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

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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 PATRICK FLEMING AND
PENNY JANE FLEMING FOR JUDICIAL REVIEW**

GIRVAN J

Introduction

[1] The applicants in these judicial review proceedings were originally Patrick Fleming and his wife Penny Jane Fleming. Patrick Fleming has since died and the proceedings have been continued by his widow. In the proceedings the applicants challenged the decision of the Legal Services Commission ("the Commission") and/or the Legal Aid Assessment Office ("the Assessment Office") taken on 20 July 2005 to revoke an emergency legal aid certificate issued on 4 July 2005.

Background to the Application

[2] On 7 December 2004 the Assets Recovery Agency ("the Agency") brought ex parte proceedings before Coghlin J seeking an interim order under section 246 of the Proceeds of Crime Act 2002 ("the 2002 Act"). The purpose of the order was to secure assets belonging to the Flemings and the mother of Mrs Fleming, the Agency alleging that the property related to the proceeds of criminal activity. That order was made subject to an exclusion in paragraph 13 which provided:

"This order does not prohibit the defendants from spending £250 per week towards their ordinary living expenses. But before spending any money each must tell the receiver where the money is to come from."

The order appointed the receiver over property belonging to the Flemings and Mrs Fleming's mother.

[3] Prior to being interviewed under caution by representatives of the receiver the applicants applied for legal aid in respect of the proceedings brought by the Agency by an application to the Commission on 28 June 2005. An emergency legal aid certificate was issued on 4 July 2005. In section 4 of each application, in relation to the question whether Mr Fleming and his wife received any money regularly the applicants: "yes", reference being made to the payment of £250 per week for living expenses paid out of the frozen bank accounts on foot of the interim order. On 20 July the Flemings were each given a notice revoking the legal aid, the Commission advising them that the certificates were now revoked as the applicants were financially outside the scope of legal aid on the grounds of their disposable income. The notice indicated that the applicants were deemed never to have been assisted persons.

[4] Mr McNamee, Legal Aid Policy Administrator of the Assessment Office (which is part of the Social Security Agency) in his replying affidavit states that the Assessment Office was concerned with the processing and assessment of the means of persons applying for legal aid to the Commission. In doing that it applied the provisions of the Legal Aid (Assessment of Resources) Regulations (Northern Ireland) 1981 ("the Assessment of Resources Regulations"). The rules for computing disposable income are found in Schedule 1 paragraph 1 of which provides that the income of the person concerned from any source shall be taken to be the income which the person may reasonably expect to receive in cash or in kind during the period of computation that income in the absence of other means of ascertaining it is taken to be the income received during the preceding year. The Assessment Officer was requested by the Commission on 30 June 2005 to undertake the assessment of the means of the applicants. On 11 July 2005 the Assessment Office informed the Commission that the disposable income of the applicants was £22,046. This was calculated by adding together the annualised computation of the Fleming's living expenses of £250 each per week permitted on foot of the interim order and deducting from the total the sum of £3,454 as an allowance for the dependants of the Flemings. The only source of monies receivable by the applicants was the permitted withdrawal of £250 per week out of the bank accounts frozen on foot of the interim Order. The computation produced a figure in excess of the sum of £8,681 being the prevailing upper income limit beyond which a person is disqualified from receiving legal aid for civil law purposes. The Assessment Office considered that the £250 for living expenses for each of the applicants fell within the "broad definition of income" provided by paragraph 1 of Schedule 4 of the 1981 Regulations.

[5] In his affidavit Mr Gerry Crossan, the Chief Executive of the Commission, referred to the new statutory provisions contained in the Serious Organised Crime and Police Act 2005 and to the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005 which came into force on 1 January 2006. Those provisions were not in force at the time of the impugned decision and were not relied on by the Commission. However, as from 1 January 2006 a defendant in proceedings under the 2002 Act can apply to the court to permit payment towards the defendants' costs out of the assets the subject of the Agency application. In consequence of that regulation paragraph 5(13) of the Legal Aid (General) Regulations (Northern Ireland) 1965 comes into play. When it appears that an applicant for legal aid has available rights or facilities making it unnecessary to obtain legal aid the legal aid authority shall not approve an application for legal aid unless and until the applicant takes all reasonable steps to obtain such rights or facilities.

[6] Mr Andrews, Head of the Reform Branch in the Public Legal Services Division of the Northern Ireland Court Service, the Commission's sponsoring body, in a letter of 10 November 2005 set out the views of his Department. It was his understanding that under section 252(3) of the 2002 Act by virtue of the 1981 Order the Assessment Office would be required to treat as income the monies received to meet reasonable living expenses. This was also the approach adopted in England and Wales. During the passage of the 2002 Act through Parliament the Attorney General made it clear that parties to civil recovery proceedings under 2002 Act could apply for funding and that the merits test would be relaxed but an applicant would still have to satisfy the standard means test.

