

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

Delivered:	14/06/12
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY MATTHEW KELLY FOR JUDICIAL REVIEW

Kelly's (Matthew) Application [2012] NIQB 42

TREACY J

Introduction

[1] The applicant sought legal aid in relation to a medical negligence claim in early 2009. Legal aid was granted subject to a contribution by the applicant of £1657.00. This figure was arrived at pursuant to the outcome of an assessment of his disposable income and disposable capital. His disposable capital was assessed at Nil.

[2] The applicant challenges the calculation of his disposable income and the corollary contribution to the legal aid fund.

Background

[3] At the time of the application the applicant was in receipt of net yearly salary /wages of £9829.00. He was living with his sister and paid a weekly contribution to her of £60 for board and lodging.

[4] In making its assessment of the applicant's eligibility for legal aid, the Legal Aid Assessment Office ('the LAAO') deducted the Lower Income Limit of £3156 from his disposable income. The Court has heard that the Lower Income Limit is a statutory amount applied to all legal aid applicants representing a notional amount to cover day to day expenses. The LAAO also deducted the sum of £3120 representing his weekly outgoing of £60 for board and lodging.

[5] Before the disputed sum for 'Benefit in Kind/Free Keep' was considered the applicant's disposable income at the time equalled £3463.00. (A weekly disposable income of £66.60)

[6] The subject matter of this application is the amount of £1420.00 of 'Benefit in Kind/Free Keep' added to the assessment of the applicant's income. When this sum is added to his income, his yearly disposable income is £4973.00 (or £95.63 weekly).

[7] Under the Legal Aid, Advice and Assistance (NI) Order 1981 ("the 1981 Order") at 12(1)(a), an applicant earning disposable income in excess of £3156.00 may be liable to pay a contribution of up to one third of that excess. In the applicant/s case, one third of the excess of disposable income, when taken to include the amount of £1420.00 in 'Free Keep' is the £1657.60 that is challenged.

Relief Sought

[8] The applicant seeks certiorari of the decision to require him to make a contribution of £1657.60 and a declaration that the Legal Aid Assessment Office's practice of treating the value of food and heating as a benefit in kind to be added to a person's income is unlawful.

Statutory / Regulatory Framework

[9] The authority regulating the Legal Aid scheme, including the powers of the Legal Aid Assessment Office in determining financial means, is found in the Legal Aid, Advice and Assistance (NI) Order 1981 ("the 1981 Order"). The relevant sections are set out below:

"Persons Eligible for Legal Aid

9.-(1) Legal Aid to which this article applies shall, subject to and in accordance with the provisions of this part, be available for any person whose disposable income does not exceed £10,306.00 (for personal injury claims) but a person may be refused legal aid if -

- a) His disposable capital exceeds £8560
- b) It appears that he can afford to proceed without legal aid

...

Contributions from persons receiving legal aid and charge on Property Recovered

12.-(1) Where a person receives legal aid in connection with any proceedings, his contribution to the legal aid fund in respect of those proceedings may include -

- a) If his disposable income exceeds £3156 a year, a contribution in respect of income not greater than one third of the excess or such other proportion of the excess or such amount as may be prescribed

...

Assessment of Disposable Capital and Income and of Maximum Contribution

14.-(1) References in this part to a person's disposable income or disposable capital shall be taken as referring to the rate of his income or amount of his capital after making -

- a) such deductions as may be prescribed in respect of -
 - i) the maintenance of dependants;
 - ii) interest on loans;
 - iii) income tax;
 - iv) rates;
 - v) rent; and
 - vi) other matters for which the person in question must or reasonably may provide; and
- b) such further allowances as may be prescribed to take account of the nature of his resources.

(2) Regulations may make provision as to the manner in which the rate of a person's income and the amount of his capital are to be computed for the purposes of paragraph (1) and in particular for -

- (a) determining whether any resources are to be treated as income or capital; and

...

(6) Subject to the provisions of this Article, the disposable income and disposable capital of a person applying for legal aid, and the maximum amount of his contribution to the legal aid fund in respect of any

proceedings, shall be determined in accordance with the regulations.”

