Article 4 of the Health and Personal Social Services Order 1972 and section 2 of the Health and Social Care (Reform) (Northern Ireland) Act 2009 by failing to secure the provision of integrated health and personal social services to women seeking lawful terminations of pregnancy in Northern Ireland by failing to investigate and issue guidance to members of the medical profession, ancillary staff and to women seeking a termination of pregnancy on the law relating to the provision of terminations of pregnancy in Northern Ireland.

(b) The applicant has a substantive legitimate expectation that the respondent would issue guidance to comply with the Order of the Court of Appeal of 8 October 2004. The respondent's failure to issue the revised guidance breaches that expectation.

(c) The High Court ordered on 30 November 2009 that the Department should withdraw the guidance and reconsider the sections relating to counselling and conscientious objection in light of the contents of his judgment. The respondent revised the guidance accordingly and conducted a public consultation exercise on the revised guidance which concluded in October 2010. A total of 32 responses were received to the consultation. 25 of those responses addressed the relevant issues of counselling and conscientious objection. The Department has had ample time to incorporate any necessary amendments to the guidance in light of these consultation responses. The applicant has a legitimate expectation that the respondent would issue the guidance at the conclusion of the consultation exercise. By failing to issue the guidance within a reasonable period of time the respondent has breached that expectation and acted unlawfully."

The Discovery Application

[10] The relevant Minister has signified his intention to issue guidance and this was confirmed in Court yesterday by Mr McLaughlin BL. Moreover, whilst not expressly conceded that the Minister is under a public law duty to promulgate guidance I apprehend this issue will not be contentious in the present proceedings.

[11] This case is not (for the moment at least) about the content or lawfulness of any guidance. The primary issue is the lawfulness of the ongoing failure of the respondent to promulgate guidance within a reasonable period of time to comply with the Order of the Court of Appeal of 8 October 2004 and an alleged breach of the relevant identified statutory provisions.

[12] The documents sought are set out in a schedule to the Summons which now has to be read in light of the respondent's replying letter of 8 January 2013 confirming that there are no documents within categories 2-4. The catch all requirement of Item 13 is not pursued.

[13] In essence the applicant seeks three categories of documents:

(i) Briefing papers;
(ii) Ministerial submissions;
(iii) Minutes of relevant meetings.

[14] It is common case that the documents sought are referred to but are not exhibited to the affidavit of Mr Sean Holland. He is the Deputy Secretary of the Social Services Policy Group in the Department of Health, Social Services and Public Safety which is the respondent in these proceedings and he is authorised to make his affidavit on behalf of the Department.

[15] Ms Doherty, on behalf of the applicant, confirmed that any part of the documents sought which attract legal professional privilege are not subject to disclosure and are not therefore being pursued.

[16] The affidavit of Mr Holland and the letter from the respondent dated 8 January 2013 explain that the documents in question, *inter alia,* referred to "the content of an ongoing process of policy formation within the Department" Mr McLaughlin, on behalf of the respondent, accepted that the fact that the documents in question refer to an ongoing process of policy formation is not an absolute bar to their production. He contended however that their disclosure is not necessary to the fair disposal of the judicial review.

[17] Ms Doherty pointed out that the documents in question were all referred to in the respondent's affidavit and should therefore have been exhibited. Or at least, if not exhibited, that fair disposal of the judicial review necessitated their disclosure to the applicant having regard to the nature of the issues in the case. Failing that she contended the Court should be furnished with the documents for consideration as to whether disclosure is required.

[18] In support of these submissions the Court was referred to Tweed v Parades Commission for NI [2006] UKHL 53 and, in particular, to Lord Bingham at para4 and Lord Carswell at para33:

> "4. Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says. There may, however, be reasons

> (arising, for example, from confidentiality, or the volume of the material in question) why the document should or need not be exhibited. The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made."

[19] At para33 Lord Carswell referred to the fact that the appellant in Tweed, in support of his claim for disclosure called in aid the provisions of RSC (NI) Order 24 Rule 11 which provides:

> "(1) Any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof.
>
> (2) The party on whom a notice is served under paragraph (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice stating a time within 7 days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds."

[20] Lord Carswell, in para33, went on to observe:

> "... A party whose affidavits contain a reference to documents should therefore exhibit them in the absence of a sufficient reason (which may include the length or volume of the documents, confidentiality or public interest immunity). If he raises objection to production of any document, the judge in a Northern Ireland case can decide on the hearing of a summons under rule 12 whether to order production, bearing in mind the provisions of rule 15(1) that no such order is to be made unless the court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs. In England and Wales the court may order specific disclosure or inspection under CPR Rule 31.12. ...".

[21] Ms Doherty further submitted that the documents sought go to the primary question of the reasonableness and therefore lawfulness of the delay and relatedly whether any or good reason exists for the substantial delay which has already occurred. They are relevant, she submitted, to whether the respondent has been conscientiously working on the guidance, what it has been doing, why and the reasons for the delay.

[22] I am persuaded that the documents sought are necessary for the fair disposal of the case. Mr McLaughlin confirmed he had read the documents and submitted that if the legal professional privilege and policy materials were redacted from the documents there was additional material that would be discoverable in ordinary circumstances but which in this case did not add to the materials before the court and that production was thus not necessary. The exercise upon which the Court is engaged requires an objective determination by the Court by reference to the issues and papers in the case and the competing submissions of Counsel bearing in mind that at this stage neither the Court nor Counsel for the moving party has seen the documents in question.

[23] At the heart of the present case is whether there is any or good reason justifying the ongoing failure to promulgate guidance in response, *inter alia,* to the judgment of the Court of Appeal in October 2004? The best evidence as to the existence and adequacy of the reasons for the delay is likely to be found in the documents referred to but not exhibited in the respondent's affidavit.

[24] Even if the content of the documents and the duty of candour to the Court did not impel the respondent to disclose them (which must be the case otherwise they should have been disclosed) I am satisfied that the disclosure is necessary for the fair disposal of the case. This is so because the documents are likely to contain the best evidence for the prosaic reason that, as Lord Bingham observed, any summary, however conscientiously and skilfully made may distort.

[25] Accordingly, I accede to the application.