

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

McDonagh's Application (Leave stage)

IN THE MATTER OF AN APPLICATION BY WILLIAM McDONAGH
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

STEPHENS J

Introduction

[1] The only outstanding issue in this case is as to whether I should order that the costs of the applicant, an assisted person, shall be taxed in accordance with the provisions of Schedule 2 of the Legal Aid Advice and Assistance (Northern Ireland) Order 1981. The substantive application which I heard and determined was an application for leave to apply for judicial review of a decision by the Prison Authorities to refuse the applicant, a sentenced prisoner, compassionate leave to attend the funeral of his grandfather. I refused to grant leave. An application was then made on behalf of the applicant for an order that his costs should be taxed in accordance with the provisions of Schedule 2. However given the number of similar judicial review applications coming before the courts (for which see McGlinchey's Application [2013] NIQB 5) I invited submissions as to whether this court has any discretion not to order taxation of the applicant's costs in accordance with the provisions of Schedule 2. Upon hearing those submissions I gave an ex tempore ruling a transcript of which was prepared. I have corrected that transcript.

The legal structure

[2] It is for the Legal Services Commission to decide whether to grant legal aid. Upon a legal aid certificate being granted then a statutory right to be paid by the Legal Aid Fund arises, for which see Article 13(1) of the Legal Aid Advice and Assistance (Northern Ireland) Order 1981 which provides that, subject to this part, a solicitor who has acted for a person receiving legal aid shall be paid for so acting out

of the Legal Aid Fund and any fee to be paid to counsel for so acting shall also be paid out of the Legal aid Fund.

[3] The obligation to order taxation of an assisted person's costs arises under Regulation 21(5) of the Legal Aid General Regulations (Northern Ireland) 1965 which provides:

“(5) Subject to the preceding provisions of this regulation, where in any proceedings commenced in the High Court to which an assisted person is a party-

- (a) judgment is signed in default of appearance or defence, the judgment shall contain a direction that the costs of any assisted person shall be taxed in accordance with the provisions of [Schedule 2 to the Order];
- (b) the court gives judgment or makes a final order in the proceedings, the judgment or order shall include a direction (in addition to any other direction as to taxation contained in the judgment or order) that the costs of any assisted person shall be so taxed.”

The language of both Regulation 21(5)(a) & (b) is mandatory imposing a requirement that the judgment or order shall include a direction that the costs of any assisted person shall be taxed in accordance with the provisions of Schedule 2.

[4] All that is required by Regulation 21(5)(b) is that the final order contains a direction for legal aid taxation. The direction of taxation in accordance with the provisions of Schedule 2 in the final order covers all costs including all the costs of any earlier interlocutory stage. This is in contrast to the position in relation to costs orders as between the parties. A direction of taxation in accordance with the provisions of Schedule 2 is not a costs order as between the parties but rather enables the taxing master to perform his duty to protect the Legal Aid Fund in a taxation which is inquisitorial in nature. The effect of identical provisions to Regulation 25 in the Regulations applicable in England and Wales was considered by Sachs J in the case of Paice v Paice [1957] 2 All ER 721. In that case the court reserved the costs of two interlocutory applications to the trial judge who ultimately made no order save one for legal aid taxation. On taxation against the fund, the Registrar refused to allow the costs of the applications as the judge had not dealt with them. On appeal from the Registrar the judge held:

“I am going to rule that where the judge after the end of a trial orders a taxation in accordance with the Legal Aid and Advice Act, 1949 Sch.3 that relates to

all the costs of the action irrespective of whether or not they have been reserved inter partes to the judge at the trial. Where a judge or a court reserves costs of an application or other proceedings to the judge at trial, prima facie that is a reservation inter partes and is not intended to affect the legal aid taxation "

Legal aid taxation is inquisitorial in nature. It is the duty of the taxing master to protect the Legal Aid Fund and one order directing taxation is sufficient to cover all the various stages of the proceedings.

