

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

John Fahy & Co Solicitors' Application [2014] NIQB 27

IN THE MATTER OF AN APPLICATION BY JOHN FAHY & CO SOLICITORS
FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] The applicant challenges policy contained in Legal Services Commission Circular 04/12 ("the circular") operated by the Northern Ireland Legal Services Commission ("NILSC") and to decisions made under that policy

Background

[2] The applicant is a firm of solicitors operating a substantial criminal practice in which much of the work is legally aided. The applicant's administrative system of work is to keep a file as a 'work in progress' until all stages of litigation have been completed. Files which progress through various courts are kept open in this manner to allow easy access for practitioners. These files are not billed until the completion of all litigation when all aspects of the case were billed for.

[3] The rules surrounding billing for criminal legal aid work in the various courts require separate billing for each stage (ie Magistrates Court, Crown Court etc) within three months of the conclusion of the work to which the legal aid certificate relates subject to various rules, exceptions and discretions. For many years, due to the administrative practice outlined above, the applicant firm has submitted its criminal legal aid claims outside of the statutory three month period. In all cases the bills were accepted without deduction or accepted with a maximum 5% deduction. There was never any prior application for extension of time and these claims were routinely accepted on the basis that either 'good reason' was shown or 'exceptional circumstances' were shown.

[4] These claims were accepted under the guidelines then in existence: 'Guidelines for enforcement of time limits for submission of costs claims'. These guidelines suggested that if good reasons were shown payment would be made in full. If it was an 'exceptional circumstance' case there was a discretion to reduce the costs by a percentage. The guidelines suggested that reductions of more than 20% should not normally be imposed and that in no circumstances should a deduction of more than 50% be made.

[5] On 29 June 2011 the Northern Ireland Audit Office published a report entitled 'Managing Legal Aid'. The report commented on 'late' submissions for criminal legal aid. The report noted:

- (a) That the current late submission policy was over 20 years old and should, according to good practice, be reviewed.
- (b) That the imposition of penalties for cases submitted late is one area where the Commission can potentially reduce its costs, but further noted that the Commission's information in this area was incomplete.
- (c) The report recommended:
 - (i) That the Commission should record centrally all instances of late claims, and provide clear explanations for the action taken, particularly when deductions have not been made.
 - (ii) That the Commission should investigate ways to access data on concluded cases, in order to produce performance information on the level of penalties imposed, both overall and on a case-by-case basis.

[6] On 17 January 2012 the NILSC published a new policy by way of the circular. The applicant contends that he was never put on proper notice of this policy. The new policy made substantial changes to how late claims would be treated – the key changes effected by this policy were that:

- (i) There is no longer provision for consideration of a 'good reason' for late submission;

- (ii) Rather than directing attention to 'good reason' the policy directs the decision maker's attention to whether there are 'exceptional circumstances';
- (iii) Extension of time on the grounds of 'exceptional circumstances' will only be permitted where there is a prior, pre-expiration, application to extend time. If no such prior application is made the claim will not be accepted for payment;
- (iv) The decision maker does have discretion to consider retrospective applications for extension for 'wholly exceptional circumstances';
- (v) If exceptional circumstances are found the decision-maker is directed to apply a tariff of financial penalties unless there are 'compelling reasons to vary the tariff';
- (vi) If the claim is submitted 15 months after the conclusion of the proceedings then the claim will 'not be assessed for payment'.

[7] After the publication of this policy, the applicant submitted several cost claims (there are 10 decisions challenged herein) which were either subject to a partial disallowance (in two cases) or entirely disallowed for costs (in the remainder of the cases). The applicant submits that the first he became aware of the policy was on 18 May 2012 upon receipt of the decision in the Kenneth Hamilton case.

[8] This new method of administering 'late' claims was intended to operate from 7 February 2012. The period between 17 January 2012 and 7 February 2012 was designated as 'the first amnesty'. During this period, all claims were to be paid in full irrespective of vintage ie no penalties would be incurred.

[9] The NILSC operated an unpublished 'second amnesty period' (not notified to the profession) between 7 February 2012 and 16 March 2012. In this period the NILSC decided that claims would not be refused on the basis of no prior request for extension had been made, however the sliding scale of deductions provided for in the circular would be applied to late claims during this period. After the expiry of this second unpublished amnesty, the new policy was to be applied in full.

Facts in relation to the Individual Decisions

[10] The applicant submits that the firm's first knowledge of the new policy was on 18 May 2012 when informed of the decision in the Kenneth Hamilton case.

Kenneth Hamilton - Crown Court

[11] The claim for costs in this case was made outside the statutory time limit and within the second amnesty period. The reasons given for the late submission was that the appeal to the Court of Criminal Appeal did not conclude until September 2011 and that the applicant had problems getting the bill of indictment.

[12] The claim was considered on 1 March 2012 and was disallowed in its entirety as there were no wholly exceptional circumstances for the late submission. This decision was notified to the applicant on 18 May. By letters dated 1 June and 7 June 2012 the applicant made further representations to the NILSC. The substance of these representations was that the case did not conclude until September 2011, in relation to their filing system and that the only person prejudiced by the late submission was the applicant itself.

[13] The NILSC reconsidered the matter on 14 June 2012 and confirmed its original decision and on 19 June 2012 wrote to the applicant advising them of this decision.

[14] On 9 July 2012 the applicant appealed this decision to the Taxing Master which appeal was dismissed by decision of 5 September 2012.

Joshua Degnan - Magistrates court

[15] This cost claim was made in the 2nd amnesty period on 14 February 2012. It was a late submission and the reasons given related to the necessity to have the papers available on file for the defendants return for trial.

[16] On 1 March 2012 it was decided that a 40% deduction should be made under para14 of the policy. By letter dated 21 May 2012 the NILSC informed the applicant of their decision. On 1 June 2012 the applicant made representations to the NILSC in relation to the deduction noting that there were delays in getting the court log corrected, in relation to their filing system, in relation to resource issues and in relation to the lack of prejudice to any party except the solicitor.

[17] On 5 July 2012 the panel considered these further representations and concluded that the original decision should be upheld. The decision was confirmed to the applicant by letter dated 6 August 2012.

Joshua Degnan - Crown Court

[18] This cost claim was made in the 2nd amnesty period on 14 February 2012. It was a late submission and no reason was given for the delay. On 5 April 2012 a 5% reduction was applied under para 14 and this decision was informed to the applicant by letter dated 21 May 2012.

[19] By letter dated 1 June 2012 the applicant made further representations in relation to this case and on 5 July 2012 the original decision was reconsidered and upheld. This was notified to the applicant by letter dated 6 August 2012.

Paul Vaughan - Magistrates Court

[20] This cost claim was submitted on 8 March 2012. It was received 13 days after the end of the statutory three months period and no reason for delay was provided. It was received after the conclusion of the amnesty periods.

[21] On 29 May 2012 the NILSC wrote to the applicant noting that the claim was being submitted outside the statutory three month period and noting that '*you have not made any representations to advise that there are wholly exceptional circumstances*' and as such the applicant was advised that the claim would not be assessed for payment.

[22] The applicant made representations on 1 June 2012 in relation to this decision broadly related to the continuation of the matter in the Crown Court and the applicant's file handling system. On 5 July 2012 the NILSC considered these representations and decided to disallow the claim in full. This was confirmed to the applicant by letter dated 6 August.

William Wilders - Magistrates Court

[23] This cost claim was submitted on 27 March 2012 outside the statutory three month time limit and after the conclusion of the amnesty periods. The reasons given for delay related to keeping the file intact for the trial.

