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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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

-v-

Special Educational Needs and Disability Tribunal
and
The Education Authority for Northern Ireland

_____

MCCLOSKEY J

Preface

i. In this judgment:

"A" = The Applicant.
"EA" = The Education Authority for Northern Ireland
"SENDT" = The Special Educational Needs and Disability Tribunal.
"LSA" = The Legal Services Agency for Northern Ireland

ii. Paragraphs [1] – [12] are the edited *ex tempore* judgment delivered by the court on 21 November 2017. The remaining paragraphs are concerned with an issue of practice relating to legal aid.

iii. A is granted anonymity. Thus there must be no publication of A's identity or of anything tending or having the potential to reveal such identity.

Framework of these proceedings

[1] A, a child aged seven years who suffers from profound physical disabilities and who is at present involved in an undetermined appeal to SENDT arising out of a dispute concerning her educational placement,

challenges, per the Order 53 pleading, the decisions of SENDT dated 06 and 09 October 2017:

> "*… not to maintain and enforce the President's discovery orders of 08 August 2017 and 04 October 2017 against* [EANI]."

Quashing and mandatory orders against SENDT are pursued. The sole relief sought against EANI is an order of mandamus compelling it to comply with the discovery orders.

[2] The assorted grounds of challenge assert unparticularised breaches of Articles 6 and 8 ECHR (contrary to section 6 HRA 1998), the frustration of a legitimate expectation of receiving full discovery, breaches of Regulation 34 of the SENDT Regulations 2005 and Order 15 of the County Court Rules, error of law in an assessment of legal privilege and, finally, irrationality.

[3] Proceedings were commenced on 20 October 2017, expedition was granted and an accelerated initial hearing date was allocated. At this remove, the only issue requiring judicial determination is that of costs.

[4] It is necessary to examine what the two Rs actually did or failed to do. SENDT, on 08 August 2017, directed EA to make general discovery. Next, on 04 October 2017, a direction was made for specific discovery of –

> "*….. all communications of any kind passing between the Education Authority, its servants and agents and Dr Watkins relating in any manner to the conditioning, preparation and provision of his report dated 05 April 2017.*"

EA's solicitor responded, by letter dated 06 October 2017, making the case, in reasoned and elaborate terms, that while there existed communications (electronic and telephonic) of the kind directed, these were protected by legal professional/litigation privilege. This letter also contained a request that if SENDT were minded to issue a further direction requiring the production of privileged materials, EA should first have the opportunity of making representations in accordance with Regulation 31(2) of the Special Educational Needs and Disability Tribunal Regulations (NI) 2005 (the "*2005 Regulations*").

[5] On the same date, the SENDT President communicated a decision that no further discovery direction would be made. This was reaffirmed on 09 October 2017. The next development was the initiation of these proceedings, on 23 October 2017. To summarise:

(a) SENDT was content with EA's response to the second discovery direction and determined to issue no further direction.

(b) The only material identifiable act on the part of EA was the assertion of privilege through its solicitor in response to the second direction.

(c) EA cannot be considered to have been in breach of either of the Tribunal discovery orders having regard to the clear, measured and considered terms in which privilege was asserted and the Tribunal's acknowledgement of the correctness thereof.

Costs vis –a – vis SENDT

[6] A initiated these proceedings without first having had recourse to the Tribunal for such further procedural remedy as was available in that forum and, hence, failed to exhaust remedies. Regulation 31(1) provides:

> "*The President may, on the application of a party or on his own motion, at any time before the hearing, give such directions on any matter arising in connection with the proceedings as appears to him to be appropriate, including such directions as are provided in regulations 33 and 34 to enable the parties to prepare for the hearing or to assist the Tribunal to determine the issues.*
>
> *(2) An application by a party for directions shall be made in writing to the Secretary of the Tribunal and, unless it is accompanied by the written consent of the other party, shall be served by the Secretary of the Tribunal on that other party. If the other party objects to the directions sought, the President shall consider the objection and, if he considers it necessary for the determination of the application, shall give the parties an opportunity of appearing before him. …..*
>
> *(4) A direction shall -*
>
> *(a) Include a statement of the possible consequences for the appeal or the claim, as provided by regulation 35, of a party's' failure to comply with the requirement within the time allowed by the President … and*
>
> *(c) Unless the party to whom the direction is addressed had an opportunity to object to the direction, or if he gave his written consent to the application for it,*

contain a statement to the effect that the person may apply to the President under regulation 32 to vary or set aside the direction."