The Proceeds of Crime Legislation

[7] Under the 2002 Act section 252 provides under the heading "Restrictions on Dealing etc with Property"

"(1) An interim receiving order must be subject to any exclusions made in accordance with this section prohibit any person to whose the property the order applies from dealing with the property.

(2) Exclusions may be made when the Interim Receiving Order is made or an application to vary the order.

(3) An exclusion may in particular make provision for the purpose of enabling any person

(a) To meet his reasonable living expenses, or

(b) To carry on any trade, business profession or occupation, and

(c) May be made subject to conditions.

(4) But an exclusion may not be made for the purpose of enabling any person to meet any legal expenses in respect of proceedings under this part.”

[8] With effect from 1 January 2006 Section 252(4) of the 2002 Act was amended by paragraph 14 of Schedule 6 of the Serious Organised Crime and Police Act 2005. The substituted section 252(4) provides:

“(4) Where the court exercises the power to make an exclusion for the purpose of enabling a person to meet legal expenses that he has incurred, or may incur, in respect of proceedings under this power, it must ensure that the exclusion –

(a) is limited to reasonable legal expenses that the person has reasonably incurred or that he reasonably incurs

(b) specifies the total amount that may be released for legal expenses in pursuance of the exclusion, and

(c) as may subject to the required conditions (see section 286A) in addition to any conditions imposed under sub-section (3).

(4A) The court, in deciding whether to make an exclusion for the purpose of enabling a person to meet legal expenses of his in respect of proceedings under part –

(a) must have regard (in particular) to the desirability of the person being represented in any proceedings under this part in which he is a participant, and

(b) must where the person is the respondent disregard the possibility that

legal representation of the person in any such proceedings might, were an exclusion not made, be funded by the Legal Services Commission or the Northern Ireland Legal Services Commission.”

[10] The Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005 which came into effect on 1 January 2006 set out the manner in which expenses are to be released by the court and the conditions on which they are released.

The Legal Aid Legislation

[11] Under article 9(1) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (“the 1981 Order”) legal aid in connection inter alia with proceedings in the High Court is available for any person whose disposable income does not exceed the prescribed limit (which is currently £8,681). A person may be refused legal aid if his disposable capital (currently the sum of £6,750) and it appears he can afford to proceed without legal aid. Thus if an applicant for legal aid satisfies the income test he may still be disqualified from legal aid if he has disposable capital over the prescribed limit but if he is over the prescribed limit in terms of capital the Commission must be satisfied that he can afford to proceed without legal aid.

[12] Under article 12 where a person’s income exceeds the sum of £2,902 a year his contribution to the legal aid fund may include a contribution of one-third of the excess or such other proportion of the excess or such amount as may be prescribed. If his disposable capital exceeds £3,000 the condition may include a contribution in respect of capital not greater than the excess for such lesser amount as may be prescribed.

[13] Under article 14 references to a person’s disposable income and disposable capital shall be taken as referring to the rate of his income or amount of his capital after making such deductions as are prescribed in respect of, for example, the maintenance of dependants, tax, rent and other matters for which the person in question must or reasonably may provide and such further allowances as may be prescribed to take account of the nature of his resources. Regulations may provide for determining whether any resources are to be treated as income or capital. The regulations shall include provisions for securing that the resources of a person seeking or receiving legal aid shall be treated as not including the subject matter of the dispute. It is clear from the wording of article 14 that the term “disposable income” means the actual income of the relevant party less the deductions to be made thereafter as prescribed by relevant regulations.

The Legal Aid Regulations

[14] Under Regulation 1 of the 1981 Regulations income includes “benefits and privileges”. By Regulation 4 the disposable income and disposable capital of the person concerned shall be determined in accordance with schedules 1 and 2 of the Regulations. Under Regulation 5 the value of the subject matter the dispute must be excluded. Under paragraph 1 of Schedule 1 it is provided:

“1. The income of the person concerned from any source shall be taken to be the income which the person may reasonably expect to receive (in cash or in kind) during the period of computation that income in the absence of other means of ascertaining had been taken to be the income received during the preceding year.”

By paragraph 14 of the Schedule it is provided:

“14. In computing the income from any source there shall be disregarded such amount, if any, as the assessment officers consider to be reasonable having regard to the nature of the income or to any other circumstances of the case.”

Regulation 5(13) of the Legal Aid (General) Regulations (Northern Ireland) 1965 states:

“Where it appears to the committee that the applicant has available rights or facilities making it unnecessary for him to obtain legal aid or has a reasonable expectation of obtaining financial or other help from a body of which he is a member they shall not approve the application unless the applicant has failed to enforce or obtain such rights, facilities or help, after having, in the opinion of the committee taken all reasonable steps to enforce or obtain them or after having permitted the appropriate committee to take those steps on his behalf.”