[24] The claim was considered on 26 April 2012 and it was decided not to assess the claim for payment. The applicant was informed of this decision by letter dated 28 June 2012. Since no further representations were made by the applicant the NILSC confirmed this decision on 6 August.

Sean McGavigan - Magistrates Court

[25] This cost claim was made on 25 April 2012 outside the statutory three month time limit and after the conclusion of the amnesty periods. The reasons given for delay related to keeping the file intact for the trial.

[26] The claim was considered on 3 May 2012 and disallowed pursuant to para 12 of the policy. The applicant was informed of this decision by letter dated 29 June 2012. Since no further representations were made by the applicant the NILSC confirmed its decision on 6 August.

McGavigan - Crown Court

[27] This cost claim was made on 25 April 2012 and submitted outside the statutory three month time limit and after the conclusion of the amnesty periods. The reasons given for delay related to keeping the file intact for the trial.

[28] This claim was considered on 3 May 2012 and disallowed pursuant to para 12 of the policy. The applicant was informed of this decision by letter dated 29 June 2012. Since no further representations were made by the applicant the NILSC confirmed its decision on 6 August.

Steven McCloskey - Magistrates Court

[29] This cost claim was made on 3 April 2012 submitted outside of the statutory three month time limit and after the conclusion of the amnesty periods and the reasons given for delay related to keeping the file intact for the trial.

[30] The claim was considered on 26 April 2012 and disallowed. This was confirmed to the applicant on 28 June 2012. Since no further representations were made the NILSC confirmed its decision on 6 August.

Ross Gamble - Magistrates Court

[31] This cost claim was made on 31 March 2012 outside the statutory three month time limit and after the conclusion of the amnesty periods. The reasons given for delay related to keeping the file intact for the trial.

[32] The claim was considered on 26 April 2012 and disallowed. This was confirmed to the applicant on 28 June 2012. By letter dated 18 July 2012 the applicant sought an extension of time citing the file handling system as the reasons and the acceptance of this as a good reason over the last 25 years. These further representations were considered on 2 August 2012 and were not considered to be 'wholly exceptional'. The decision to disallow in full was upheld and notified to the applicant by letter dated 23 August 2012.

Stefan Connolly - Magistrates Court

[33] This cost claim was made on 25 April 2012 outside the statutory three month time limit and after the conclusion of the amnesty periods. The reasons given for delay related to keeping the file intact for the trial.

[34] The claim was considered on 3 May 2012 and disallowed in full under para 12 of the policy. This was confirmed to the applicant by letter dated 29 June 2012. On 9 July 2012 the applicant made further representations to the NILSC in similar terms to those made in relation to the Ross Gamble case. These further representations were considered by on 2 August 2012 and were not considered to be wholly exceptional. The earlier decision was upheld and this was notified to the applicant by letter dated 23 August 2012.

Order 53 Statement

Relief Sought (Policy)

[35] In respect of the impugned policy the applicant sought the following relief:

- (a) A declaration that LSC Circular 04/12 is unlawful, unreasonable and incompatible with the LSC's obligations under rule 15 of Legal Aid in Crown Court Proceedings (Costs) Rules 2005 and / or Rule 19 of the Magistrates Court and County Court Appeals (Criminal Legal Aid) (Costs) Rules (NI) 2009;
- (b) An order of certiorari quashing circular 04/12.

Grounds upon which relief is sought (Policy)

[36] The grounds upon which the relief was sought in relation to (a) and (b) included:

- (a) Circular 04/12 is unlawful and unreasonable and effects a non-compliance and corruption of the LSC's duties under Rule 15 of the Legal Aid in Crown Court Proceedings (Costs) Rules 2005 or Rule 19 of the Magistrates Court and County Court Appeals (Criminal Legal Aid)(Costs)

Rules (NI) 2009 (hereinafter referred to as 'the extension provisions');

- (b) Para 7 of Circular 04/12 leaves out of account entirely and divests any assessor of the obligation to consider the defence of 'good reason' and removes from the assessor the duty to assess on a case by case basis whether good reason for late submission exists and is therefore a misdirection, a fettering of discretion and directs the decision-maker to leave a relevant factor out of account and therefore the policy is unlawful and in breach of the extension provisions in this regard as a result;
- (c) The policy, in particular at para 9, asserts that the Commission has divested itself of its statutory power to deem that a late claim has been submitted late for 'good reasons' where it states that 'the Commission is retaining discretion to accept a claim outside of the statutory time limit if it considers there to be exceptional circumstances' - as per the extension provisions, the exceptional circumstances consideration can only take place after it has been determined that no good reason exists; the presumption in the policy that one moves directly to a consideration of exceptional circumstances is a misdirection, a fettering of discretion, the leaving out of account of a relevant factor and is unlawful and in breach of the extension provisions;
- (d) At para 10 of the policy an application for extension must be made before the time limit has expired. At para 12 of the policy it is stated that 'where a claim has been submitted to the Commission after the statutory time limit has expired, and the practitioner has not sought prior authority for the time limit to be extended, the claim will not be accepted for payment'. This is unlawful in that it represents a requirement or presumption that exceptional circumstance are to be considered only in

advance of the expiry of the time limit which is contrary to the wording of the extension provisions in which retrospective and prospective applications are put on the same footing.

- (e) In para 12 of the circular it is stated that where there is no prior request for extension then 'the claim will not be accepted for payment', this is a breach of statutory duty and the assertion of a power that the Commission does not have - there is an obligation to consider 'exceptional circumstances' precisely at the point of receiving a claim where the representative has failed to comply with a time limit; a statement that such application will not be accepted for payment is at least a fettering of discretion or at worst a clear intent to flout the statutory duty to consider applications for exceptional circumstances after the fact; the requirement for a prior extension application coupled with the refusal to consider 'exceptional circumstances' at all where no prior extension application has been made represents a misdirection, a fettering of discretion, a failure to exercise the relevant statutory discretion properly or at all and is unlawful and in breach of the extension provisions.
- (f) Para 13 of the policy is unlawful in that 'wholly exceptional circumstances' is not a test which appears in the extension provisions, the imposition of such a test for a retrospective extension application represents a misdirection, a fettering of discretion and is unlawful, ultra vires and outwith the statutory discretion given to the LSC by the extension provisions.
- (g) The policy is unlawful in the manner in which it provides for financial penalties (at para 14), i.e. where it stipulates that financial penalties will be applied 'unless there are compelling reasons to vary the tariff'. This represents a fettering of statutory discretion and is

unlawful. The extension provisions require the decision-maker when finding 'exceptional circumstances' to 'consider whether it is reasonable in the circumstances to reduce costs'. There is no statutory presumption therein imposed to the effect that it is unreasonable not to reduce costs. Any such presumption would be unreasonable in a case of 'exceptional circumstances' in any event. Para 14 however operates a clear and strong presumption in favour of reducing and in some cases totally disallowing costs and is to that extent a misdirection, effects a fettering of discretion and is unlawful and in breach of the extension provisions.

- (h) The financial penalties under para 14 are in any event unlawfully imposed as they are imposed on foot of the policy at a time when the assessor has never considered in the first place whether there was a 'good reason' for 'late' submission in the case; if 'good reason' had been shown then no financial penalty would have been applicable at all as per the extension provisions;
- (i) The extent of the financial penalties imposed by paras 14 - 16 of the policy is disproportionate and unlawful. The statutory discretion in the extension provisions allows for a 'reduction' in the costs rather than allowing for a total disallowance of costs. In this regard paras 14-15 of the policy are ultra vires;
- (j) The general level of the financial penalties in para 14 is in any event disproportionate and unlawful and out of any comparison with previous disallowance. The general level of such penalties is contrary to common law and A1P1;
- (k) Para 14 fails to provide for any consideration of proportionality as to whether the penalty imposed is too harsh in all the circumstances;

- (l) The policy is unlawful in its retrospective effect. Prior to imposition of the policy practitioners operated under the assumption that 'lateness' in the submission of criminal legal aid claims would not work to their detriment. The policy retrospectively defeated that legitimate expectation in a manner that was unfair and represented an abuse of power.
- (m) In all the circumstances the policy provided no proper lead-in period;
- (n) The policy introduced financial penalties which are retrospective in effect without advance warning or with inadequate warning, in breach of a previously induced legitimate expectation, which were retrospectively punitive, substantially unfair and in breach of common law and the applicant's rights to property desired from A1 P1."