[10] Pursuant to the 1981 Order, the Legal Aid (Assessment of Resources) Regulations (NI) 1981 (“the 1981 Regulations”) were promulgated which, in material part, provide at Schedule 1:

“Rules for computing disposable income

1. The income of the person concerned from any source shall be taken to be in the income which that 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 being taken to be the income received during the preceding year.

2. The income in respect of any emolument, benefit or privilege receivable otherwise than in cash shall be estimated at such a sum as in all the circumstances is just and equitable.

...

9. (1) There shall be a deduction in respect of rent of the main or only dwelling in the case of a householder of the amount of the net rent payable, or such part thereof as is reasonable in the circumstances

...

(2) In this rule the expression “rent” means –

(a) the rent payable in respect of a year; and

(b) a sum in respect of the yearly outgoings borne by the householder including, in particular, rates, a reasonable allowance towards any necessary expenditure on repairs and insurance and any annual instalment (whether of interest or capital) payable in respect of a mortgage debt or heritable security charged on the house in which the householder resides or on any interest therein.

(3) In this rule the expression “net rent” means the rent less any proceeds of sub-letting any part of the

premises in respect of which the said rent is paid or the outgoings incurred. ...

10. If the person concerned is not a householder, there shall be a deduction in respect of the cost of his living accommodation of such amount as is reasonable in the circumstances.

...

13. Where the person concerned must provide for any other matter the assessment officer may make an allowance of such amount as he considers to be reasonable in the circumstances of the case.

14. In computing the income from any source there shall be disregarded such amount, if any, as the assessment officer considers to be reasonable having regard to the nature of the income or to any other circumstance of the case."

Arguments

[11] The applicant argues in the first instance that the respondent is not entitled to treat 'free keep' as income except insofar as it is related to employment. In the connection they rely on Tennant v Smith [1892] AC 150 and add that even in circumstances where a benefit is employment-related it may not be treated as income unless it is convertible to cash.

[12] In the alternative they argue that if a benefit need not be derived from employment, it must represent an income of some sort. They submit that in the applicant's case, free keep amounts at most to a reduction of outgoings which is not equivalent to income.

[13] It is further argued that whatever the interpretation of Regulations 13 and 14, no support can be found in those rules for the impugned practice in relation to Free Keep. It is also submitted that there is no basis in statute for this practice.

[14] Regardless of the existence of any statutory or regulatory basis for the practice the applicant contends that the estimation of Food and Heat at 45% of the Lower Income Limit is arbitrary (ie not a 'just and equitable estimation' as required by paragraphs 1-2 of the Regulations in relation to non-cash emoluments, benefits and privileges).

[15] The applicant continues by stating that food and heat are to be regarded as expenditures and not as income and are thus not assessable in relation to disposable income in relation to an applicant's eligibility for Legal Aid.

[16] It is argued that no unfairness arises in the manner supposed by the respondent (ie that a person in the applicant's position will benefit unfairly from the Regulations) and that if it does, the current approach is not a justified manner of addressing it.

[17] Finally the applicant argues that it is illogical when considering the non-contingent deductions for rent for householders at Regulations 9-10 that the applicant's deduction for rent is reduced by the sum of £1420.

[18] For these reasons the applicant contends that the practice is unjustified and unlawful.

[19] The respondent argues that there is no basis in the Regulations for restricting income to employment and that to the contrary the regulations specify 'any source' of income. To apply such a restriction would preclude consideration of other income streams such as sick pay, maternity leave, gifts etc. Similarly they argue that nothing in the regulations restricts their consideration to amounts convertible to cash.

[20] They argue that Regulations 13-14 give them a discretion to ensure an equitable result and to ensure that no hardship results in the circumstances. Using this discretion, a consideration of 'free keep' allows the respondent to strike a fair balance between persons in the applicant's position and those who must pay for food and heat on top of rental payments. This is because the Lower Income Limit is deducted from all applicants regardless of their circumstances and represents a notional amount to allow for day to day expenses including food and heat. If the applicant was to be in receipt of free heat and food while benefitting from the notional allowance for these necessities he would in effect be benefitting from double consideration of these expenses.