The Income Issue

[15] The first issue for determination is whether the Commission or Assessment Office were correct in their conclusion that the weekly sums provided for in paragraph 13 of the interim order represented “income” for

the purposes of the 1981 Order and the Assessment of Resources Regulations. Central to Dr McGleenan's argument on behalf of the applicant was the proposition that those sums could not represent disposable income as far as the applicant's were concerned. Section 252(3) of the 2002 Act prohibited the exclusion of any money for the purpose of enabling a person to meet legal expenses in respect of proceedings. The weekly payments could not be used for legal expenses. Dr McGleenan relied on a footnote definition of disposable income in Halsbury's Laws dealing with legal aid at paragraph 1900. This states that disposable income means the amount of income available for the making of contributions after the person concerned's income has been computed in accordance with the regulations. The sums were payable out of capital sums held in the Woolwich bank accounts of the applicants and they represented not income but periodic release of capital out of capital funds. The capital fund and the weekly payments received thereout were the subject matter of the dispute since the Agency were alleging that all the assets should be forfeited to the state as representing the proceeds of crime and that they should all be frozen in the meantime. Mr Lyttle QC on behalf of the Commission and Mr Good on behalf of the Assessment Office argued that the weekly payments withdrawn from the accounts represented income in the sense that they were received as periodic payments providing an income on which the applicants could live. Even if the payments were drawn out of capital once they were drawn and paid to the applicants they ceased being capital and not being capital had to be treated as income. Income was widely defined as including "any benefits" received by the applicant.

[16] In Jones v Ogle [1872] 42 LJ Ch 334 Lord Selborne stated:

"As to the word 'income' it is a general expression signifying what comes in and that expression is used with reference to periodical payment in the nature of income."

In R v Supplementary Benefits Commission (ex parte Singer) [1973] 2 All ER 931 the applicant for legal aid had been in receipt of loans and gifts from friends and relatives amounting to £17,000 in the present year. The assessment official concluding that it was deemed reasonable to estimate as income the sum of £5,000 "the sum expected from a combination of earnings gifts and loans from relevant funds." Bridge J giving the judgment of the Divisional Court concluded that the definition of income in Regulation 1(2) of the relevant England regulations as including "benefits and privileges" was intended to ensure that receipts which would be regarded in a colloquial sense as part of a person's income should not escape from consideration merely because they were receivable as "benefits and privileges" and not by legal right. The essential feature of receipt by way of income was an element of recurrence. "Income" could not include ad hoc receipts. While some gifts

were capable of forming part of a person's income (for example regular payments by a parent for the upkeep of a child) it was wrong to treat all gifts and loans as income indiscriminately. As Bridge J stated:

“The essential feature in our judgment of receipts by way of income is that they display an element of periodic recurrence.”

[17] The conclusion to be drawn from the authorities is that the regular payment out of the frozen bank accounts of £250 to each of the applicants represented income of the applicants for the purposes of the assessment of resources regulations. While the funds out of which the income is paid may have represented capital in the ordinary sense of the term the fund was claimed by the Crown under the 2002 Act and would otherwise have been frozen and unavailable to the applicants if paragraph 13 had not been included in the interim order. Until the application under the 2002 Act is finally resolved it is not known whether this fund was the beneficial property of the applicants or represented proceeds of crime from which the applicants would be debarred from benefiting. The effect of the release of the regular payments to the applicants was to provide them with what in ordinary terms represented an income on which to live. Once released the Agency could not seek to recover the monies back even if it is successful in the application under the 2002 Act at the end of the day. The £250 a week thus cannot be regarded as property falling to be disregarded under Regulation 5 as representing the money in dispute.

The Schedule 1 Paragraph 14 Issue

[18] Dr McGleenan argued that even if the periodic sum of £250 payable to each of the applicants represented income of the applicants, the Assessment Office had failed to consider and apply paragraph 14 of the Assessment of Resources Regulations and failed to exercise the discretion vested in the Assessment Office to disregard the income in computing the relevant disposable income. The income payable to the applicants was unavailable for use in the payment of legal expenses and the applicants had thus no income which could be used for payment of a contribution towards legal expenses or for the discharge of legal expenses and fees. Mr Lyttle QC argued that the applicants were no different from other potential litigants with an income over the prescribed limit. They could live frugally and use what they could from the living expenses for legal purposes.