Relief Sought (Individual Decisions)

[37] The applicant challenges the following decisions:

- (a) The decisions of 18 May 2012 and 19 June 2012 in relation to Kenneth Hamilton;
- (b) The decisions of 21 May 2012 and 6 August 2012 in relation to Joshua Degnan / Crown Court;
- (c) The decisions of 21 May 2012 and 6 August 2012 in relation to Joshua Degnan / Magistrates Court;
- (d) The decisions of 29 May and 6 August in relation to Paul Vaughan;
- (e) The decision of 6 August 2012 in relation to William Wilders;
- (f) The decision of 6 August 2012 in relation to Sean McGavigan / Crown Court;

- (g) The decision of 6 August 2012 in relation to Sean McGavigan / Magistrates Court;
- (h) The decision of 6 August 2012 in relation to Steven McCloskey;
- (i) The decision of 23 August 2012 in relation to Ross Gamble;
- (j) The decision of 23 August 2012 in relation to Stefan Connolly.

[38] In relation to each decision above, the following relief was sought:

- (a) A declaration that each decision was unreasonable, unlawful and void;
- (b) An order of certiorari quashing each decision.

Grounds upon which relief is sought (Individual Decisions)

[39] The grounds upon which relief was sought in relation to the individual decisions was as follows:

Kenneth Hamilton

- (a) The NILSC failed to exercise any or any proper discretion on the applicant's application for an extension of time at all;
- (b) The NILSC fettered its discretion unduly by reference to its circular 04/12.
- (c) The NILSC in taking the impugned decisions operated an unlawful policy and its decisions are tainted by the unlawfulness of the policy it operated.
- (d) In taking its decision of 19 June 2012 the NILSC failed to observe its 'second amnesty' and incorrectly applied para12 of circular 04/12.
- (e) The NILSC failed to consider whether to depart from the tariff of financial penalties in the case

on grounds that the unfairness of the retrospective application of the policy constituted a compelling reason for not operating the financial penalties against the applicant.*

- (f) The NILSC failed to take into account the delay caused in submission of the report by either the inability to obtain the original indictment or the delay caused in obtaining the court log.
- (g) The NILSC failed to consider whether good reasons had been shown.
- (h) The NILSC failed to find that the applicant had shown good reason for the late submission of the claim.
- (i) The NILSC failed to find that there were exceptional circumstances.
- (j) The NILSC failed to recognise the long standing practice of accepting cases submitted late from the applicant and accepting them as being submitted late for good reason or in exceptional circumstances.
- (k) The NILSC violated the applicant's rights under Art 1 of the First Protocol.

Joshua Degnan - Crown Court

- (a) As a result of para 9 of the circular the NILSC ignored the question of whether there was 'good reason' in the case;
- (b) As the case was submitted during the second amnesty period the NILSC did not apply para12 of the circular and did not reject the claim purely on the basis that no prior extension application had been made in accordance with para10 of the policy;
- (c) Having accepted the claim as an 'exceptional circumstances' claim by dint of the above the

NILSC and without having considered whether 'good reason' applied in the case the NILSC applied the financial penalties which the circular presumes must apply in para14; as the claim was submitted 4 months after the proceedings concluded / 1 month late the NILSC applied a 5% financial penalty.

- (d) Having applied the financial penalty the NILSC considered whether full payment should be made, not on the basis of either 'good reason' or 'exceptional circumstance' but on the basis of the 'wholly exceptional circumstances' test set out in para 13 of the circular.
- (e) In taking their decision on 6 August 2012 the NILSC failed to give any consideration to the case; failed to properly consider the applicant's representations or ignored or misconstrued such representations as were made; failed to properly consider the case before it and irrationally considered that representations made by the applicant in correspondence dated 1 June 2012 provided 'no fuller explanation' for the delay than had hitherto been supplied, whereas in truth no explanation had been supplied before 1 June 2012 at all.
- (f) The NILSC failed to exercise any or any proper discretion on the Applicant's application for an extension of time at all.
- (g) The NILSC fettered its discretion unduly by reference to its circular 04/12.
- (h) The NILSC in taking the impugned decisions operated an unlawful policy and its decisions are tainted by the unlawfulness of the policy it operated.
- (i) In taking its decision of 19th June 2012 the Commission failed to observe its 'second amnesty' and incorrectly applied para12 of circular 04/12.

- (j) The NILSC failed to consider whether to depart from the tariff of financial penalties in the case on grounds that the unfairness of the retrospective application of the policy constituted a compelling reason for not operating the financial penalties against the applicant.
- (k) The NILSC failed to take into account the delay caused in submission of the report by the fact that an incorrect Court Log had been produced by Court Service.
- (l) The NILSC failed to consider whether good reasons had been shown.
- (m) The NILSC failed to find that the applicant had shown good reason for the late submission of the claim.

Joshua Degnan - Magistrates Court

- (a) As a result of para 9 of the circular the NILSC ignored the question of whether there was 'good reason' in the case.
- (b) As the case was submitted during the second amnesty period the NILSC did not apply para 12 of the circular and did not reject the claim purely on the basis that no prior extension application had been made in accordance with para10 of the policy.
- (c) Having accepted the claim as an 'exceptional circumstances' claim by dint of the above the NILSC and without having considered whether 'good reason' applied in the case the NILSC applied the financial penalties which the Circular presumes must apply in Para 14; as the claim was submitted 8 months after the proceedings concluded / 5 month late the LSC applied a 40% financial penalty.

- (d) Having applied the financial penalty the NILSC considered whether full payment should be made, not on the basis of either 'good reason' or 'exceptional circumstance' but on the basis of the 'wholly exceptional circumstances' test set out in para 13 of the circular.
- (e) The NILSC failed to exercise any or any proper discretion on the applicant's application for an extension of time at all.
- (f) The NILSC fettered its discretion unduly by reference to its circular 04/12.
- (g) The NILSC in taking the impugned decisions operated an unlawful policy and its decisions are tainted by the unlawfulness of the policy it operated.
- (h) The NILSC failed to consider whether to depart from the tariff of financial penalties in the case on grounds that the unfairness of the retrospective application of the policy constituted a compelling reason for not operating the financial penalties against the applicant.
- (i) The NILSC failed to consider whether good reasons had been shown.
- (j) The NILSC failed to find that the applicant had shown good reason for the late submission of the claim.
- (k) The NILSC failed to consider the implications of the legitimate expectation they had induced in the applicant as to the consequences of submission of a 'late' claim form.
- (l) The NILSC violated the applicant's rights under Article 1 of the First Protocol.