[21] In relation to Regulations 9-10, the respondent submits that the reductions allowed for therein do not relate to food and heat which are covered by the Lower Income Limit.

[22] The respondent argues that in order to reflect the differences in circumstances between people in the applicant's position and others, they must employ 'other mechanisms' as they cannot reduce the Lower Income Limit as it is set by statute. It is argued that the 45% Lower Income Limit figure for food and heat is a uniform approach to the issue and is therefore not arbitrary.

[23] In approaching the interpretation of the relevant Regulations it is submitted that they must have some function and effect and that they should be given an ordinary, face-value construction. The respondent argues that an ordinary construction would permit the application of the 'Free Keep' concept in order to achieve an overall equity and if this construction is *not* permitted the result would be to allow an 'inequitable absurdity'.

[24] Finally the respondent submits that the matter resolves to one issue: should the Applicant have benefitted from the full Lower Income Limit. They argue he should not and that his submissions are without merit and must fail.

Discussion

[25] The LAAO is responsible for determining financial means in accordance with the 1981 Order and associated 1981 Regulations.

[26] The 1981 Order defines the parameters of the Legal Aid scheme. It makes clear rules as to the eligibility of persons in respect of this scheme. It states that legal aid will be available for those whose *disposable income* is less than £10,306.00 in a personal injuries claim. In certain circumstances it stipulates that a contribution *may* be required from the legal aid recipient if his disposable income exceeds £3156.00 per year. As a corollary of this, no contribution will be required if the recipient's disposable income is less than £3156 per year. If the recipient's disposable yearly income is greater than £3156 a discretion exists in relation to the contribution to be paid, up to a maximum of one third of the disposable income in excess of £3156.

[27] In assessing a person's eligibility, and any contribution that must be paid, there must be an assessment of disposable income. Disposable income is defined as the person's rate of income after making any prescribed deductions and prescribed allowances. Permissible deductions from income *may* include expenditure on, inter alia, maintenance of dependants, interest on loans and 'other matters for which the person in question must or reasonably may provide'. Permissible allowances may also be prescribed 'to take account of the nature of his resources'.

[28] The order grants authority for regulations to be made making provision as to the 'manner in which the rate of a person's *income*... [is] to be computed' (emphasis added) for the purposes of determining disposable income (ie as required by Art14 of the 1981 Order). As noted above disposable income is defined as the rate of income after making any prescribed deductions and allowances.

[29] In particular, the Regulations may make provision for determining whether any resources are to be treated as income. The Regulations, subject to the provisions of Art14 of the Order, shall determine disposable income and maximum contribution due.

“(i) Income: This term is not given any special meaning. The Oxford English Dictionary definition of income is:

‘the money or other assets received, esp. periodically or in a year, from one’s business, lands, work, investments, etc.’

(i) Disposable income: Rate of income after making prescribed deductions and allowances

(ii) Deductions: This refers to sums which may be deducted from ‘rate of income’ to reflect monies that must be expended and thus reduce the actual level of disposable income

(iii) (To Make) Allowances: This is not given any special meaning. The Oxford English Dictionary definition of make allowances is:

‘take into consideration (mitigating circumstances)’

(iv) Resources: This is not given any special meaning. The Oxford English Dictionary definition of resources is:

‘a stock or supply that can be drawn on (available assets)’.”

[30] There are several similar terms at play in the 1981 Order:

[31] The Regulations referred to in 14(2) and 14(6) are provided by the 1981 Regulations. Recalling that these Regulations are authorised to:

“(i) Make provision as to the manner in which the rate of a person’s income... [is] to be computed

(ii) Determine whether resources are to be treated as income

(iii) Determining disposable income and the maximum contribution.”

And also recalling that the authority to determine disposable income is subject to the provisions of Art14 ie it is subject to the definition of disposable income above, I can turn now to the provisions that have in fact been made to fulfil these authorised purposes.

