

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

Delivered:	30/10/13
------------	----------

IN THE HIGH COURT OF JUSTICE IN Northern Ireland

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

The Family Planning Association's Application [2013] NIQB 108

**IN THE MATTER OF AN APPLICATION BY THE FAMILY PLANNING
ASSOCIATION FOR JUDICIAL REVIEW**

TREACY J

Introduction

[1] The applicant is the Family Planning Association of Northern Ireland ("FPANI"). The respondent is the Department for Health, Social Services and Public Safety ("the Department"). The applicant sought to impugn the decision of the Department to refuse to issue revised Guidance on Termination of Pregnancy.

[2] Following the resolution of this application on the eve of the substantive hearing the application was dismissed.

[3] The applicant seeks its costs contending that it has obtained the result it had set out to achieve. The respondent resists such an order and seeks an order for costs against the applicant. There is a further discrete issue in relation to the costs of the discovery application. For the reasons which follow I have decided that the applicant is entitled to the costs of bringing this application. As to the costs of the discovery application the respondent accepts liability for a portion of the costs associated with the discovery application but not the costs of the Court of Appeal. I consider that the applicant is also entitled to recover the costs of the discovery application above and below.

Background

[4] The factual background to the application is that FPANI obtained a ruling from the Court of Appeal ([2004] NICA 38) in October 2004 that required the Department to promulgate such guidance. Guidance was duly published in March 2009. It was subject to a judicial review challenge and Girvan LJ gave judgment on 30 November 2011([2009] NIQB 92). The Court held that the guidance accurately

stated the legal position on termination of pregnancy in Northern Ireland but required that two components of the guidance - counselling and conscientious objection - be revised in light of the contents of the judgment.

[5] The Department issued interim guidance - omitting the sections on counselling and conscientious objection. On 27 July 2010 the Department withdrew the interim guidance and issued revised guidance for consultation. This guidance was in identical form to the March 2009 guidance save that the sections on counselling and conscientious objection had been redrafted. The consultation period ran for 12 weeks and concluded on 22 October 2010. No guidance issued at the end of the consultation process.

[6] On 22 June 2011 the Chief Medical Officer advised the applicant that publication of the guidance was "under active consideration". On 10 November 2011 the applicant wrote to the Department asking that guidance complying with the Order of the Court of Appeal of 8 October 2004 issue without further delay. On 8 December 2011 the Chief Social Services Officer, Sean Holland, replied and stated that the matter was "with the Minister for consideration" and that he could not advise when the guidance would issue to health professionals.

[7] On 13 January 2012 the Minister advised the Assembly that he had directed his Department to reconsider the revised Guidance and that it was not possible to confirm when it would issue. On 15 February 2012 the applicant's solicitors wrote to the Department seeking confirmation that the revised Guidance would be referred to the Executive Committee for approval within 7 days. The Department failed to respond to that letter. On 13 March 2012 the applicant sent correspondence in accordance with the pre-action protocol for judicial review to the Department. The pre-action letter invited a response within 14 days. The Department failed to respond, at all, to that letter.

Order 53 Statement

[8] The grounds upon which relief had been claimed were identified as follows in the Order 53 Statement:

"(a) The Respondent has acted unlawfully and in breach of Article 4 of the Health and Personal Social Services Order 1972 and section 2 of the Health and Social Care (Reform) (Northern Ireland) Act 2009 by failing to secure the provision of integrated health and personal social services to women seeking lawful terminations of pregnancy in Northern Ireland by failing to investigate and issue guidance to members of the medical profession, ancillary staff and to women seeking a termination of pregnancy on the

law relating to the provision of terminations of pregnancy in Northern Ireland.

(b) The Applicant has a substantive legitimate expectation that the Respondent would issue guidance to comply with the Order of the Court of Appeal of 8th October 2004. The Respondent's failure to issue the revised guidance breaches that expectation.

(c) The High Court ordered on 30th November 2009 that the Department should withdraw the guidance and reconsider the sections relating to counselling and conscientious objection in light of the contents of his judgment. The Respondent revised the Guidance accordingly and conducted a public consultation exercise on the revised Guidance which concluded in October 2010. A total of 32 responses were received to the consultation. 25 of those responses addressed the relevant issues of counselling and conscientious objection. The Department has had ample time to incorporate any necessary amendments to the Guidance in light of these consultation responses. The Applicant has a legitimate expectation that the Respondent would issue the Guidance at the conclusion of the consultation exercise. By failing to issue the guidance within a reasonable period of time the Respondent has breached that expectation and acted unlawfully."

Withdrawal of the Judicial Review

[9] On Tuesday 26 February 2013 (at 5pm) a letter was emailed from the Departmental Solicitor's Office to the applicant's solicitor in the following terms:

"I am writing to update your client and the Court of the most up to date position in relation to this matter.

