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

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REIVEW BY NIACRO

AND IN THE MATTER OF A DECISION BY THE EUROPEAN SOCIAL FUND MANAGING AUTHORITY, AN AUTHORITY ESTABLISHED BY AND WITHIN THE DEPARTMENT FOR EMPLOYMENT AND LEARNING

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NIACRO'S Application [2016] NIQB 22 Leave stage

MAGUIRE J

Introduction

[1] The applicant in this case is NIACRO (the Northern Ireland Association for the Care and Resettlement of Offenders). The intended respondent is the Department of Employment and Learning. The proposed judicial review is about an application made by the applicant to the intended respondent in respect of a funding source – the European Social Fund – administered by the intended respondent.

[2] The purpose of the Social Fund is to combat poverty and enhance social inclusion by reducing economic inactivity and increasing the skills base of those currently in work and future potential participants in the workforce.

[3] The programme offers funding to organisations which enhance and extend employment opportunities. Both public sector and private or voluntary bodies can apply for funding under the Social Fund Scheme.

[4] The intended respondent publicised a competition for funding from the Fund in late 2014. The closing date for applications was 9 January 2015. Successful applicants were to receive 40% of their funding from the European Social Fund; and 25% from the Department. Under the rules of the competition, the applicant had to be able to raise the remaining 35% itself.

[5] In the event, as was expected, there were a large number of applications for limited funds. A competitive process was therefore required. All applicants who might become eligible for funding had to pass a quality threshold: on doing so they were deemed eligible to receive funding. Applicants received funding in order of merit until the available funds were exhausted. Thus not all applicants who were deemed suitable would necessarily receive funding.

[6] Application forms and guidance notes were made publicly available. There were in the event some 134 applicants. After a sifting exercise had been carried out, eligible applicants had the actual merits of their applications considered by selection panels. The applicant's application was considered on its merits and assessed. The assessment process involved it being marked by members of a panel. The applicant scored a mark of 121 (out of a possible 170). Scores equal to or greater than 115 met what was described as the quality threshold. However the applicant did not score highly enough to gain actual funding as the available funding was exhausted before the applicant's position in the merit list was reached.

Marking

[7] The applicant's application was marked by a panel consisting of three persons. Each had individually marked the application in accordance with a scoring matrix. However, having done so, the Panel met together to agree a final score in accordance with the scoring matrix. This is how the score of 121 was arrived at.

[8] The scoring matrix in respect of the particular items that had to be assessed was divided up into marking categories. While not universal the marking categories tended to be as follows: Category 1 - no marks, Category 2 – 1 to 3 marks, Category 3 – 4 to 7 marks and Category 4 – 8 to 10 marks.

[9] The Panel's overall marking sheets in respect of the applicant were before the court. Each section had a description and a numeral designation. The applicant's marks are set out below:

Numeral Designation	Mark
2.1	Mark 9 (Marking range 8-10)
2.2	Mark 4 (Marking range 1-4)
3.1	Mark 16 (Marking range 16-20)
4.1a	Mark 3 (Marking range 1-3)
4.1b	Mark 4 (Marking range 4-5)
4.2	Mark 8 (Marking range 8 to 10)
4.3	Mark 8 (Marking range 8 to 10)
4.4	Mark 5 (Marking range 4 to 5)
4.5	Mark 8 (Marking range 8 to 10)
4.6	Mark 4 (Marking range 4 to 5)

4.7	Mark 5 (Marking range 4 to 7)
5.2	Mark 5 (Marking range 4 to 7)
5.3a	Mark 8 (Marking range 8 to 10)
5.3b	Mark 6 (Marking range 4 to 7)
5.3c	Mark 7 (Marking range 4 to 7)
6.1b	Mark 3 (Marking range 1 to 3)
6.1d	Mark 7 (Marking range 4 to 7)
7.1a	Mark 7 (Marking range 4 to 7)
7.1b	Mark 4 (Marking range 4 to 5)

Total mark 121 Total available marks 170 Quality threshold 115

Project recommended for funding – Yes
Date of Panel meeting - 10 February 2015.

The appeal

[10] The decision in respect of the applicant's funding application was conveyed to the applicant on 26 March 2015. The applicant thereafter participated in a meeting with the intended respondent designed to enable the intended respondent to provide feedback to it at the applicant's request. On 10 April 2015 the applicant launched an appeal.

