Neutral Citation No: [2012] NIQB 79

Ref:	**TRE8606**

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

Delivered:	**26/10/12**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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McTaggart's Application [2012] NIQB 79

IN THE MATTER OF AN APPLICATION BY BRIAN McTAGGART FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE PAROLE COMMISSIONERS FOR NORTHERN IRELAND

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[1] This matter was listed before the Judicial Review Court on the 28 September 2012. By consent the impugned decision of the 11th June 2012 was quashed on the basis that the decision maker took into account incorrect and irrelevant factors. These were not particularized. (see Order 53 3(a)(viii)).

[2] The applicant was funded in his application through the legal aid fund. The applicant seeks the costs incidental to this application, which has been resisted by the respondent. It was ordered that the parties outline their submissions in writing with regard to costs.

[3] The application for costs is based on the following:

1. The applicant was ultimately successful in his application for judicial review.

2. The applicant is publicly funded and is under a duty to seek the recovery of his costs.

3. The legal aid budget is facing growing constraints and whilst the respondent is a publicly funded body there should be no special rule why it should not bear the burden of costs.

4. The applicant complied with Practice Note 1 of 2008 in that a pre-action protocol letter was forwarded on the 7 August 2012 outlining the applicant's case. This correspondence outlined 25 issues the applicant took in relation to the respondent's decision-making process.

5. The respondent forwarded a short response on the 10 August 2012 which did not address the issues raised by the applicant who then issued Proceedings at the beginning of September 2012.

6. A full response to the pre-action protocol letter was received on 25 September 2012. The leave hearing was scheduled for the following day, 26 September.

7. At the leave hearing Mr Sayers on behalf of PCNI sought an adjournment to deal with a mistake of fact issue and the following day PCNI indicated its consent to a quashing order.

[4] On 27 September 2012, the applicant's representatives were advised that:

> "The above application for leave to apply for judicial review was adjourned on 26 September 2012 to allow the proposed respondent to investigate a reference in the Single Commissioner's decision to 'Information relating to recent convictions in respect of offences committed by Mr McTaggart while unlawfully at large following his recall'.
>
> The PCNI accept that this reference was erroneous and are prepared to consent to the quashing of the Single Commissioner's decision, and to undertake that this decision will promptly be taken afresh by a different Single Commissioner.
>
> A copy of this correspondence is sent to the court. In order to advance the matter promptly, we would hope to mention the matter before the court on Friday 28 September 2012."

[5] On 28 September 2012, the proposed respondent invited the court to quash the decision referred to at paragraph 2(a) of the Order 53 statement, on the ground set out at paragraph 3(a)(viii): that is, 'The decision maker took into account incorrect and irrelevant factors'. [otherwise unparticularized].

[6] As the decision was quashed on the basis of one particular error the court was not called upon to adjudicate on the other matters.

[7] The applicant submits that had the respondent given proper consideration to the circumstances outlined in advance and granted the relief sought then proceedings would not have been required. But for the proceedings being issued the applicant says the decision would not have been quashed and a fresh decision would not have been taken.

[8] The applicant further relies upon R (on the application of Bahta) and others v Secretary of State for the Home Department [2011] EWCA Civ 895:

> "[59] What is not acceptable is a state of mind in which the issues are not addressed by a Defendant once an *adequately formulated letter of claim* is received by the Defendant. In the absence of an adequate response, a Claimant is entitled to proceed to institute proceedings. If the Claimant then obtains the relief sought, or substantially similar relief, the Claimant can expect to be awarded costs against the Defendant. Inherent in that approach, is the need for a Defendant to follow the Practice Direction (Pre-Action Conduct) or any relevant Pre-Action Protocol, an aspect of the conduct of the parties specifically identified in CPR r 44.3(5). The procedure is not inflexible; an extension of time may be sought, if supported by reasons.
>
> [60] Notwithstanding the heavy workload of UKBA, and the constraints upon its resources, there can be no special rule for government departments in this respect. Orders for costs, legitimately made, will of course add to the financial burden on the Agency. That cannot be a reason for depriving other parties, including publicly funded parties, of costs to which they are entitled. It may be, and it is not of course for the court to direct departmental procedures, that resources applied at an earlier stage will conserve resources overall and in the long term.

> [61] In the case of publicly funded parties, it is not a good reason to decline to make an order for costs against a Defendant that those acting for the publicly funded Claimant will obtain some remuneration even if no order for costs is made against the Defendant. Moreover, a culture in which an order that there be no order as to costs in a case involving a public body as Defendant, because a costs order would only transfer funds from one public body to another is in my judgment no longer acceptable."

[See also M v Croydon London Borough Council [2012] 3 All ER 1237 which followed the decision in Bahta].

[9] Mr Sayers referred the court to R (Boxall) v London Borough of Waltham Forest [2000] ALLER(D) 2445 (EWQBD) discussed at para 16.09 of "Judicial Review in Northern Ireland" (Larkin & Scoffield). This decision now requires to be read in light of the Bahta decision.

[10] When a point is clearly made in pre-action correspondence and a proposed respondent does not promptly make an appropriate concession Mr Sayers acknowledged that there was a strong argument that an application for costs should be favourably received. By the same reasoning he submitted that where pre-action correspondence does not assist a proposed respondent in identifying and addressing issues of complaint, an applicant who nonetheless benefits from prompt resolution of the matter should not be entitled to recover costs. Despite raising a list of twenty-five issues, the pre-action correspondence did not expressly allege that the Single Commissioner proceeded on the basis of an error of material fact in referring to 'Information relating to recent convictions in respect of offences committed by Mr McTaggart while unlawfully at large following his recall'. Nor does the Order 53 statement allege such error expressly.

[11] I accept the respondent's submission that it has responsibly and promptly resolved the matter without the need for the leave application having to be moved by counsel and, crucially, that it did so in respect of an issue which was not expressly raised in the pre action correspondence or the Order 53 statement. Such resolution is not to be discouraged, and has in this case taken place before the court has had an opportunity to hear submissions on the particular circumstances of the case.

[12] In the circumstances I accept that good reason does not exist to depart from the fall back position described in the fifth Boxall principle, which is to make no order as to costs between the parties.