I am instructed that the Minister intends to submit a paper to Ministerial colleagues by 07 March 2013 seeking the approval of the Executive to consult on a version of the Guidance on Termination of Pregnancy. While the draft paper will be in circulation by 7th March 2013 it should be born in mind that the Minister does not control the Executive agenda. The Minister would propose consulting on the Guidance

in due course and hopes to secure the support in principle of Executive colleagues at the earliest possible stage.”

[10] The applicant contended that as a result of that development, hours before the application was due to be heard and some 8 months after the application for judicial review had been lodged, it had obtained the result it had set out to achieve. In consequence, it no longer considered that there was any purpose in pursuing the application for judicial review. As a result the application was dismissed on the applicant’s application to withdraw.

Pre-Action Protocol

[11] In a submission dated 6 July 2011 the Chief Medical Officer (“CMO”) advised the Minister that one of the options open to him was to choose not to issue guidance at all:

“Although the guidance is being issued in compliance with a Court of Appeal order, you could choose not to issue any guidance to health professionals. However you should be aware that this option is likely to lead to difficulties with the Courts, *given that the FPANI would almost certainly bring further action against the Department for failing to comply with the 2004 order of the court which would probably be successful....This option is not recommended*” [applicants emphasis]

[12] Following the Court of Appeal’s decision in 2004, the applicant’s solicitors corresponded with the Department attempting, unsuccessfully, to progress compliance with the Court’s Order. This culminated in a letter dated 15 February 2012 from Leigh Day solicitors to the Minister for Health, *inter alia*, requiring him:

“... to indicate within 7 days of the date of this letter that all remaining obstacles to the publication of the Guidance have been cleared and *that the revised guidance will issue, in its present form, to the Executive Committee for approval at its next meeting within 21 days of today’s date.* If we do not receive such a written assurance then our instructions are to take the appropriate steps to return this matter for the supervision of the Court.” [applicant’s emphasis]

[13] It is a matter of considerable surprise that, notwithstanding the terms of the letter and, in particular, the threat of court action, **no** response was ever received to this letter. It was, however, subject to detailed consideration within the Department - see memo dated **15 February 2012** from Craig Donnachie in the Family Policy Unit to the Minister and others noting that the correspondence has been received. The

memo recommends that "...you agree to issue the February 2011 draft Guidance to the Executive for clearance." A draft response letter was appended to the memo.

[14] The memo noted that:

"In Submission 1282/2011 the working group advised you that option 3, to issue the February 2011 draft guidance to the Executive for approval before issue to health professionals was most likely to be considered a proper compliance with the order of the Court of Appeal in 2004, and the subsequent decision of Girvan LJ in 2009. It remains the position of the Department's Chief Professional Officers that this would be the most appropriate way to produce clinical guidance capable of complying with the direction of the Court" (para 7)

[15] And, at para 13:

"The Department believes that the February 2011 draft guidance is the most appropriate way of complying with the 2004 order of the Court of Appeal. This draft uses the formulation of the law that has been expressly approved by four senior judges, most recently Girvan LJ."

[16] A meeting took place on 5 March 2012 (at which the Minister, the CMO and others were present) to discuss a possible draft response to the Leigh Day letter of 15 February 2012.

[17] During the course of the meeting Minister Poots advised:

"It was his intention to bring guidance to the Executive as soon as possible

....

His view is that abortion should be available in Northern Ireland but only as a last resort where it is required to save the life of the woman.

He wants to ensure that he does not produce guidance that leads to challenge from pro life groups.

His view is that a minimalist document of 2-3 pages would give less opportunity for legal challenge - the

current guidance is too long and the February 2011 draft guidance produced by the Department will not ... the document issued to health professionals.”

[18] Para 5 of the minutes states:

“It was agreed that Minister would have further discussions..... *The response to Leigh Day would be held until these discussions had been concluded. It was acknowledged that this may lead to an application for Judicial Review being lodged with the Court, however this was unavoidable.*” (applicant’s emphasis)

[19] A response to the letter of 15 February 2012 was never in fact issued as already pointed out above. As the applicant observed, the risk that failure to respond would lead to the lodgement of an application for judicial review was discussed but the Department decided nevertheless to run the risk of such an eventuality by refusing to respond at all.

[20] A formal pre-action protocol letter was sent on 13 March 2012 which stated:

“The Department has stated that the revised Guidance requires to be approved by the Executive prior to being issued. The original 2009 Guidance was already approved by the Executive Committee in December 2008. In the interests of rapidly progressing the publication of the Guidance, and to avoid the need to bring the matter back before the Court for directions on the Department’s failure to comply with the Court of Appeal Order, our clients invited the Minister to confirm that the revised Guidance document be placed before the Executive Committee meeting at the next scheduled meeting. That confirmation was sought on 14th February 2012 (sic). No response was provided by the Department.”

[21] There was no response whatsoever to this pre-action protocol letter until 11 September 2012, some 6 months later and days before the leave hearing. I accept the applicant’s point that this belated response failed to engage with the issues raised, asserting that the application for judicial review was premature.