[11] On 28 April 2015 the intended respondent communicated to the applicant that its appeal had been unsuccessful.

[12] Extensive correspondence between the parties then followed. On 18 May 2015 the intended respondent provided further information as to how the Appeals Panel had done its work. This indicated that the role of the appeal panel was not to re-score marks but to ensure that the original panel acted reasonably.

[13] Following an exchange of pre-action correspondence this judicial review was launched on 24 June 2015.

The grounds of judicial review

[14] The grounds of judicial review can be summarised as follows:

- The intended respondent had failed to operate a fair procedure.

- The intended respondent was guilty of a lack of openness/transparency in marking.

- The intended respondent failed to provide reasons explaining and demonstrating why the marks allocated were in fact allocated.

- On appeal there was a failure to provide a rational explanation or to provide transparency at this stage.

- The process was not rational and was unfair.

- There was a failure by the intended respondent to weigh the material in the applicant's application.

- The intended respondent's marking was arbitrary/broad brush.

The applicant's submissions

[15] In the course of Mr Potter's submissions on behalf of the applicant the principal issues upon which leave was sought related to:

(i) What he identified as the arbitrary nature of the scoring which had led to the applicant receiving a score of 121 only. This undermined the integrity of the process.

(ii) What he viewed as an inappropriate appeal process whereby the Appeal Panel only reviewed the marking in order to determine whether or not the individual marks were within a band of reasonableness. This approach, he considered, meant that the appeals process failed to provide adequate explanations for the decisions which had been made.

[16] Mr Potter made it clear to the court that his client's case was of a structural nature and would not involve the court itself being required to remark the applicant's application. Moreover, he made it clear that it was not part of the applicant's case that it was impugning the *bona fides* of the exercise or was claiming that the applicant had been discriminated against.

The pattern of marking impugned

[17] In respect of the first issue, at the core of it, was the suggestion that the pattern of the original panel's marking was defective in respect of how the marking process in respect of the top category of marks failed to make use of the full range of marks. There were ten instances where the applicant's application received a mark in the top category. These marks were:

(i) 9 where the range was 8 to 10.

(ii) 16 where the range was 16 to 20.

(iii) 4 where the range was 4 to 5.

(iv) 8 where the range was 8 to 10.

(v) 8 where the range was 8 to 10.

(vi) 5 where the range was 4 to 5*.

(vii) 8 where the range was 8 to 10*.

(viii) 4 where the range was 4 to 5.

(ix) 8 where the range was 8 to 10.

(x) 4 where the range was 4 to 5.

[18] Only in two cases, Mr Potter pointed out, was any comment offered in the box available for notes/comments (as marked by the asterisks above).

[19] In only one case was a top score recorded.

[20] By way of contrast, it was Mr Potter's argument, that when attention was devoted to the marks given in other than top category, the picture was different. These marks were:

(i) Mark 4 (where the range was 1 to 4)*.

(ii) Mark 3 (where the range was 1 to 3)*.

(iii) Mark 5 (where the range was 4 to 7)*.

(iv) Mark 5 (where the range was 4 to 7)*.

(v) Mark 6 (where the range was 4 to 7)*.

(vi) Mark 7 (where the range was 4 to 7)*.

(vii) Mark 3 (where the range was 1 to 3)*.

(viii) Mark 7 (where the range was 4 to 7)*.

(ix) Mark 7 (where the range was 4 to 7)*.

[21] It is to be noted that in all nine cases a comment was recorded. Moreover in 6 of the 9 marks it can be seen that the top mark within the category was used.

[22] The pattern, it was alleged, revealed an arbitrary approach on the part of the Panel for the reasons already alluded to. This, Mr Potter argued, was significant in

that the applicant lost out in the competition as a whole by just four marks. If the markers had made more use of the spread within the top category, there was, counsel argued, a real chance that this would make a difference. Taken with the absence of justification for the marks given, there was an arguable case of arbitrariness which was contrary to the public law principles of rationality and fairness.

[23] For the intended respondent, Mr Sands argued that the challenge had to be placed in its correct context which unfortunately was that the applicant was dissatisfied having failed to achieve funding within a competitive process. In reality the challenge, he suggested, was an attempt to rerun the merits of the competition. The court, Mr Sands submitted, should not permit its processes to be used for this purpose. This, moreover, was not a case where it was alleged that the intended respondent had a hidden agenda or anything of that sort.