Paul Vaughan; William Wilders; Sean McGavigan – Crown Court; Sean McGavigan – Magistrates Court; Steven McCloskey; Ross Gamble; Stefan Connolly

- (a) As a result of para9 of the circular the NILSC ignored the question of whether there was 'good reason' in the case.
- (b) The NILSC failed to exercise any or any proper discretion on the applicant's application for an extension of time at all.
- (c) The NILSC fettered its discretion unduly by reference to its circular 04/12.
- (d) The NILSC in taking the impugned decisions operated an unlawful policy and its decisions are tainted by the unlawfulness of the policy it operated.
- (e) The NILSC failed to consider whether good reasons had been shown.
- (f) The NILSC failed to find that the applicant had shown good reason for the late submission of the claim.
- (g) The NILSC rejected the claim in its entirety and thereby asserted a power it did not have.
- (h) The NILSC in rejecting the claim in its entirety failed to have regard to the fact that this represented a 100% disallowance and failed to have regard to the proportionality of that action.
- (i) The NILSC in rejecting the claim in its entirety failed to accept that this represented a disproportionate penalty in breach of common law and Article 1 of the First Protocol.
- (j) The NILSC rejected the claim for payment on the basis that no prior extension application had been made and thereby fettered its

discretion, misdirected itself and acted ultra vires.

- (k) The NILSC failed to take into account the applicant's legitimate expectation as to how 'late' claims would be dealt with and acted with substantial unfairness and abuse of its power.
- (l) The NILSC failed to consider whether exceptional circumstances existed in the case.
- (m) The NILSC failed to find exceptional circumstances in the case.
- (n) The NILSC applied a 'wholly exceptional circumstances' test to the case in lieu of either a 'good reason' test or 'exceptional circumstance' test.
- (o) The NILSC violated the Applicants rights under Article 1 of the First Protocol.

Paul Vaughan

- (a) As the case was submitted during the second amnesty period the NILSC did not apply para 12 of the circular and did not reject the claim purely on the basis that no prior extension application had been made in accordance with para10 of the policy.
- (b) Having concluded that the claim was to be rejected in accordance with paras 10 and 12 the only basis on which the applicant might be paid in accordance with the policy was by way of the 'wholly exceptional circumstances' test in Paragraph 13; no wholly exceptional circumstances having been shown the claim remained rejected in its entirety on the basis that the claim was submitted some 13 days 'late'.

William Wilders

- (a) As the case was submitted during the second amnesty period the NILSC did not apply para12 of the circular and did not reject the claim purely on the basis that no prior extension application had been made in accordance with para 10 of the policy.
- (b) Having concluded that the claim was to be rejected in accordance with paras10 and 12 the only basis on which the applicant might be paid in accordance with the policy was by way of the 'wholly exceptional circumstances' test in Paragraph 13; no wholly exceptional circumstances having been shown the claim remained rejected in its entirety on the basis that the claim was submitted some 6 weeks late without prior extension application.

Sean McGavigan - Crown Court

- (a) As the case was submitted during the second amnesty period the NILSC did not apply para 12 of the circular and did not reject the claim purely on the basis that no prior extension application had been made in accordance with para 10 of the policy.
- (b) Having concluded that the claim was to be rejected in accordance with paras 10 and 12 the only basis on which the applicant might be paid in accordance with the policy was by way of the 'wholly exceptional circumstances' test in Paragraph 13; no wholly exceptional circumstances having been shown the claim remained rejected in its entirety on the basis that the claim was submitted some 1 or 2 days 'late' without prior extension application.
- (c) The NILSC failed to pay any regard to the fact that the submission of the Crown Court element of the claim in McGavigan's case had been delayed by the applicant's inability to obtain copies of the original bill of indictment and court log until 27 March 2012.

Sean McGavigan - Magistrates Court

- (a) As the case was submitted during the second amnesty period the NILSC did not apply para 12 of the circular and did not reject the claim purely on the basis that no prior extension application had been made in accordance with para 10 of the policy.
- (b) Having concluded that the claim was to be rejected in accordance with paras 10 and 12 the only basis on which the applicant might be paid in accordance with the policy was by way of the 'wholly exceptional circumstances' test in Paragraph 13; no wholly exceptional circumstances having been shown the claim remained rejected in its entirety on the basis that the claim was submitted some 3 weeks late with no prior extension application.

Steven McCloskey

- (a) As the case was submitted during the second amnesty period the NILSC did not apply para 12 of the circular and did not reject the claim purely on the basis that no prior extension application had been made in accordance with para10 of the policy.
- (b) Having concluded that the claim was to be rejected in accordance with paras 10 and 12 the only basis on which the applicant might be paid in accordance with the policy was by way of the 'wholly exceptional circumstances' test in Paragraph 13; no wholly exceptional circumstances having been shown the claim remained rejected in its entirety on the basis that the claim was submitted some 2 months late without prior extension application.

Ross Gamble

- (a) As the case was submitted during the second amnesty period the NILSC did not apply para12 of the circular and did not reject the claim purely on the basis that no prior

extension application had been made in accordance with para 10 of the policy.

- (b) Having concluded that the claim was to be rejected in accordance with paras 10 and 12 the only basis on which the applicant might be paid in accordance with the policy was by way of the 'wholly exceptional circumstances' test in Paragraph 13; no wholly exceptional circumstances having been shown the claim remained rejected in its entirety on the basis that the claim was submitted some 13 days 'late'.

Relevant Law

[40] The relevant sections of the Legal Aid in Crown Court Proceedings (Costs) Rules 2005 ("the 2005 Rules") provide:

4(2) In determining costs, the commission shall, subject to and in accordance with these rules -

- (a) take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved; and
- (b) allow a reasonable amount in respect of all work reasonably undertaken and properly done.

...

7(1) Subject to rule 19, no claim by a solicitor for costs in respect of work done under a criminal aid certificate shall be entertained unless he submits it within three months of the conclusion to which the criminal aid certificate relates or within three months of his receipt of a copy of the certificate, whichever is the later

...

(5) Where there are any special circumstances which should be drawn to the attention of the Commission, the solicitor shall specify them.

...

19(1) Subject to paragraph (2) the time limit within which any act is required or authorised to be done under these Rules may, for good reason, be extended -

- (a) in the case of acts required or authorised to be done under rule 14 or 15, by the taxing master or the High Court as the case may be; and
- (b) in the case of facts required or authorised to be done by a representative under any other rule, by the commission

(2) Where a representative without good reason has failed (or, if an extension were not granted, would fail) to comply with a time limit, the Commission, the taxing master or the High Court, as the case may be, may, in exceptional circumstances, extend the time limit and shall consider whether it is reasonable in the circumstances to reduce the costs; provided that the costs shall not be reduced unless the representative has been permitted a reasonable opportunity to show cause orally or in writing why the costs should not be reduced.

(3) A representative may appeal to the taxing master against a decision made under this rule by the Commission and such an appeal shall be instituted within 21 days of receiving notification of the decision by giving notice in writing to the taxing master specifying the grounds of appeal.

[41] The relevant sections of the Magistrates Court and County Court Appeals (Criminal Legal Aid) (Costs) Rules (NI) 2009 ("the 2009 Rules") provide:

6(3) Subject to rule 15, no claim by a solicitor for costs in respect of work done under a criminal aid certificate shall be entertained unless the solicitor

submits it within three months of the conclusion of the proceedings to which it relates.

15(1) Subject to paragraph 2, the time limit within which any act is required or authorised to be done under these rules, may, for good reason, be extended -

- (a) in the case of acts required or authorised to be done under rule 13, by the taxing master; and
- (b) in the case of any acts required or authorised to be done by a representative under any other rule, by the Commission

(2) where a representative without good reason has failed (or if an extension were not granted, would fail) to comply with a time limit, the Commission or the taxing master, as the case may be, may, in exceptional circumstances, extend the time limit and shall consider whether it is reasonable in the circumstances to reduce the costs; provided that the costs shall not be reduced unless the representative has been permitted a reasonable opportunity to show cause orally or in writing why the costs should not be reduced.