[22] The pre-action protocol on judicial review provides that proposed respondents should respond to a pre-action letter within 14 days (para 15). Para 16 provides:

“Where it is not possible to reply within the proposed time limit the respondent should send an interim reply and propose a reasonable extension. Where an extension is sought, reasons should be given and, where required, additional information requested.”

[23] Whilst Counsel on behalf of the Department acknowledges that it ought to have complied with the pre-action protocol, no explanation has been provided by the respondent for its failure to comply. Where there has been, as here, a detailed and properly formulated pre-action letter a public authority is obliged to engage in prompt, thorough, frank and cooperative correspondence so as to avoid unnecessary litigation.

[24] Following the grant of leave the applicant wrote on 3 December 2012 requesting the Department’s agreement to a proposed timetable for publication of guidance including the immediate submission of draft guidance to the Executive Committee for approval. By email on 12 December 2012 the DSO stated:

“I am waiting on instructions with regard to your request for Discovery and the timetable you have suggested.”

[25] No further response was received.

Legal Principles

[26] The general principles to be applied to the issue of costs where the judicial review is being discontinued were considered in R (Boxall) v London Borough of Waltham Forest (2001) 4 CCL Rep 258 [see para 22]. The *Boxall* principles must now be read in light of the judgment in R (on the application of Bahta) & Ors v Secretary of State for the Home Department [2011] EWCA Civ 895 [see paras 59-61]. The *Bahta* judgment was applied by the Court in M v Croydon London Borough Council [2012] 3 All ER 1237 and McTaggart's Application [2012] NIQB 79.

The Parties Submissions

[27] The applicant submitted that, applying the principles set out at para 22 of R (Boxall) v London Borough of Waltham Forest [2000] All ER (D) 2445 (EWQBD) the costs order sought by the applicant should be made because:

- (a) there were numerous approaches made to the Department in an attempt to elicit information and/or a commitment on a date for publication, both before and after its commencement;
- (b) the respondent Department failed at all stages to engage with the applicant and respond appropriately or at all to the correspondence;

- (c) the applicant obtained the outcome it sought by lodging the proceedings;
- (d) it is likely that the applicant would have been successful in the proceedings in any event; and
- (e) indeed, the Department's own officials considered the application would probably succeed (see CMO's submission of 6 July 2011).

[28] The respondent contended that the judicial review was unnecessary and that the applicant would not have been entitled to any relief had the matter proceeded to a substantive hearing.

[29] In the case of R (Bahta & Ors) v Secretary of State for the Home Department [2011] EWCA Civ 895 the Court of Appeal applied the Boxall principles and added:

"[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.”

[30] The court also said that:

“[65] When relief is granted, the defendant bears the burden of justifying a departure from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party and that the burden is likely to be a heavy one if the claimant has, and the defendant has not, complied with the Pre-Action Protocol.”

Discussion

[31] I consider, contrary to the respondent’s position, that the applicant’s purpose in lodging the judicial review application was substantially vindicated by the Department’s belated response of 26 February 2013 on the eve of the substantive hearing. It is tolerably clear that had the case proceeded to a full hearing the applicant was likely to have been successful. The precise form of any relief to be granted may have been open to debate but the likely outcome on the substantive merits is sufficiently clear.

[32] I therefore reject the respondent’s contention that this judicial review was unnecessary and the further contention that the applicant would not have been entitled to any relief. It follows that I also reject the respondent’s audacious submission that the applicant should pay the respondent’s costs. The present case is emphatically not one where “unnecessary litigation is commenced to obtain obvious results” as the respondent appeared to contend by its reliance upon para 47 of Lord Scott’s judgement in R (Rusbridger) v AG [2003] UKHL 38.

[33] I have had regard to the general guidance on costs contained in the authorities earlier referred to and to the facts and circumstances of the case and consider that the appropriate order is that the respondent should pay the applicant’s costs.

[34] No explanation has been provided by the respondent for its failure to comply with the pre- action letter. As I observed earlier, where there has been, as here, a

detailed and properly formulated pre-action letter a public authority is obliged to engage in prompt, thorough, frank and cooperative correspondence so as to avoid unnecessary litigation. As the Court of Appeal in England pointed out in Bahta, what is not acceptable is a state of mind in which the issues are not addressed by a defendant on receipt of a properly formulated letter of claim. Absent an adequate response an applicant is entitled to commence judicial review proceedings. If the applicant then obtains the relief claimed, or substantially similar relief, he can expect to be awarded costs against the defendant.

Costs of the Discovery Application and Appeal

[35] Although the Court of Appeal allowed the respondent's appeal against the discovery order, it decided that the costs of the appeal should be reserved to the Judge following his consideration of the documents.

[36] I ordered disclosure of all of the documents sought. In my view the costs of the discovery proceedings should follow the order for discovery.