

Neutral Citation No: [2019] NIQB 60

Ref: McC10990

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

*Ex tempore  
Delivered: 22/05/2019*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION BY MB3  
FOR JUDICIAL REVIEW

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

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McCLOSKEY J

[1] This case comes before the court in a somewhat unusual way. It is an application by the applicant to exercise the liberty to apply provision contained in the previous order of this court dated 21 September 2018. I emphasise at the outset that the Applicant continues to have the benefit of anonymity, with all of the restrictions and consequences which flow therefrom.

[2] The background, in very brief compass, is that the Applicant made application to the Secretary of State for the Home Department, who is the Respondent, for leave to remain in the United Kingdom, based on the Applicant's status of a discharged member of Her Majesty's Forces. This gave rise to two decisions, adverse to him, dated 24 March 2017 and 5 May 2017, respectively. The Applicant challenged those decisions by judicial review proceedings in this court. The outcome of those proceedings was an order of this court made on 21 September 2018 and filed on 28 September 2018. This was a consensual order, the parties having resolved their differences. It was a not untypical order of its kind. In a significant proportion of immigration and asylum cases where the Secretary of State, in the context of judicial review proceedings, makes a concession the gist of the concession entails the litigant making further representations in writing and the Secretary of State then considering the totality of the evidence and making an entirely fresh decision.

[3] On the consensual basis which was achieved between the parties, the order of this court made on 21 September 2018 was in the following terms:

“(1) *The impugned decisions are quashed.*

(2) *The respondent shall make a fresh decision on the application for leave to remain in the United Kingdom, as a discharged member of Her Majesty’s Forces. The Respondent will make this fresh decision within 12 weeks of the date of receiving further representations from the Applicant’s solicitors and, in doing so, shall take into account any further representations and evidence on behalf of the Applicant. The further representations shall be sent to the Respondent by the Applicant’s solicitors within two weeks of the date of the court order.”*

[4] The order granted the parties liberty to apply. The next provision recited no order as to costs *inter-partes* and finally, taxation of the Applicant’s costs, as an assisted person.

[5] In the event, the Secretary of State has failed to comply with this order. That is the reason for the liberty to apply application which has been made on behalf of the Applicant. An affidavit has been filed on behalf of the Secretary of State by her solicitor, who is a legal officer in the Crown Solicitor’s Office. Until receipt of this affidavit, the impression clearly conveyed regarding the Secretary of State’s conduct was an exceedingly unfavourable one. But for the affidavit, that impression would have continued and would have had certain consequences to which I shall refer presently.

[6] *Prima facie*, the conduct on behalf of the Secretary of State appeared to be contumelious. The two choices available to the Secretary of State in the period following the court order, were:

- (1) to comply with the order in the terms clearly and unequivocally recited; or
- (2) to invoke the mechanism of liberty to apply.

The Secretary of State did neither.

[7] I accept entirely the explanation given as to why the second course was not pursued: essentially uncertainty on the part of the legal representatives regarding the propriety of invoking the liberty to apply mechanism. While the judgement which I gave in the Upper Tribunal, in the case of *AM v Secretary of State for the Home Department* [201] UKUT (IAC) addressed extensively the legal implications and operation of a liberty to apply provision in the order of a court, I find it unsurprising that the existence of that judgement was not discovered on behalf of the Respondent,

taking into account the jurisdiction to which the judgement belongs. In short, the jurisprudence of the Upper Tribunal (Immigration and Asylum Chamber) would not necessarily have been an obvious point of reference or enquiry for the legal representatives concerned and I fully accept on the basis of all the material before the court today that they were attentive and assiduous at all stages.

[8] The chronology which is set out in the affidavit of the respondent's solicitor contains some rather important information. While it is uncontested that on 01 November 2018 further written representations were transmitted by the Applicant's solicitors to the Home Office, it is also undisputed that these were misfiled by the Respondent.

[09] Nothing further requires to be said about that. The truth of the misfiling is confirmed by the letter of 20 December 2018, written by the Home Office to the Applicant's solicitor, asking if they were going to provide any further representations and if so, to do so by 10 January 2019. That is a rather important letter. But for that letter, the court would have adopted a most unfavourable view of the Respondent's conduct.

[10] However, that letter indicates some proactivity on the part of the Respondent with regard to complying with the order of the court. It precludes the court from concluding that the Secretary of State was acting contumeliously. It further precludes any conclusion that the Secretary of State has flagrantly breached the order of a duly constituted court and has blithely ignored the order made and undermined the authority of the court. On the contrary, some explanation and some mitigation on the part of the Secretary of State emerge - or rather have emerged belatedly - via the important affidavit which has been provided, supplemented by the explanation given by counsel relating to his later involvement in the wake of the order of the court.

[11] For obvious reasons, this application must succeed. The Applicant has been charged with certain offences and he is scheduled to be sentenced next week, on the 28 May. In those circumstances, I consider it appropriate to make an order which has the following three components: First, as in the case of *AM* the court declares that the Secretary of State has unlawfully failed to comply with the order of this court, filed on 28 September 2018.

[12] Second, I accede to the Secretary of State's application to extend the time limit for compliance with that order. I do so given that the court is seized of an application for liberty to apply on behalf of the Applicant and can therefore exercise the full panoply of powers available to it, without insisting upon the formality of a corresponding liberty to apply application on behalf of the Respondent. I note Mr Henry's instructions that the Respondent is seeking an extension of four weeks from today. I was minded to confine that to two weeks, but taking account of the sentencing date in the Applicant's uncompleted criminal case I will extend that to three. Accordingly, the order of the court filed on 28 September 2018 is modified

and revised to the effect and extent that the Secretary of State will comply with the order, that is make a fresh decision, within 21 days of today. I emphasise today and not the date of filing of the order. That means that the deadline will be 11 June 2019.

[13] The third component of this order is an order for costs. But for the affidavit evidence provided, the court would have ordered the payment of costs on an indemnity basis. In light of the explanation and mitigation provided via the affidavit evidence, I decline to make the costs order in those punitive terms.

[14] Fourthly, and finally, this order shall also recite liberty to apply. I add the following. It is reasonably foreseeable that the Applicant's legal representatives may wish to make further representations in writing to the Secretary of State in the light of all of the changed circumstances and, having obtained their client's further instructions, relating particularly to his personal circumstances and life situation, which must have changed to a material extent since the original new representations were made, within 14 days of the order filed on 28 September 2018. It is not necessary for the court to address that *in extenso* at this stage, sufficing to raise it only.

[15] The Applicant's legal representatives will doubtless wish to give consideration to the court's observation. If the outcome of that consideration is that they are instructed to make further representations in writing on their client's behalf that would, in principle, engage the liberty to apply provision in today's order and could, foreseeably, result in the Secretary of State seeking a further short extension of time for the purpose of making the new decision. Accordingly, the liberty to apply provision in today's order is one of some importance and both parties must be alert to its full practical implications and consequences.