(3) A representative may appeal to the taxing master against a decision made under this rule by the Commission and such an appeal shall be instituted within 21 days of receiving notification of the decision by giving notice in writing to the taxing master specifying the grounds of appeal.

[42] The relevant sections of the Legal Aid in Criminal Proceedings (Costs) Rules (NI) 1992 (“the 1992 Rules”) provide:

4(3) In determining costs the appropriate authority shall, subject to and in accordance with these rules-

- (a) take into account all relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved, and

- (b) allow fair remuneration according to the work reasonably undertaken and properly done.

5(1) Subject to rule 16, no claim by a solicitor for costs in respect of work done under a criminal aid certificate shall be entertained unless the solicitor submits it within three months of the conclusion of the proceedings to which the criminal aid certificate relates

...

16(1) Subject to paragraph (2), the time limit within which any act is required or authorised to be done may, for good reason, be extended:-

- (a) in the case of acts required or authorised to be done under rule 13, 14, or 15, by the taxing master or the High Court as the case may be;
- (b) in the case of acts required or authorised to be done by a solicitor or counsel under any other rule by the appropriate authority.

(2) Where a solicitor or counsel without good reason has failed (or, if an extension were not granted, would fail) to comply with a time limit, the appropriate authority, the taxing master or the High Court, as the case may be, may, in exceptional circumstances, extend the time limit and shall consider whether it is reasonable in the circumstances to reduce the costs; provided that costs shall not be reduced unless the solicitor or counsel has been allowed a reasonable opportunity to show cause orally or in writing why the costs should be reduced.

(3) A solicitor or counsel may appeal to the taxing master against a decision made under this rule by an appropriate authority in respect of proceedings other than proceedings before a magistrates' court and such an appeal shall be instituted within 21 days of the decision being given by giving notice in writing to the taxing master specifying the grounds of appeal.

[43] The relevant paragraphs of the circular are as follows:

“Late Submission of Legal Aid Claims

1. This circular is to advise practitioners of the Northern Ireland Legal Services Commission’s (“the Commission”) new policy and procedures for the assessment of legal aid claims that are not submitted within the statutory timeframes. The legislative references governing the application of this policy and procedures, including the practitioner’s right to appeal are provided at **Annex A**.
2. This circular replaces the existing arrangements previously set out in the 1988 Guidance – “Guidance for Enforcement of Time Limits for Submission of Costs Claims.” Practitioners will wish to note that the Commission has used the opportunity to review the penalties that will be imposed should it conclude that exceptional circumstances apply and that an extension to the relevant statutory time limit for the submission of the claim should be allowed.

Scope of the new Policy and Procedures

3. The new policy and procedures become effective from **7 February 2012** and apply to claims submitted under the following scheme: Criminal, Legal Advice and Assistance and Assistance by Way of Representation. Practitioners are therefore encouraged to submit any claims that have not been submitted within the statutory time frames as soon as possible. No penalties will be incurred for any outstanding claims submitted up to and including 6 February 2012.
4. From **7 February 2012**, the Commission will strictly apply the legislative time limits for the submission of claims following the conclusion of legal proceedings. For example, any claim submitted under the Magistrates Court and County Court Appeals (Criminal Legal Aid)

(Costs) Rules (NI) 2009, must be submitted within three months of the conclusion of the proceedings to which the criminal legal aid certificate relates.

The Reasons why the Commission is issuing new Guidance at this time

5. The Value for Money Review of the Criminal Legal Aid Scheme, conducted by the Northern Ireland Audit Office (“the NIAO”) was critical of the robustness of the Commission’s handling of claims for payment submitted after the statutory time limit had expired. In responding to the NIAO’s recommendations, the Commission considered it appropriate to review its procedures for the handling of late claims.
6. While the NIAO review was focused on the Criminal Legal Aid Scheme, the Commission considers this recommendation to be relevant to the Legal Advice and Assistance Scheme (LAA) and the Assistance by Way of Representation Scheme (ABWOR).
7. When developing this policy and associated procedures, the Commission recognises that the introduction in recent years of standard fees removes the need for practitioners to compile and submit detailed reports and notes of time spent on cases. The introduction of standard claim forms further facilitates the timely submission of claims for assessment and payment. As such, it is considered that claims should be submitted within the statutory period.
8. The new policy and procedures do not, at this time, apply to civil legal aid claims. The Commission does, however, intend to review the position in respect of all civil cases. In the interim, Regulation 15(14A) of the Legal Aid (General) Regulations (NI) 1965 will continue to be applied.

Representation for the Acceptance of Late Claims

9. The Commission recognises, however, that circumstances can prevail which prevent the practitioner from submitting a claim within the statutory time frame. As such, the Commission is retaining discretion to accept a claim outside of the statutory time limit if it considers there to be exceptional circumstances ie the practitioner could not reasonably be expected to have submitted the claim on time.
10. In circumstances where it becomes apparent that, due to exceptional circumstances, the claim cannot be submitted within the statutory time frame from the proceedings concluding, the Practitioner should write to the Commission in advance seeking an extension to the statutory time limit. The request should clearly set out the reasons for the claim being late, together with the date when it is anticipated that the claim will be submitted. Practitioners should also make such representations as they consider appropriate as to the application of any penalty as outlined at paragraph 14.
11. Should the Commission concur that exceptional circumstances prevail, the practitioner will be provided with written confirmation that the statutory time limit will be extended, the date of the extension and details of any financial penalty that may be applied, based on the Commission's consideration of the representations made on this issue. In keeping with the statutory framework, the practitioner retains the right to appeal to the Taxing Master the Commission's decision to refuse an extension and any financial penalty imposed if an extension is allowed.
12. Where a claim has been submitted to the Commission after the statutory time limit has expired, and the practitioner has not sought

prior authority for the statutory time limit to be extended, the claim will not be accepted for payment. The practitioner will receive formal confirmation that it has not been assessed for payment as it was received after the statutory time limit expired. In keeping with the statutory framework, the practitioner retains the right to make representations and to appeal to the Taxing Master the Commission's decision not to assess the claim for payment.

13. The Commission has also retained discretion to consider, in wholly exceptional circumstances, claims submitted outside the statutory timeframe and for which no prior authority was obtained. In such cases, the practitioner should provide full details as to why the circumstances are wholly exceptional. The Commission will consider the penalty to be imposed against the range of tariffs set out below.

Financial Penalties

14. As advised at paragraphs 10 and 11 above, the Commission retains discretion to impose a range of financial penalties should it be agreed that exceptional circumstances prevail. In such circumstances, the following tariff system of deductions will be applied unless there are compelling reasons to vary the tariff:
 - 5% for claims submitted 4 months after the proceedings have concluded.
 - 10% for claims submitted 5 months after the proceedings have concluded.
 - 20% for claims submitted 6 months after the proceedings have concluded.
 - 30% for claims submitted 7 months after the proceedings have concluded.
 - 40% for claims submitted 8 months after the proceedings have concluded.
 - 50% for claims submitted 9 months after the proceedings have concluded.

- 60% for claims submitted 10 months after the proceedings have concluded.
 - 70% for claims submitted 11 months after the proceedings have concluded.
 - 80% for claims submitted 12 months after the proceedings have concluded.
 - 90% for claims submitted 13 months after the proceedings have concluded.
 - 95% for claims submitted 14 months after the proceedings have concluded.
15. Any claim submitted after 15 months from the conclusion of proceedings will not be assessed for payment.

..."