Court's assessment

[24] In order to grant leave to apply for judicial review the court needs to be satisfied that there exists an arguable case of illegality. Such a case, the court reminds itself, must be one based on evidence which causes the court to consider that the case could succeed at full hearing.

[25] In respect of Ground 1 – the arbitrariness ground – the material to which reference has been made in respect of the marking is interesting and may legitimately beg some questions about how the Panel approached its task, but the court is unable to accept the proposition that there is an arguable case of illegality demonstrated by it. The court says this for the following reasons:

(a) There is nothing in the material before the court which indicates that the Panel had been required to provide under each head notes or comments. Rather, it appears that this matter was left to the discretion of the Panel. In exercising its discretion as to marking, there is no evidence to suggest that the Panel members were ill-motivated towards the applicant and this is not even alleged. In concise terms, there is nothing to suggest that in this case the panel abused their discretion in any way. In respect of each mark recorded there is no reason why the court should take the view that the mark given was arguably wrong.

(b) Nor is there any reason why the court should reach the conclusion that there is evidence of arbitrariness. The Panel had to exercise judgment and on the face of it it did so by making a decision about what category of marks the applicant's case fell into and then allocating a particular mark within that category. While it may be helpful for the Panel to offer a brief explanation for its mark, the court finds it difficult to say

that a failure to do so renders the Panel's exercise of judgment arguably unlawful.

(c) This is not a case where it can be said that the approach of the original marking panel in the applicant's case is different to that the same panel deployed in someone else's case. There simply is no evidence that this was so. It may or may not be the case (the court cannot say) that the approach of the Panel was just the same across the board.

(d) If the Panel tended not to use the full range of marks in the case of the top category there is no reason why the court should view this as arguably unlawful. In the absence of material impugning the Panel's marking for a forbidden reason, it seems likely to the court that the Panel may simply have been reluctant to regard a particular response by an applicant as perfect or close to perfect. In these circumstances while the answer may have merited placement in the top category, it may not have been seen as appropriate by the panel to award a very top mark.

(e) The court must bear in mind that the process of marking by a panel of three involves an exercise in collective judgment where perfection is likely to be elusive. The court suspects that the mental process will usually be to address the issue of into which category of marks the case falls first and then after that to consider the allocation of a particular mark within that category. None of this is simple. Placing a case within a particular marking category will involve often borderline decisions as will marking within a category.

[26] On the first ground, the court does not consider that there is enough in the challenge to pass the arguability threshold.

The appeal

[27] The court is of the opinion that the applicant's submissions in this area do not disclose an arguable case of illegality.

[28] In the court's view, a key consideration relates to how the competition was originally structured. Within the papers there is an extensive document called "Guidance Notes for Applicants". In effect, it tells the applicant what the requirements and procedures are before the applicant applies. The applicant clearly had access to this document. Of significance in respect of this aspect of the case is that at page 32 of the document there is reference to the grounds of appeal. It states:

> "Applicants who receive a letter of rejection will have a right of appeal which will require the applicant to demonstrate that

> The outcome was a decision no reasonable person would make on the basis of the information provided in the application, and/or
>
> There was a failure in adherence to procedures or systems.
>
> Appeals on any other ground will not be considered."

[29] While the court accepts that at the appellate level a case can be made against a review approach being used in respect of the issue of whether the marks awarded were awarded correctly, and it also can accept that the use of a review approach will make it much harder for applicants who feel they should have received better marks than they did to succeed on appeal, nonetheless the applicant applied on the basis of the above quoted words which form part of the rules of the competition. That being so, the court considers that it should be slow to interfere in respect of a challenge which was made *ex post facto*, at least in respect of an argument which seeks to persuade the court that a different form of appeal should have been adopted by the intended respondent or one which says that there exist inherent defects in a review process which require correction.

[30] In any event, the court bears in mind the difficulty faced by a panel reviewing the marks of another panel. Inevitably there are issues of judgment, often borderline issues. It is not possible for the court to reach a conclusion that any of the overall judgments made by the Appeal Panel in respect of this application bordered on the unlawful.

Conclusion

[31] While the court well understands the considerable disappointment felt by the applicant in respect of the failure of its application, it is unable on the material before it, for the reasons given, to grant leave to apply for judicial review.