[32] Under the Regulations, income shall be taken to mean income from any source whether in cash or in kind during the period of computation. Any income represented by a non-cash emolument, benefit or privilege shall be estimated at a just and equitable sum. Therefore, total *income* as assessed is income from any source of any kind, with non-cash income given estimated cash value and then added to the cash income of that person.

[33] For householders there is a prescribed deduction from income of the amount of net rent payable in respect of the main dwelling. For non-householders there is a prescribed deduction of a reasonable amount in all the circumstances in respect of their living accommodation. If the Legal Aid applicant must provide (financially) for any other matter, the Assessment Officer may make a reasonable allowance for same.

[34] In computing income from any source the Assessment Officer may disregard any sum having regard to the nature of that income or any other circumstances.

[35] The LAAO's powers and functions in relation to an assessment of a person's disposable income for the purposes of determining their eligibility for legal aid thus in essence falls a three part process:

- (a) Assessing rate of income from any source of any kind;
- (b) Assessing personal circumstances to account for necessary expenditure which erodes rate of income in addition to any allowances for other matters which the person must provide for; and
- (c) Making a calculation based on a - b of disposable income.

[36] Once the persons 'disposable income' has been determined, it can then be considered whether they are eligible for legal aid under Art9 of the 1981 Order and whether they should make a contribution to the Legal Aid fund under Art12 of the 1981 Order.

[37] At this point it is useful to recall the purpose of the Legal Aid Scheme as deposed by Ms Deery:

“ ‘To assist those of limited or moderate means to pay for the services and expenses of legal representatives’,

and also to recall the fundamental importance of this objective.”

[38] Looking now at the net point the issue becomes: was it within the power of the LAAO to consider the provision of free meals as a source of non-cash income valued at £1420?

[39] In order to decide on this point the concept of ‘Lower Income Limit’ must be addressed. The term ‘Lower Income Limit’ is not referred to in the 1981 Order or in the 1981 Regulations nor is the concept attributed to it by the LAAO, ie that it is a notional allowance to account for day to day living expenses such as food and heat. It may be assumed that the amount of the Lower Income Limit is a basic amount for daily living expenses, but nowhere is it specified that this amount is to be taken specifically to cover food and heating – it is merely presented as a bald amount below which no contribution is required. It certainly cannot be taken to authorise a calculation of extra income based on ‘free keep’. The purpose of the legal aid scheme is to help those who do not have the income to pay for legal representation. Legal representation cannot be paid for in free dinners. However broad the definition of ‘income’ may be stretched, the relevant income in relation to paying for legal aid must be cash-based. While no doubt getting some or all of one’s meals for free must free up some income, it cannot be equated with usable income and therefore falls outwith the limits of assessment entrusted to the LAAO.

[40] In relation to the discretion evident in Regulations 13-14 of the 1981 Regulations, there is no reference to ‘achieving a fair balance’ between applicants in different circumstances. All that is permitted is that the Assessment Officer may take into account other matters which the applicant must provide for (Reg13) and that the Assessment Officer may disregard a source of income due to its nature or other circumstances (Reg14). In taking into account this consideration, ie that the applicant has some or all meals free while other persons seeking legal aid must pay for food and heat on top of other legal expenses, the LAAO have acted *ultra vires*.

[41] While it may be useful or beneficial to try and account for differences between persons seeking legal aid who get free meals in their ‘Board and Lodgings’ and those who must pay their accommodation expenses plus extra for food and heat, that is not a matter for the LAAO but one for the legislature. The only function of the LAAO is to assess means with regard to the rules expressed in the Order and the Regulations. On an ordinary construction income cannot be derived from the provision of free meals and heating. The Lower Income Limit is not defined in the statute save for the amount, and it may not be used by the LAAO to convert the provision of free meals and heat into a source of income.

[42] It does not appear necessary to consider the rest of the arguments advanced.

Conclusion

[43] For the above reasons I must allow the application and grant the relief sought.