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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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Burns' (Michael) Application [2015] NIQB 24

IN THE MATTER OF AN APPLICATION BY MICHAEL BURNS FOR JUDICIAL REVIEW

-and-

IN THE MATTER OF THE LEGAL AID FOR CROWN COURT PROCEEDINGS (COSTS) RULES (NORTHERN IRELAND) 2005 & 2011

-and-

IN THE MATTER OF A DECISION OF THE DEPARTMENT OF JUSTICE

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TREACY J

Introduction

[1] By this application the Applicant challenges the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 ("the 2005 Rules"), as amended by the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011 ("the 2011 Amendment Rules"), as being unlawful by reason of their failure to provide for cases which require exceptional time and skill.

Background

[2] The Applicant faces trial on serious criminal charges of attempted murder and possession of a firearm with intent to endanger life. He received a letter of assurance from the Northern Ireland Office dated 18 June 2003 stating that there was no outstanding direction for prosecution in Northern Ireland, there were no warrants in existence and that he was not wanted in Northern Ireland for arrest, questioning or charge by Police. Relying upon this letter the Applicant lived openly in Northern Ireland until the time of his arrest and charge for the offences referred to above.

[3] When arrested and charged the Applicant initially applied for leave to seek judicial review of the DPP's decision to prosecute him, on the ground that this decision was unlawful in light of the letter of assurance he had received. The Applicant asserted that he could not raise these matters as an abuse of process application within his criminal trial because the legal aid fund did not remunerate the kind of exceptional work and skill required to bring an effective application in that forum.

[4] At an interlocutory hearing, the Divisional Court directed that the proceedings be served on the Northern Ireland Legal Services Commission ("the Commission"). The Commission subsequently appeared as notice party and, at the court's request, provided a position paper entitled "*Crown Court Remuneration for Abuse of Process Applications*". At para7 the Commission set out the fixed fees applicable where abuse of process applications are made prior to the commencement of a trial. Where the application lasts in excess of 3 hours, maximum payments of £400 for senior counsel, £200 for junior counsel and £365 for solicitor can be made. These payments are inclusive of all preparation work and advocacy.

[5] The position paper confirmed that there are no "exceptionality" provisions whatsoever. Unless the application is successful (in which case solicitor and counsel become entitled to the basic trial fee plus any refresher fees, set out at para8), only the standard application fees are payable.

[6] The leave application was ultimately dismissed. The Divisional Court concluded that, because of the complexity of the issues and the steps that would be required to establish all the relevant facts before the legal issues could be determined, it would be more appropriate for the matter to be dealt with in the Crown Court. In refusing relief, the Divisional Court said that:

(a) the court was troubled with the legal aid arrangements for the Crown Court proceedings;

(b) in the case of Raymond Brownlee, the Supreme Court had given a clear steer on the need for adequate funding with respect to cases which require exceptional commitment on the part of those representing defendants; and

(c) on the basis of the available material, if a judicial review application were to be brought on that issue, it would need to be dealt with by way of a full hearing and leave would likely be granted expeditiously.

[7] The Applicant now wishes to make an Abuse of Process Application in the context of his criminal trial. His solicitor, Mr Matthew Higgins, avers that his counsel of choice have refused papers in the case and that he made extensive efforts to find other suitable counsel for the case but that none would accept papers for this work.

[8] The Applicant contends that the absence of any allowance in the Costs Rules for the kind of exceptional work required to prepare and conduct his abuse of process application in the Crown Court means that he has no effective remedy in that forum.

Order 53 Statement

[9] The Applicant sought the following relief:

> (a) A declaration that the Respondent's decision to make no provision for exceptional circumstances in the payment of fees under the Crown Court Proceedings (Costs) (Amendment) Rules 2011 ("the 2011 Rules") is unlawful in all the circumstances;
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> (b) A declaration that the 2011 Rules are *ultra vires* the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 ("the 1981 Order");
>
> (c) A declaration that the Respondents "swings and roundabouts" policy is unlawful;
>
> (d) A declaration that the 2011 Rules operate in a manner which breaches the Applicant's right to a fair trial pursuant to Section 6(1) of the Human Rights Act 1998 and Article 6 of the European Convention on Human Rights ("the Convention");
>
> (e) A declaration that the provisions for payment under the 2011 Rules do not amount to appropriate and reasonable remuneration within the meaning of Article 37 of the 1981 Order;
>
> (f) An order of *certiorari* quashing the Respondent's decision to exclude provision for payments in exceptional circumstances or on the individual merits of a case;
>
> (g) An order of *certiorari* quashing the decision to refuse to make an exceptional payment in the circumstances of this case;
>
> (h) An order of *mandamus* compelling the Respondent to take all such necessary steps to make provision for the exceptional work required to be

undertaken by the Applicant's legal team in a criminal case of this nature;
..."