Arguments

Applicants Arguments

[44] The applicant submitted that the 2005 Rules and the 2009 Rules were intended to work in the same way as the 1992 Rules and that the manner in which the 1992 rules were intended to work is as follows:

- By rule 5(1) claims were to be submitted within 3 months of the conclusion of criminal proceedings.
- This time limit was subject to rule 16 which allowed for the extension of time for the submission of claims or allowed claims to be admitted late with penalties imposed.
- By rule 16 the time limit could be extended for 'good reason'. In relation to this the Applicant submits that it had always laboured under the impression that its system of working on files and thus submitting cases 'late' constituted 'good reason'.
- By rule 16, even where no good reason was shown the time limit might be extended for 'exceptional circumstances'.

- The extension of this time limit for 'exceptional circumstances' (like the extension for good reason) applied equally whether an application for extension was made before or after the expiry of the time limit - this is shown by the language of 16.2 which states 'Where a solicitor or counsel without good reason has failed (or if an extension were not granted, would fail) to comply with a time limit'.
- Where an application for extension on grounds of 'exceptional circumstances' was granted then the relevant decision maker 'shall consider whether it is reasonable in all the circumstances to reduce the costs'; this provision stated expressly that there was a discretion, not a duty, to reduce the costs; moreover the discretion was as to a 'reduction' of costs and not a total disallowance.

[45] The applicant submitted that this interpretation of the 1992 Rules is confirmed by authority and that the operation of the 2005 and 2009 Rules require the decision maker to require in the following manner:

- to consider each case on the merits on a case by case basis and without any undue fetter on discretion.
- to consider each case on the merits on a case by case basis whether or not the claim for extension is made before or after the expiry of the initial statutory deadline.
- to consider in that regard whether 'good reason' is shown for the late claim - if a late claim is submitted with good reason then the claim should be paid in full.
- if, and only if it is considered that no 'good reason' is shown then the decision-maker should consider whether there are 'exceptional circumstances'.
- if 'exceptional circumstances' are found then the decision-maker should consider, again on a case-by-case basis and without any undue fetter, whether it is reasonable in the circumstances to reduce costs - the

power here is to 'reduce and not to totally disallow costs.

[46] The applicant submitted that the policy is unlawful in the *Padfield* sense, in that it directs decision makers to exercise their discretion in a manner that does not accord with the intention of the legislator. Further the applicant submitted that the policy is a corruption of the statutory decision making model provided for in the 2005 and 2009 Rules for the following reasons:

- The leaving out 'good reason' consideration at para 7 removes from the assessor any duty to assess on a case by case basis and is therefore a misdirection, a fettering of discretion, a direction to the decision maker to leave a relevant factor out of account and is therefore unlawful.
- At para 9 were the policy expressly retains the discretion to consider 'exceptional circumstances' but not the 'good reasons' consideration the policy goes against the statutory flow whereby exceptional circumstances cannot be entered into until after the good reasons consideration and therefore represents a misdirection, a fettering of discretion, and the leaving out of account of a relevant factor and is therefore unlawful.
- In insisting that an exceptional circumstances extension must be applied for in advance is contrary to the statutory extension provisions and an assertion of power that the LSC does not have. It is further a fettering of discretion or an attempt to flout the statutory duty, misdirection, a failure to exercise the relevant statutory discretion properly or at all. (paras 10 & 12).
- The wholly exceptional circumstances test at Para 13 is not provided for in the extension provisions and the imposition of such a test for a retrospective extension application represents a misdirection, a fettering of discretion and is unlawful and ultra vires.
- Where the policy permits the decision maker to allow for exceptional circumstances Para 14 stipulates that a tariff of financial penalties will be applied 'unless there are compelling reasons to vary the tariff'. The

applicant submits that this is a fettering of discretion and is unlawful as the statutory extension provisions require that the decision maker is to consider, where there are exceptional circumstances, whether or not it is reasonable in the circumstances to reduce costs.

- The applicant submits that the financial penalties imposed by para 14 are in any event unlawful as they are imposed without good reason consideration. If there was good reason consideration and good reason had been shown then no penalty would have been applicable at all.
- The applicant submits that the financial penalties are disproportionate and unlawful. The statutory discretion allows for a 'reduction in the costs. It does not allow for total disallowance of costs. Para 14 is ultra vires in this regard.
- The general level of financial penalties in para 14 is disproportionate and unlawful and out of comparison with previous allowances. The general level of the penalties are contrary to common law and article 1 of the first protocol.
- The applicant submits that para 14 fails to provide for any consideration of proportionality as to whether the penalty imposed is too harsh in all the circumstances.

[47] A particular course of conduct was followed prior to January 2012. The applicant relied upon this course of conduct and legitimately expected that it would continue. The applicant's legitimate expectation is characterised in the following ways:

- The applicant would legitimately expect that late cases submitted per the applicant's admin practice would be accepted as being late for 'good reason' or accepted for payment for only minimal deduction.
- The applicant would legitimately expect that late cases would be accepted as being late for 'good reason' or in 'exceptional circumstances' without the need for any prior prospective application.

- The applicant had a legitimate expectation that the initial statutory time limit was not being enforced so as to entirely disallow payment on late files.

[48] The retrospective application of the policy made work done by the applicant in the named cases effectively worthless by virtue of the new strict application of the time limit and by virtue of the fact that the applicant did not make prior applications for extensions of time.

[49] This retrospective application and the lack of any or any proper advance warning was in breach of his legitimate expectation, and was unfair and oppressive so as to represent an abuse of power.

[50] The applicant submitted that in dealing with the instant claims the NILSC failed to properly consider whether the unfair and oppressive nature of the application of the policy should be accommodated within the policy itself by considering whether these circumstances represented 'compelling reasons', or 'wholly exceptional circumstances' to operate the policy waivers in paras 13 and 14 of the policy.

[51] The applicant submitted that the impugned policy is unlawful per se and that the retrospective implementation of the policy was unlawful.

Arguments in relation to Respondents Reply

[52] The applicant submitted that the respondent's affidavit did not comply with its duty of candour in judicial review proceedings.

[53] The applicant submitted that the change of policy cannot be explained or justified by reference to the supposition that it is now much easier and simpler to make claims for criminal cases. The respondent's policy prior to January 2012 applied without complaint to the simple procedures under the 2005 and 2009 rules. There is no material difference between criminal legal aid claims made prior to January 2012 under any of these rules and claims made subsequent to January 2012.

[54] The applicant submitted that the prior policy was considered policy which addressed the proportionality of penalties in the context of balancing the need for speedy submission of claims as against the need to remunerate solicitors for reasonable work done. The applicant further submitted that the Respondent nowhere avers to a similar balancing exercise being performed in relation to this new policy. Further the applicant submits that the Respondent does not aver at any stage that the policy or decisions taken under it were proportionate. In the context of a Judicial review challenge where the impugned policy and the decisions taken

under it are said to be disproportionate and in violation of a1p1 the applicant submits that this is significant.

[55] The applicant submitted that no reliance can be placed upon the consultation with the profession generally as it was not a bona fide consultation.

Respondents Arguments

[56] Legal aid for criminal proceedings in the Magistrates' Court and the Crown Court is governed by two separate schemes and is administered under different statutes. Both schemes provide for a 3 month time limit and have provisions for extensions of time.

[57] The respondent argued that the relevant test for the legality of the policy adopted by the Commission is one of 'consistency' and that the compatibility of a policy with its governing legislation should be judged on the basis of an objective comparison with the governing legislation.

[58] The respondent submitted that where a policy admits of more than one interpretation, one of which would involve the authority acting consistently with the governing legislation and one of which would not, the Court should favour a consistent interpretation where it is possible to do so. Consequently it is submitted that the Court should not find that a policy is unlawful by reason of an inconsistency, unless required by the clear wording of both the policy and the legislation to do so.