[5] As I have indicated, the language of Regulation 21(5) is mandatory indicating that the court does not have discretion to refuse to order taxation in accordance with the provisions of Schedule 2. I have been referred by counsel to "Judicial Review in Northern Ireland, a practitioner's guide" by Larkin and Scoffield in which the question as to whether the court has any discretion is addressed at paragraph 16.24 in the following terms:

"Costs of a legally assisted party

Where a party (usually the applicant) has the benefit of civil legal aid in order to fund the proceedings ... the legally assisted party should seek an order for legal aid taxation from the Court."

The footnote to this excerpt reads:

"There appears to be no discretion on the part of the Court to refuse such an application: see Regulation 21(5) of the Legal Aid (General) Regulations (NI) 1965 which is expressed in mandatory terms. Hence, the Court cannot do so as a means of expressing its disapproval that funding was provided by the Legal Services Commission."

[6] I agree that the decision as to whether a litigant should be legally assisted is a decision for the Legal Services Commission and that absent any question of fraud, the court has no discretion not to make an order for taxation of an assisted person's costs on the basis that it considers that the initial decision of the Commission was incorrect. I have indicated that one qualification to that proposition is where fraud is established. Another qualification may arise if the proceedings have not been properly instituted for example without leave of the court as required by statute see RH and others v IH [2009] NI Fam 17, [2009] 10 BNIL 17. The court's powers not to order taxation in accordance with Schedule 2 are limited but the court does have power to deal with costs *within* the proceedings. Orders can be made under Order 62 Rule 10(1) and also under Order 62 Rule 11 of the Rules of the Court of

Judicature (Northern Ireland) 1980. These orders for costs relate to how proceedings are actually conducted before the court as distinct from the question as to whether or not proceedings should have been legally assisted at all. The decision as to whether to provide legal aid in relation to proceedings at all times remains with the Legal Services Commission. This court cannot under Regulation 21(5) challenge the decision of the Legal Services Commission. That decision would only be amenable to the court's supervisory jurisdiction by way of judicial review.

[7] Order 62 Rule 10(1) provides for misconduct or neglect in the conduct of any proceedings so that where it appears to the Court in any proceedings that anything has been done, or that any omission has been made, unreasonably or improperly by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party. Accordingly, it remains possible for a court, for instance, to disallow some part of a legally assisted persons costs. The effect of disallowing some aspect of the legally assisted persons costs would not be to render the assisted person personally liable for the costs but merely to deprive solicitor and counsel of their remuneration as Article 11(1) (b) of the Legal Aid Advice and Assistance (Northern Ireland) Order and Regulation 15(16) of the Legal Aid (General) Regulations (NI) 1965 are absolute bars to solicitor and counsel seeking costs directly from the assisted person. If costs for work done in the currency of a certificate are not recovered from the Legal Aid Fund solicitor and counsel may not seek payment from the client:

“Once a certificate has been granted and so long as it is outstanding, the legal advisers of the legally aided person cannot ask him to make any payment towards their costs”

The misconduct or neglect under Order 62 Rule 10(1) must be within the proceedings such as a failure to produce medical reports after liability had been admitted, see Vose v Barr [1966] 2 All ER 226n or failure to comply with directions given by the Court, see Christy Hunt plc v Davis and Another The Times January 24 1990.

[8] Order 62 Rule 11 provides for the personal liability of solicitor for costs, so that where it appears to the Court that costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the Court may for instance order the solicitor whom it considers to be responsible (whether personally or through a servant or agent) to repay to his client costs which the client has been ordered to pay to any other party to the proceedings.

[9] Order 62 Rules 10 and 11 apply to party and party costs but because a party is legally assisted does not mean that these powers are not available to or cannot be used by the courts, see Antoinette Carr v Margaret Poots [1995] NI 428.

Conclusion

[10] I make an order for legal aid taxation of the applicant's costs.