[10] The grounds upon which this relief was sought included:

> "(a) The 2011 Rules and aforementioned policy are *ultra vires* the 1981 Order;
>
> (b) The Respondent has acted in breach of Section 6(1) of the Human Rights Act 1998 by failing to have any or any adequate regard to the Applicant's rights under Article 6 of the Convention;
>
> (c) The 2011 Rules operate as a barrier to the Applicant's right to a fair trial in breach of Article 6 of ECHR and/or constitute a barrier to his right of access to justice;
>
> (d) The 2011 Rules fetter the discretion of the proposed Respondent and/or its agent, the Northern Ireland Legal Services Commission, to make adequate provision for payments to legal representatives in exceptional circumstances and/or to assess the merits of individual cases;
>
> (e) The 2011 Rules and the aforementioned policy are arbitrary, irrational and *Wednesbury* unreasonable."

Statutory Framework

[11] Part III of the 1981 Order is entitled: *'Free Legal Aid in Criminal Proceedings'*. As amended, Art36(3) of the 1981 Order empowers the Department of Justice to make rules for carrying Part III into effect and in particular for prescribing the rates or scales of payment of fees and costs. Art37 provides:

> "37. The [Department of Justice] in exercising any power to make rules as to the amounts payable under this Part to counsel or a solicitor assigned to give legal aid, and any person by whom any amount so payable is determined in a particular case, shall have regard, among the matters which are relevant, to—

(a) the time and skill which work of the description to which the rules relate requires;

(b) the number and general level of competence of persons undertaking work of that description;

(c) the cost to public funds of any provision made by the rules; and

(d) the need to secure value for money,

but nothing in this Article shall require him to have regard to any fees payable to solicitors and counsel otherwise than under this Part."

[12] Various Statutory Rules were passed in exercise of this power. Among these were the Legal Aid for Crown Court Proceedings (Costs) Rules (NI) 2005 ('the 2005 Rules') which implemented a scheme for payment for legal services provided in the Crown Court that included provision for additional payments to be made in exceptional cases. These rules were amended by the Legal Aid Crown Court Proceedings (Costs) (Amendments) (Rules) (NI) 2011 ('the 2011 Rules') which abolished the provision allowing for such additional payments. It is these last Rules that the Applicant challenges on the grounds set out above.

Submissions

[13] The Applicant referred the Court to Re Brownlee's Application for Judicial Review [2014] NI 188 in which the Supreme Court considered the provision of legal aid payments in a case where there was a change of counsel between the guilty verdict and imposition of sentence. Referring to the effect of Art37(a), Lord Kerr said (at para9) that a clear enjoinder is given to the rule-making body to devise rules that will allow payment to be made which reflects the time and skill necessary to carry out particular types of criminal legal aid work. It necessarily follows, he said, that rules which do not cater for payment on the basis of the skill and time required for such work are *ultra vires* the enabling power.

[14] Lord Kerr referred to the following passage in a judgment of Lord Clyde in McLean v Buchanan [2001] 1 WLR 2425 concerning criminal legal aid regulations in Scotland:

> 'The requirements of fairness in judicial proceedings are rarely, if ever, met by blanket measures of universal application. Universal policies which make no allowance for exceptional cases will not readily meet the standards required for fairness and justice.'

[15] At the conclusion of his judgment Lord Kerr said:

> "**[37]** Lord Clyde [in McLean v Buchanan] acknowledged that his observations went further than was required to decide the issue before the Privy Council in that case. So also in the present appeal. But his words contain a salutary warning. While we are satisfied that the new draft rules, since they are to be applied retrospectively, meet the appellant's complaint, it cannot be predicted with confidence that a combination of circumstances, at present unforeseen, might not give rise to a similar challenge to that which the appellant has successfully made to the Rules in the present case."