[19] In paragraph 6 of his affidavit Mr McNamee stated that in assessing the applicants' means the Assessment Office included money excluded in the interim order as these fell within the broad definition of income provided by paragraph 1 of Schedule 4. In this regard the Assessment Office ensured a consistent determination of the applicants' application together with those of

other persons. He stated that he was unaware of any statutory provision or other instruction requiring the Assessment Office to exclude or discount those funds received by the applicants pursuant to the exclusionary provisions of the interim order. Dr McGleenan contended that section 252(4) was such a statutory provision.

[20] Since the court in exercising its powers under section 252(3)(a) intended that the monies excluded were to be used for reasonable living expenses and since the court would be precluded under section 252(4) from releasing money to meet legal expenses it must be presumed that the court concluded that the sum released was enough for living expenses and not intended for legal expenses. If it became apparent that the applicants were using the money not for living expenses but for legal expenses the Agency would be bound to apply to stop that happening and to reduce the living expenses figure to the level which represented what was actually needed for living expenses. Accordingly the applicants could not legitimately draw monies out of the accounts intending to use it for legal expenses since they would be abusing the purpose of the exclusion. This puts the applicants in a different position from other litigants with an equivalent income. Who can use their income as they see fit. Thus, the Assessment Officer failed to properly direct himself in relation to his paragraph 14 powers and duties. The decision to revoke was based on the assessment of income which was an exercise carried out without proper regard to the duty under paragraph 14 to consider whether it was reasonable to disregard the income or any part of it having regard to the special nature of the applicant's income arising under paragraph 13 of the interim order.

The Regulation 5(13) Issue

[21] Mr Lyttle argued that the Commission was entitled to rely on regulation 5(13) of the General Regulations on the basis that it was now open to the applicant to apply to the court under the amended legislation and the regulations made thereunder for an order authorising payment out of the frozen assets of reasonable legal expenses backdated to the date of the emergency certificate. It was argued that this made it unnecessary for the applicant to obtain legal aid. Coghlin J in exercise of the powers vested in the court under the amended section 252 made an order authorising payment of specific legal fees from 1 January 2006 onwards. He declined, however, to deal with the question of costs prior to 1 January 2006 because the matter was the subject of this ongoing judicial review application. He has not made a ruling whether or not the powers of the court under the amended section 252 have retrospective effect to authorise the release of assets, the subject of an interim order, to cover costs incurred prior to 1 January 2006.

[22] If the court has no power to order such costs retrospectively to cover legal work undertaken before 1 January 2006 Mr Lyttle's point is of no

relevance for in the period prior to 1 January 2006 there would be no other funds available to the applicant to meet legal expenses incurred. If there is a power vested in the court to authorise such legal expenses it is for the court seised of the Proceeds of Crime Proceedings Act application to decide how and if it should exercise the powers under section 252.

[23] At the invitation of the court the Director of the Assets Recovery Agency made submissions on the power of the court under the Proceeds of Crime Act application to make an order to cover costs incurred prior to the coming into effect of the 2005 Act and the 2005 regulations on 1 January 2006. Mr Aiken on behalf of the Director argued that the amended section 252(4) clearly gives the applicant the ability to apply for an exclusion in respect of legal expenses already incurred. The amendment placed no restriction on how far back the defendant could go in applying for the exclusion to cover legal expenses incurred. There is nothing in the new section 252(4) to suggest any difficulty for an applicant applying for an exclusion to cover legal expenses incurred. If the question of retrospectivity arises, then it was apparent that the legislature did intend the provisions to have retrospective effect. The changes effected by the new legislation related to a procedural matter and where the legislature is making a procedural change it is presumed to be retrospective (see Benion on Statutory Interpretation at page 269). Mr Lyttle QC and Mr Good on behalf of the Commission and the Assessment Officer supported those arguments. Dr McGleenan on behalf of the applicants contended that the amending legislation spoke only from the date upon which the amendments came into effect and accordingly there was no power vested in the court to permit costs incurred prior to 1 January 2006 to be paid out of the frozen assets.

[24] I have reached the conclusion that it would be open to Coghlin J on foot of the amendment of the legislation to permit the payment of legal costs and expenses incurred prior to 1 January 2006 out of the frozen assets. I accept Mr Aiken's argument on behalf of the Director that on its true construction the legislature covers costs whenever incurred and that strictly no question of retrospectivity arises. If the question of retrospectivity does arise then I am satisfied that the legislature effected a change of procedure and that it would be retrospective in effect since it relates only to procedure. The proper course, accordingly, is to adjourn the present application to enable the application to be made to Coghlin J who will then have to decide whether in the exercise of the court's powers and discretions the court should permit payment of legal expenses and costs out of the assets and, if so, in what sum. If the result is that the legal expenses incurred are permitted to be paid out of the frozen assets then no legal aid would be necessary or appropriate. Accordingly, the court will await the outcome of the application before Coghlin J before reaching its final conclusion on the proper order to make on the current application.