[59] Individual decisions, taken pursuant to the policy should be judged on their own merits. Even if aspects of the policy are considered to be inconsistent with the legislation and ultra vires, it may not necessarily follow that the individual was unlawful. To be compatible, the policy provision need not be a 'mirror image' of the legislative provisions. Compatibly implies that there may be differences. The test should be based upon an analysis of the substance of the two provisions. The respondent submitted that there has been no leave granted to challenge the legality of the consultation exercise with the NILSC.

Good Reasons v Exceptional Circumstances

[60] The respondent refuted the allegation that para 7 is unlawful in that it does not take into account the power to extend time for good reasons. The Respondent asserts that this paragraph does not make an unqualified assertion about submitting claims within the statutory time period. Instead, the Respondent asserts that this paragraph is introductory and aspirational in nature. Furthermore it is submitted that para 7 should not be read in isolation and that paras 10, 11 and 12 make clear that the LSC will operate a discretion to extend time, in respect of extension applications made both before and after the statutory time limit.

[61] The respondent argued that the difference in wording between the policy extension provisions and the legislative extension provisions does not of itself demonstrate that the policy is ultra vires (ie that the legislative provisions provide that time can be extended for 'good reasons' whereas the policy states that time can be extended where there are 'exceptional circumstances'). The respondent made a number of points to support this submission:

- The comparison between the extension provisions must not, as here, be based on the wording of the sections only, but on the substance of the provisions.
- The key feature of Rules which permit an extension of time for 'good reason' is that they authorise the LSC to exercise a discretion on the facts of any particular case about whether the claim should be 'entertained'. In the absence of a definition of 'good reason' within the Rules, the LSC is fully entitled to form its own views on the issue and give guidance on how it is likely to exercise the discretion vested in it. In doing so, it is submitted that the LSC's approach should only be considered unlawful if it is either irrational in the Wednesbury sense, or it is clearly contrary to the provisions of the rules.
- Neither the 2005 nor 2009 Rules contain any definition of the term 'good reasons' or any indication of what should or should not be considered a good reason. It is therefore appropriate that the term should be construed by reference to the remainder of the Rules and the administrative systems for payments which have been established to implement their terms.
- In considering what definition should be given to defining the term 'good reasons' there are two aspects of the rules which are relevant.
- First, in both sets of rules the extension of time provisions are supplementary to a general time limit which also provides expressly for a sanction in the event of non-compliance (i.e. no claim shall be entertained after the time limit). The general rule is therefore one of exclusion in the event of delay.

- Second, the payment schemes established by the rules are substantially different from those contained in the previous rules. Both rules contain a system of fixed fees, whereby payment is calculated by reference to easily accessible tables within the rules. Payment procedures are also streamlined to ensure there are unlikely to be problems in the submission of the claim form.
- The old policy was very permissive and did not properly reflect the prohibition against entertaining late claims. The new policy is an expression of intent that the previous permissive approach would no longer be applied and that the structure of the legislation would be followed much more strictly, with an onus upon practitioners to justify payment in cases which were submitted late.
- It is submitted that the term '*exceptional circumstances*' used within the policy is entirely faithful to and consistent with the rules. It makes clear that the LSC will continue to operate discretion to entertain late claims, as required. The words '*exceptional circumstances*' represent nothing more than an expression of the LSC's general approach that under the new systems, there are likely to be a limited number of circumstances in which it will be considered that the practitioner might not have been able to complete and submit his claim within three months. There should be something 'exceptional' about the circumstances, or some exceptional impediment. The statutory discretion is maintained, the approach is rational and legitimate.
- The Applicant's submission appears to be premised upon the assumption that the term 'good reason' represents a statutory definition which encompasses a fixed set of circumstances, which in turn do not alter with time. It is submitted that this is incorrect. Instead it is submitted that the term establishes the discretion to extend time. Further it is submitted that the circumstances in which discretion might be exercised can change from time to time.

- It is submitted that the wording is consistent with the rules. It provides guidance on how the LSC is likely to exercise its discretion to extend time, which in turn reflects the circumstances surrounding the operation of the new payment systems.

Exceptional Circumstances v Wholly Exceptional Circumstances

[62] Again the focus is on language rather than the substance of the legislative provisions. The legislation provides that in the absence of good reasons for an extension of time, a practitioner may still obtain payment if there are exceptional circumstances, albeit that the LSC must also consider making a deduction. Para 14 of the policy makes clear that it will operate this residual discretion.

[63] The policy simply offers guidance on how the NILSC will approach both aspects of the discretion - i.e. entertaining the claim in the first place and the extent of deductions which it will generally apply.

[64] The policy is strict, but a firm general approach to the exercise of discretion does not amount to a fetter, an abdication or irrationality. It simply makes clear that the NILSC will normally only exercise its discretion in more limited circumstances. It is contended that this approach is entirely in line with the legislation and is a rational reflection of the more streamlined administrative changes which support the new fee system.

Applications for extensions before expiry

[65] The respondent submitted that this approach is not inconsistent with the rules for the following reasons:

- The general approach of the legislation is exclusionary for late claims. A policy which maintains that exclusionary approach by seeking to clarify the issue of an extension, within time, is entirely consistent with the general rule.
- The rules are silent upon when an extension of time application should be made. It is therefore not inconsistent with the Rules to adopt a general approach that the application should be made within time.

- Insofar as the Applicant contends that the Rules permit extension of time applications to be made after expiry of the time limit, the policy continues to reflect this entitlement. As set out above, para 12 makes expressly clear that practitioners can still make representations in favour of an extension of time, if the claim is submitted after expiry of time. This is evident from (a) the section of the form in which the practitioner is invited to advance any good reasons for an extension of time. If no prior extension has been obtained and the claim form is submitted outside time, this section only has meaning if the LSC actually proposed to consider the extension application. (b) a late claims committee has been established to determine applications for extensions of time. The individual claims in this case demonstrate that the committee considered the reasons for late claims notwithstanding that a claim is submitted outside time.

Financial Deductions

[66] The 2005 and 2009 Rules provide that a claim may still be allowed in exceptional circumstances, but also that the LSC should consider whether it is reasonable to reduce the amount payable. In short, where the LSC proposes to exercise its residual discretion to entertain the claim, it must also consider exercising its discretion to reduce the claim.

[67] It is submitted that the policy is entirely consistent with these requirements and within the proper boundaries of the discretion which has been vested in the LSC.

[68] The policy reflects the fact that the NILSC has a discretion to reduce a claim and also that it must consider exercising it in the event of exceptional circumstances.

[69] The Rules do not prescribe the circumstances when it might be considered reasonable to reduce the claim. The LSC therefore has a discretion to determine those circumstances for itself subject to the boundaries of rationality. The policy adopts the general approach that deduction will normally be considered reasonable unless there are '*Compelling circumstances*'.

[70] The policy makes clear that the general approach is not rigid or inflexible. Practitioners remain free to submit representations as to why no deduction should be made or why the scale for reductions should not apply.

[71] The rules do not provide any guidance on the approach which should be adopted to the amount of any deduction. The use of a sliding scale had been endorsed in *Re Nagra* and found to be rational.

[72] Again a firm approach is evident but it is rational and within discretion.

[73] The entitlement of the practitioner to make representations about making a deduction in any individual case provides an adequate safeguard against a lack of proportionality in that particular case.

[74] Any decision by the NILSC on the size of the deduction can be appealed to the Taxing Master. This is an adequate safeguard against disproportionality. The appeal is a full merits appeal in which the Taxing Master can exercise his own discretion, as he sees fit, without any reference to any scale and taking into account all material factors.

[75] In only two of the individual claims was a deduction made. In the remaining cases, the issue of the proportionality of the sliding scale of deductions does not arise as in those cases the claims were refused entirely because they were late.

[76] The policy respects and reflects the NILSC discretion to extend time and impose no penalty.