[16] The Applicant submitted that inflexible rules have resulted in judicial review challenges in Scotland and Northern Ireland but none in England and Wales, presumably, it contends, because there is, and always has been, an exceptionality provision in the equivalent rules in England and Wales. Article 17 of the equivalent 2007 Order (in England) provides:

> "17. - (1) Where this paragraph applies, a preparation fee may be claimed in addition to the graduated fee payable under this Schedule.
>
> (2) This paragraph applies where, in any case on indictment in the Crown Court in respect of which a graduated fee is payable under this Schedule, it has been necessary for the trial advocate to do work by way of preparation substantially in excess of the amount normally done for cases of the same type because the case involves a very unusual or novel point of law or factual issue.
>
> (3) The amount of the special preparation fee shall be calculated from the number of hours of preparation in excess of the amount normally done for cases of the same type, using the rates for hourly fees set out in the Table following paragraph 22 as appropriate to the category of trial advocate and length of the trial. …'"

[17] The 2005 Rules and the 2011 Rules in Northern Ireland are made under Art 36(3) of the 1981 Order. The original 2005 Rules contained a provision for exceptionality. The 2011 Rules abolished this provision and the Applicant submitted that there are now no rules that "cater for payment on the basis of the skill and time required" for the work of the kind required in the present case.

[18] In reply to these submissions the Respondent lodged an affidavit sworn by Edward Mark McGuckin, Senior Civil Servant within the Department of Justice on 13 February 2015. Mr McGuckin noted by way of preliminary observation that the Respondent does not accept the following premises which underlie the Applicant's position: first that the proposed abuse of process application involves exceptionally complex and time consuming preparatory work such as to take it outside the range of work that would normally be expected to be done under the relevant criminal legal aid certificate; secondly; that it is not or would not be possible to secure the services of other counsel to carry out the necessary work; finally, that the Applicant is a proper person to make this application as it is a challenge to the level of the remuneration payable for the proposed work.

[19] Mr McGuckin sets out the legislative and policy background to the current rules. He states that the 2005 Rules were the product of an extensive programme of policy reform and consultation, as were the 2011 amending rules. He details various aspects of the consultative processes in relation to both sets of rules. He confirms that the 2005 Rules, as amended, do not contain a general power or discretion under which the [legal services] Commission can apply fees other than those set out in the relevant rules '[para38].

He states:

> "43. 'It remains the Respondent's position that it is entirely legitimate, lawful and reasonable to construct a statutory scheme governing the payment of public funds for the provision of criminal legal aid services that brings value for money and financial/budgetary certainty and avoids the need for complex and time consuming assessment of individual cases.
>
> 44. The inclusion of provision for *exceptionality* in the funding scheme would serve to fundamentally undermine the purpose and benefits of the …scheme… In short, where there is the possibility of additional fees for an 'exceptional' case, experience has shown that this is relied upon by practitioners in a great many cases and the process of the Commission (or the Taxing Master, on appeal) determining whether or not cases are exceptional on a case-by-case basis itself defeats the key advantages of having a standard fee system.' …..
>
> 48. In such a structured scheme it will follow that the legal profession (and the public purse) operate within the realities of the swings and roundabouts

> concept. The Respondent does not accept that this is in any way unreasonable. Indeed the concept has been endorsed in…… judicial pronouncements on the topic.'"

Discussion

[23] The issue in the present case is whether the 2011 Rules (as amended) do or do not comply with the requirements of the 1981 Order. As we have seen Art36 of this Order empowers the Department to make rules prescribing the fees payable in criminal proceedings and Art37 requires that in the exercise of this power the Department must have regard to:

> "(a) the time and skill which work of the description to which the rules relate requires;
>
> (b) the number and general level of competence of persons undertaking work of that description;
>
> (c) the cost to public funds of any provision made by the rules; and
>
> (d) the need to secure value for money."

The parties are agreed that the current Rules pay due regard to paragraphs (c) and (d) above. The question is whether they also pay regard to paragraphs (a) and (b) in a manner consistent with the purpose and objectives of the enabling legislation.

[24] In relation to sub-para(b) the Applicant's solicitor Mr Higgins asserts that his preferred Counsel refused to take a brief in this case, that he then made extensive enquiries around the Bar Library seeking to find Counsel willing to undertake the work and that these efforts were unsuccessful. Mr McGuckin for the Department points out that there is no evidence that the Applicant's solicitor has researched the possibility of engaging solicitor advocates to perform the work, to which the Applicant's solicitor replied: "my professional assessment is that the issues in this case are such as to require the involvement of senior and junior counsel with a high level of experience in conducting complex and difficult criminal proceedings.'

[25] In relation to the question of how far a solicitor must look to secure an advocate willing to undertake a brief it is important to remember that Art37(b) recognises that 'the number and general level of competence of persons undertaking work of that description' is a relevant factor.

