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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY GAVIN ROONEY FOR JUDICIAL REVIEW

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COSTS RULING

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KINNEY J

Introduction

[1] I previously gave the substantive judgment in this matter. I made a declaration that the actions of the first respondent were procedurally unfair in failing to provide the applicant with an adequate opportunity to make meaningful representations on proposed variations to his licence. I declined to make any other orders or grant further relief. The applicant now seeks the costs of the proceedings against the first respondent. It is common ground between the parties that the second respondent, the Department of Justice, should not be held liable for the payment of the applicant's costs. The first respondent contests the application for costs and submits that there should be no order for costs between the parties.

[2] The applicable law was largely agreed by the parties in their submissions. It can be aptly summarised in the approach taken in *Re YPK and others Applications* [2018] NIQB 1 where the court said at paragraph 5:

> "[5] At this juncture it is appropriate to draw attention to the soi-disant "*Boxall*" principles, deriving from the decision in *R (Boxall) v Waltham Forest LBC* [2001] 4 CCLR 258. The not insignificant preface to the six principles devised by Scott Baker J is that the context was one where leave to apply for judicial review had been granted but a substantive hearing was not required as the challenge had

been rendered moot by certain intervening developments. The code of principles is the following:

> '(1) The court has discretion as to —
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs—
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including—
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and …
>
> (5) The conduct of the parties includes —
>
> (a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended his case or a particular allegation or issue;

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.'"

[3] The court went on to consider the circumstances where a claim succeeds in part only and at para [18] said:

> "18. The main effect of the decision in *M* was to generally align the principles governing the award of costs in ordinary civil litigation with those applicable in judicial review proceedings: see especially [58] in this respect. Where does this leave the *Boxall* code and the decision in *Bahta*? The court was at pains to point out that its decision did not entail any inconsistency with these two earlier cases: see [59]. Finally, the court in *M* promulgated the following guidance:
>
> (i) Where a claimant has been wholly successful whether following a contested hearing or via settlement "… it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary": see [61].
>
> (ii) In a case where the claimant succeeds in part only following a contested hearing or via settlement, the court will normally evaluate the factors of "… how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim": see [62]. The court's evaluation of such questions will be greatly facilitated where the case has proceeded to the stage of substantive judicial adjudication. But the judicial task will be altogether more difficult in cases where the claimant's partial success arises through the mechanism of consensual resolution. In the latter type of case "… there is often much to be said for concluding that there is no order for costs": see [62]."

[4] The factual background in this case is set out in the earlier judgment. The applicant lodged his judicial review proceedings on 2 August 2021 after an electronic tag was fitted to him on 28 July 2021. The tag was removed on 3 August 2021. The applicant did not issue PAP correspondence. In its position paper on costs the applicant said that the PAP requirements could not be met in this case as the tag was

to remain for a period of 14 days and that by the time the PAP requirements would have been met the 14 day period would have elapsed. The applicant contended that to have waited to complete the PAP requirements would have enabled the respondents to achieve the 14 day curfew in circumstances where it was deemed unlawful by the applicant's representatives. I am satisfied that the initial thrust of the applicant's judicial review application related to the tag and curfew.

[5] However, after a leave hearing leave was granted on three grounds:

(i) whether there was procedural fairness in not providing an adequate opportunity to the applicant to make representations on the proposed variation;

(ii) whether any such alleged failure constituted unlawful interference with the applicant's article 8 rights;

(iii) whether the absence of an outward facing policy or guidance on the procedure for variation was a breach of the applicant's article 8 rights in that it failed the quality of law test.

[6] As can be seen from the earlier judgment the applicant was successful in the first two grounds and unsuccessful on the third.

Submissions of the parties

[7] In essence the applicant argued that, as he was successful, costs should simply follow the event. The applicant acknowledged that there were no rules on costs in judicial review proceedings. The first respondent never accepted the unlawfulness that the court found in its actions. A hearing on the issues for which leave was granted was required.

[8] The respondent agreed that there was no rule on costs. In this case the first respondent had provided the applicant with practical relief before the issue of proceedings. It was noted in the earlier judgment that the applicant's conduct was not impressive and that there was both a lack of engagement and lack of candour. The applicant was in fact unsuccessful on most grounds and on a proper analysis if the applicant had followed the PAP procedure, then the matter should never have come before the court.

Consideration

[9] It is clear from the earlier judgment that the applicant has not been wholly successful, either at the leave hearing or subsequently on the full hearing. I am satisfied that the applicant did not achieve the primary relief sought, which was the removal of the curfew and tag because this had already been conceded by the first respondent and the tag and curfew had been removed before the matter came before the court. The applicant was also not wholly successful at the final hearing when

one of the three grounds contended by him was not accepted by the court. The question of whether or not there should be an outward facing policy was one that took a considerable amount of court time and had generated substantial submissions. I am satisfied that having heard and determined the matter at full hearing I am in a position to conduct an evaluation and apportionment of the respective weight to be attached to the various grounds of challenge.

[10] I am satisfied that the applicant's success in the declaratory relief obtained would not have been obviated had the PAP procedure been followed. The matters on which leave was granted were fully contested by the first respondent. However, as the judgment reflects even on those matters on which the applicant was able to proceed to full hearing the applicant was found to be the creator of a substantial element of his own misfortune and lacked candour throughout.

[11] On the first respondent's part, it did not concede the procedural unfairness claims raised by the applicant and those matters required both the leave hearing and subsequently a full hearing.

[12] The applicant was successful in his application. That success was partial. He also bears some responsibility for the circumstances that led to these proceedings. The respondent contested the matters on which leave was given.

[13] In all of the circumstances, therefore, I consider that it is proper to award the applicant part of his costs. I am satisfied that the appropriate award against the first respondent is one half of the applicant's costs in these proceedings.