Legitimate Expectation/Retrospectivity

[77] The respondent submitted that no legitimate expectation has lawfully arisen. There has been no unequivocal or unconditional representation to that effect.

[78] If such a representation could be derived from prior practices it is not legitimate to consider that such practices must continue.

[79] Such an expectation is contrary to the general exclusionary principle.

[80] It is perfectly lawful that the LSC should decide to change its previous practices. At most, practitioners might have an expectation of sufficient notice and clarity about the introduction of the new practices. It is submitted that any such expectation has plainly been met in the case in light of the consultation which has taken place with professionals, the publication of the new policy, the circulation of the policy amongst subscribers to the email service and also the lead-in time contained within the policy and the amnesty periods.

[81] It is wrong to characterise the policy as having retrospective effect. The policy applied only prospectively to claims submitted after its introduction. It had no application to claims which had already been made.

Candour

[82] The respondent has fully discharged its obligations to the court.

Discussion

[83] The extension provisions are one part of the rules which govern the administration of the criminal legal aid schemes. The NILSC is the relevant authority vested with the responsibility for this administration. The Rules govern all aspects of criminal legal aid: when it can be claimed, how it can be claimed, by whom it can be claimed etc. The NILSC is to operate within these rules. Within the rules there is a certain amount of discretion granted to the NILSC. The NILSC has authority to use this discretion as it sees fit, so long as it does not use its discretion to undermine the objectives of the scheme itself or stray outside the bounds of the powers actually vested in the NILSC.

[84] In the context of the extension provisions the discretion granted to the NILSC is outlined below.

[85] The extension provisions in the 2005 Rules and 2009 Rules are virtually identical to the extension provisions in the 1992 Rules which were considered in the *Nagra* cases. They are also virtually identical to the extension provisions contained in the criminal legal aid rules in England and Wales. The manner in which these extension provisions ought to be applied has been considered in both jurisdictions and the conclusion has been the same.

[86] In *Re Nagra* [2003] NIQB 76 Weatherup J summarised the extension provisions as follows at para3 of his judgement:

“The scheme of the 1992 Rules provides that -

- (a) A claim by a solicitor should be made within three months of the conclusion of the proceedings (Rule 5).
- (b) The three months time limit may be extended ‘for good reason’ (Rule 16(1)(b)). If so extended the claim is paid in full.
- (c) The three months time limit may be extended ‘in exceptional circumstances’ and in that event it will be considered whether it is reasonable to reduce the costs to be paid (Rule 16(2)).
- (d) If the time limit is not extended no payment will be made on a late claim.

- (e) An appeal from the Appropriate Authority lies to the Taxing Master.... (Rule 16(3))”

[87] In R v North Kent Justices, ex parte McGoldrick & Co [1995] 160 JP 30 Schiemann J considered the circumstances in which the time to submit costs could be extended:

‘The relevant Regulations are Regulations 6 and 12.

Regulation 6(1) reads:

“Subject to Regulation 12, no claim for costs shall be entertained unless it is submitted within three months of the date on which the costs order was made.”

Regulation 12(1) reads:

“Subject to paragraph (2), the time limit within which there must be made or instituted-

(a) A claim for costs by an applicant under Regulation 6... may, for good reason be extended by the appropriate authority...

(2) Where an applicant without good reason has failed (or, if an extension were not granted, would fail) to comply with a time limit, the appropriate authority... may, in exceptional circumstances, extend the time limit”

Regulation 12(2) clearly addresses both applications made before the expiry of the three-month limit and applications made after the expiry of that limit. That follows from the words “has failed (or, if an extension was not granted, would fail)”.

Regulation 12(2) is dealing with cases where there was no good reason for failure to comply with the time limit. By definition we are therefore dealing with procedurally unmeritorious cases. The “Exceptional circumstances” referred to in that paragraph must relate to something other than explanations for failing to submit the applications in time. In my judgement this follows from the opening words of this paragraph.

Regulation 12(1) on the face of it applies both to applications within and outwith the three month time limit. If procedurally unmeritorious cases can be considered outside the three month time limit, then there is no reason to impose a more restrictive regime on those which are procedurally more meritorious, the more so since the opening words of para 2 preclude the procedurally more meritorious cases from being considered under that paragraph. It follows that in the case of an application made after the expiry of the three-month time limit, nothing in para 12(1) prevents the time limit from being extended for good reason. That good reason needs to relate to the question: 'Why was the application not made within three months?'

Regulation 12(2) is, as the opening words make clear, not concerned with the question of why a delay occurred. It is concerned with whether there are exceptional circumstances which should lead the decision-making body to extend the time, notwithstanding that there was no good reason for the delay. In the present case it seems clear that the clerk construed reg 12(1) in such a way that in cases where the application to extend time was made after the expiry of the three months, it prevented him from considering whether or not there was a good reason for the failure to apply within three months. That, as I have indicated, was a misconstruction. It also seems clear in the present case that the clerk construed reg 12(2) in such a way that the exceptional circumstances there referred to must relate to the reasons for the failure to apply within three months. That was also in my judgement a misconstruction.

... The second of these misconstructions is implicit in ... in which he refers to reg 12(2) as imposing a stricter test than in para 12(1). As I have indicated, the test is no stricter, it is different.'

[88] The impugned policy is intended as a guide to the manner in which the NILSC will exercise the discretion granted to it in the rules. It is a guide for decision makers and practitioners alike.

[89] However, in writing this impugned policy, the NILSC has strayed beyond creating a guide as to how they will use their statutorily granted discretion, and have

instead fundamentally changed the nature and extent of the discretion they will apply to cost claims submitted late. This has occurred in a number of ways.

[90] In the first instance, the NILSC has entirely jettisoned their discretion to decide whether there are 'good reasons' for the late submission of a costs claim. Making a decision on this issue is essential in order for the NILSC to meet the statutory requirement to make full payment on cost claims submitted late for good reason. That is, the LSC in this policy have divested itself of the ability to perform this part of its functions and in this regard the policy is unlawful.

[91] Second, the NILSC has jettisoned their discretion to decide whether there are 'exceptional circumstances' which justify the payment of cost claims submitted late where representations in relation to those circumstances are made after the expiry of the statutory time limit. In place of this statutory discretion they have substituted a narrower test whereby they can make such payment if there are 'wholly exceptional circumstances'. That is the NILSC in this policy have significantly departed from the statutory scheme and unlawfully fettered their discretion and in this regard the policy is unlawful.

[92] Thirdly, the NILSC have jettisoned their discretion to decide whether, in the event of a costs claim submitted after the statutory time limit for exceptional circumstances, it is reasonable in the circumstances to reduce the costs. In place of this statutory discretion they have substituted a narrower 'test' whereby pre-set penalties will apply unless there are 'compelling reasons' to vary the tariff. That is, the LSC have fettered their discretion and in this regard the policy is unlawful.

[93] Fourthly, in substituting the narrower 'test' in relation to the financial sanctions to be applied in exceptional circumstances and imposing a pre-set scale of penalties the NILSC have jettisoned their discretion to decide if a sanction is proportionate and have divested themselves of their ability to perform their statutory duty to allow a reasonable amount in respect of all work reasonably undertaken and properly done. In this regard the policy is unlawful.

[94] Fifthly, in adopting a sliding scale of financial penalties in the event of 'exceptional circumstances' for late submission of costs which mandates that no payment at all will be made for claims submitted 15 months late or more, the LSC are asserting a power they do not have.

Individual Decisions

[95] I can find no reading of the policy which would be consistent with the Rules. For this reason the individual impugned decisions under the policy cannot stand.

Conclusion

[96] For these reasons the judicial review is allowed.