[26] There is no doubt that we have a large number of both counsel and solicitor advocates who are, in principle, available to conduct criminal work and in many cases even the most junior of these advocates will have sufficient training to enable

them to undertake such work competently. However, in some cases involving serious criminal charges where the liberty of the subject is in jeopardy different considerations may apply. The number and general level of competence of persons undertaking work of that description will be different to the numbers and levels of competence of advocates appropriate for general legally aided criminal work where the risk to liberty is either absent or much reduced.

[27] In selecting an advocate for the most serious and complex criminal cases the instructing solicitor is not required to invite all advocates on the sole condition that they are willing to take a brief in the case. In the most serious and complex criminal cases involving grave risk to liberty and to reputation the accused's solicitor is obliged to use his professional judgment to select advocates he believes have the right skills plus sufficient experience to do justice to the interests of his client. Solicitors in such cases must never take the attitude that 'any representative will do'. His professional duty to his client requires him to exercise a careful judgement in relation to the skills and level of competence of any advocate he may approach. The 1981 Order recognises that such factors are relevant and indeed instructs the Department to have regard to these factors when setting remuneration rates in the rules it issues. Any rules issued should therefore enable criminal solicitors to brief only those advocates who are genuinely competent to perform this work in terms of both their skills and their experience.

[28] In my experience the number of appropriate advocates available to a solicitor for a criminal trial such as the present one is relatively limited. This case involves several distinct elements. There is the criminal trial itself and there is a separate and distinct abuse of process application which will operate almost like an internal judicial review investigating the legality of the decision to have a trial at all. This combination of elements requires advocates with a particular mix of skills and experience spanning criminal law, public law and human rights law, all of which will apply to trials of this kind. Advocates with this range of competencies are relatively rare and the solicitor should be encouraged to use his best judgment in selecting appropriately. The legal aid rules should also have regard to the relative scarcity of appropriately skilled advocates because this is what Art 37(b) of the Order requires.

[29] Art 37(a) states that 'the time and skill which work of the description to which the rules relate requires' is another relevant factor to which the Department must have regard when setting remuneration rates. The rules relate to all criminal trials and *for each one of them* the time and skill required for that particular trial is relevant to the determination of fees payable. In many cases the time involved will be standard and it is right and proper that a standard fee should apply to these. Standard fees for criminal cases undoubtedly help to control costs to public funds and help secure value for money, factors to which the Department must have regard under Art 37(c) and (d) respectively.

[30] Many criminal cases involve, comparatively speaking, reduced levels of risk and follow predictable paths. Standard cases are characterized by broadly predictable and uniform elements such as the amount of preparation time required, the duration of the advocate's commitment to the case and the range of potential outcomes to the proceedings. These elements are uniform in the sense that they fall within normal ranges which apply to all cases within that category. The range allows for a degree of variation between cases but this variation is not such as to make an individual case within the category anything other than a standard case. Such cases may well be appropriate for remuneration by scale fees and indeed for the operation of the 'swings and roundabouts' principle because between cases properly within standard categories the scope for *gross* under- or overpayment does not arise. Indeed such scope ought never to arise where the rules are dealing with a category of genuinely comparable cases.

[31] While many if not most criminal cases will fall into standard categories it is also the case that some criminal cases *may* arise which are not routine or predictable and where the work required to deliver a convention compliant 'fair trial' may be very significant indeed. Such cases must not be treated as standard cases. To treat them as standard when they are in fact exceptional is to run the risk that the legal teams involved could be grossly underpaid for the work they are required to do in their client's interests. In such circumstances the lawyers will be underpaid by reference to the norms established by the remuneration scheme itself. So, if the scheme normally pays advocates £x per hour (on average) but in a particular case it pays only a small percentage of the normal rate when the payment is averaged over all the hours actually spent on that case, that outcome itself suggests that the scheme has failed to have appropriate regard to .. "the time …… which work of the description to which the rules relate requires;". A set of rules which delivered such an outcome would be contrary to the requirements of the enabling legislation and, to that extent, those rules would be unlawful. The question is whether or not the work required in the present case is such as to take it out of the 'standard' range?

[32] In the present case the time and skill involved in the abuse of process application is said to be covered by the standard "application fee" available under the Rules. It is common case among the parties that this fee is intended to cover both the preparation time and the presentation of the application. The Applicant's solicitor has set out in some detail at para7 of his affidavit of 9 January 2015 the preparatory work which, in his professional judgment, is required to do justice to this abuse of process application. Nothing in this list appears to be excessive: the preparatory steps listed appear appropriate in the present case. It is immediately clear that this work will require significant time to prepare and that the presentation of this case will require enough time to allow counsel to take the court through all the relevant materials and to present their submissions in the case.

