

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered:	26/06/12
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY BRIGID GREEN
FOR JUDICIAL REVIEW

Green's (Brigid) Application [2012] NIQB 48

TREACY J

Introduction

[1] The applicant is the widow of Barney Green killed on 18 June 1994 in the attack on the Heights Bar in Loughinisland. She wishes to pursue an application for leave to apply for judicial review of the NI Police Ombudsman's report into the police investigation of the attack. That application stands adjourned pending the resolution of this application which relates to the dismissal of the applicant's appeal against the refusal of legal aid funding. There is no dispute by the legal aid authorities as to the merits of the extant judicial review against the Ombudsman's report.

Background

[2] Following an appeal against the refusal of legal aid the panel by letter dated 10 October 2011 refused legal aid on the basis of Regulation 5(11) of the Legal Aid (General) Regulations (NI) 1965. A request for more detailed reasons by the applicant was met with a letter indicating that the refusal was grounded on Regulation 5(11)(b).

Statutory Framework

[3] Regulation 5(11) of the Legal Aid (General) Regulations (NI) 1965 states:

“(11) Where an application is made by or on behalf of a person in connection with a cause or matter in

which *numerous* persons have the *same* interest and, in accordance with rules of court, one or more persons may sue or be sued, or may be authorised by a court to defend any such cause or matter on behalf of or for the benefit of all persons so interested, the appropriate committee *shall* refuse the application if they are satisfied-

that such refusal would not seriously prejudice the right of the applicant; or

that it would be *reasonable and proper* for the other persons having the same interest in the matter as the applicant to defray so much of the costs as would be payable from the fund in respect of the proceedings if a certificate were issued." [Emphasis added]

Rival Contentions and Discussion

[4] The applicant raised a number of points contending that the conditions precedent for the exercise of the Regulation 5(11) power were not present. Thus it was contended that whilst there were a *number* of persons who arguably had the same interest there were not *numerous* persons as required by 5(11). It was further contended that whilst the collective of bereaved relatives had a *common* interest in obtaining a proper investigation of the massacre this was not coterminous with the *same* interest.

[5] I am unable to accept either of these submissions. The first submission was not advanced to the panel but I accept that this is not an obstacle to the point being raised now since it goes to the jurisdiction of the panel to invoke 5(11). I disagree with the respondent that *numerous* persons is to be equated with *other* persons since if that was what the legislature had intended it would have been very simple to have said so and it didn't. It is interesting to observe that the same term appears in the analogous provisions in the English Regulations namely Regulation 32(2)(a) of The Civil Legal Aid (General) Regulations 1989.

[6] On the facts of the present case, bearing in mind the underlying purpose of Regulation 5(11) (ie the identification of other parties with the means to fund the litigation and with the same interest in the outcome, as a form of protection for the LSC fund), I am satisfied that there are *numerous*, that is to say many who have the same interest in the outcome in the present case.

[7] As to the second submission it seems clear to me that the "collective of bereaved families" have not only a shared or common interest in seeing the proper investigation of this terrible crime but they also share an *identity* of interest in the outcome of the challenge to the Ombudsman's report as a step on the way to

achieving what they believe they have not yet had – ie an adequate investigation into the massacre.

[8] In the light of these conclusions the conditions precedent to the exercise of Regulation 5(11) have been established.

[9] The respondent was, however, only obliged to refuse legal aid under 5(11) if it considered that it would be reasonable and proper for the other persons having the same interest to defray the costs etc. I agree that this test plainly involves the exercise of judgement by the panel subject to the considerations of rationality, legality and fairness. Provided the judgement is properly exercised against the background of the necessary test and any necessary investigations the view of the panel will not be lightly disturbed.

[10] Undoubtedly the existence of the unencumbered property owned by Mrs R was a factor that the panel were entitled to take into account. But the judgment to be formed was whether it was reasonable and proper for the other persons having the same interest to defray the costs.

[11] In this context I accept that *proper* means “fitting” or “appropriate”. If, as was contended by the applicant, the panel felt *bound* to reach the decision they did based solely on the existence of Mrs R’s unencumbered asset then I consider they misdirected themselves and failed to give proper consideration to the “reasonable and proper” test.

[12] Whether they did so or not, I accept the applicant’s argument that there is no evidence that there was any consideration of *other* factors in deciding what would be reasonable and proper.

[13] These other factors should have included considerations such as whether the refusal of legal aid would seriously prejudice the rights of the applicant, the public interest in ensuring that such a challenge should be allowed to proceed, the nature of the judicial review proceedings, the Art2 context, the underlying incident and the circumstances in which Mrs R came into possession of the unencumbered property. Whilst these factors were *known* to the decision maker it has not been established that they were *considered* either properly or at all by the respondent.

Conclusion

[14] For these reasons I consider that the panel erred in law in so confining its consideration and in failing to take into account other material factors which bore on the issue of whether or not it was reasonable and proper that Mrs R should be required to fund a judicial review application brought by this applicant.

[15] In the light of the conclusion to which the Court has come, it is unnecessary to decide on the further arguments based on alleged unequal treatment or breach of Art2 ECHR.

[16] Accordingly, the application for judicial review is successful and I quash the decision of the panel.