[33] The fees for preparing and presenting this application are covered by the general rules covering applications in Crown Court trials which Mr Higgins summarises in para 10 of his affidavit of 23 February 2015. The rules divide such

applications into three bands related to the length of time required to hear the application. These bands contemplate applications lasting less than 1.5 hours or between 1.5 and 3 hours or more than 3 hours. Fees for senior counsel range from £113 -£375 depending on which band applies. The highest fee available is 'equivalent to a day's refresher' and the implication is that scheme 'does not … seem to contemplate the possibility of applications lasting more than one day.' It is agreed by both parties that the applicable fee covers both preparation and presentation of the case.

[34] It is clear from the above that the rules envisage applications in the Crown Court as generally short matters involving relatively little preparation and the remuneration levels are set accordingly. Neither assumption is correct in the specific circumstances of this Applicant's case and therefore his application ought not to be treated as a 'standard' one. It ought not to be remunerated at a rate which ignores the very different preparation level and time commitment which this particular application calls for. To treat this application as 'standard' runs the risk of a significant discrepancy occurring in payment rates applicable to this application as compared to other Crown Court applications. This discrepancy is potentially so large that it cannot reasonably be justified by the swings and roundabouts concept.

[35] During the hearing of this case the Respondent advanced the view that where counsel undertake abuse of process applications such as the one contemplated here they also access the brief fee for the criminal trial, whether that trial runs or not. The Respondent argued that because of the availability of this second element of remuneration the overall payment for the entire case ought to be regarded as fair and reasonable because of the operation of the 'swings and roundabouts principle'.

[36] This argument is flawed for two reasons. First, where a brief fee is paid in respect of a standard criminal trial it is usual that the preparatory work for that trial has already been done. The brief fee is therefore already earned - whether the trial runs or is abandoned in light of the abuse application. If counsel have already delivered the work required to earn the brief fee it is or may be unreasonable to then require them to spread that same fee over hours of work done in preparation done for a separate aspect of the case, which aspect requires a different knowledge/experience base, a different skill set and a separate preparatory process. It would certainly be unreasonable to require such a spreading of fees earned if the net effect of it *could* be to reduce the hourly rate represented by the brief to less than the minimum hourly rate which that fee would deliver in a truly standard case. For example- if a standard criminal trial attracts a brief fee of £x this fee might represent an hourly rate of X/60 hours, if sixty hours is the amount of time generally spent preparing for and presenting a case in that category. Counsel might not have a complaint if they had to spend 62 hours on a particular criminal case so reducing their hourly rate in that case to X/62. Similarly the public purse might legitimately pay out X/57 in the event that counsel could deal with a given case in this shorter time and the swings and roundabouts principle can justify such minor variations in the interests of administrative simplicity and streamlining of the payments process.

However, if spreading the brief fee to cover a shortfall in funding for a long and complex abuse of process application has the effect that that fee now represents an hourly rate of say X/120 then that level of discrepancy is beyond redemption by the swings and roundabout principle. Spreading the brief fee in such a case does not result in fair and reasonable remuneration for that whole complex criminal case. Rather it results in a gross underpayment for the work already done in preparing the criminal aspect of the case- 'gross' in the sense that the hourly rate received in the case would now be excessively out of step with the hourly rate paid generally for cases in that category. Where this would be the result it indicates that the swings and roundabouts principle ought not to apply. If it were otherwise the terms 'standard' or 'scale' fees would become devoid of objective meaning.

[37] Having a potential discrepancy of this scale between the remuneration paid for different types of Crown Court applications is contrary to the purpose of the 1981 Order. The possibility of receiving comparatively *lower* fees for cases involving *more* preparation and presentation time runs counter to the 'clear enjoinder' given in Art 37(a) 'to devise rules that will allow payment to be made which reflects the time and skill necessary to carry out particular types of criminal legal aid work' [per Lord Kerr, Re Brownlee's Application for Judicial Review [2014] NI 188 at para 9]. The effect of such a discrepancy is that some types of criminal work become less attractive than others to the most skilled and competent advocates in the field. In such cases the rules operate as a disincentive to such advocates to take on the most difficult cases requiring the most extensive preparation and such an outcome is contrary to the terms of the enabling legislation to the public policy underlying that legislation.

Conclusion

[38] For the above reasons I consider that the present rules are *ultra vires* the 1981 Order insofar as they do not have proper regard to the time and skill required to do the work involved in the Applicant's case.