Regulation 34 provides:

> *"**34.** – (1) The President –*
>
> *(a) may give directions requiring a party to deliver to the tribunal any document or other material which the tribunal may require and which it is in the power of that party to deliver;*
>
> *(b) shall impose a condition on the supply of a copy of any document or other material delivered in compliance with a direction given under this paragraph that the party receiving it shall use such document only for the purposes of the appeal or claim;*
>
> *(c) may require a party to give a written undertaking to observe that condition before receiving a copy.*
>
> *(2) The President may grant to a party an order for such disclosure or inspection of documents (including the taking of copies) as might be granted by a county court."*

[7] I consider that within the collection of procedural provisions reproduced above, there was ample scope for A to have recourse to the Tribunal seeking resolution of the issues forming the centrepiece of this judicial review challenge. I am mindful that SENDT, in common with all others, attempts to operate with appropriate degrees of informality and flexibility. Notwithstanding, I am of the view that the provisions rehearsed above clearly contemplate the elementary procedural formalities of an application formulated in writing, setting forth the procedural relief sought and the grounds upon which this is pursued, coupled with notice of such application to the other party. This applies with special force where the judicialised tribunal is being asked, in effect, to set aside one of its orders. I consider that the brief electronic communication from A's solicitors to the Tribunal in the present case was quite insufficient to comply with the basic requirements just rehearsed.

[8] This issue prompts the following brief comment. The 2005 Regulations do not prescribe any form to be utilised for the purpose of making interlocutory applications. Nor is there any prescribed form for the Tribunal's interlocutory directions. An assessment may have been made that in this particular tribunal forum this is considered neither necessary nor appropriate. If so, this court would not presume to quibble. However, as the present case demonstrates, some elementary degree of formality is desirable. This can be

achieved, in practice, by the mechanism of letters which observe the basic requirements rehearsed in [7] above. The President of SENDT might wish to reflect on the desirability of a simple Practice Note/Direction regulating this topic.

[9] While I have noted the electronic exchanges between A's solicitors and SENDT there was no attempt on behalf of A to invoke any specific procedural provision and, in particular, no clearly formulated application, formal or otherwise, to the Tribunal and no considered representations relating to the powers exercisable by the Tribunal under the 2005 Regulations 2005 and Order 15 of the County Court Rules. Furthermore the Tribunal was not involved in the PAP correspondence and had no role in the resolution which was ultimately achieved exclusively between A and EA.

[10] In addition, by well - established principle, as a strong general rule costs should not be awarded against an inferior court or tribunal taking no active part in the judicial review proceedings: see especially R(Davies) v Birmingham Deputy Coroner [2004] EWCA Civ 207 at [47]. In this case, SENDT's contribution was limited to making the case that it should not be condemned in costs. I also take into account my assessment that success for A's prospects of substantive success against SENDT in these proceedings were minimal. For this combination of reasons there can be no question of awarding costs against SENDT.

Costs vis – a – vis The EA

[11] On behalf of EA it is submitted that its very recent change of heart has been motivated by pragmatism, the doctor/patient relationship which applies to the child and the paediatrician in question and the desirability of avoiding further delay in the long running Tribunal proceedings. I take into account all of these considerations, together with the alternative remedy factor already noted, the absence of any subject access request under DPA 1998 and A's failure to comply with the PAP, in breach of the JR Practice Note.

[12] The resolution which ultimately materialised is strongly indicative of a likelihood that compliance with the PAP would have yielded a consensual outcome and obviated the need for these proceedings. I further take into account that it is far from clear that A would have secured any relief from this court against EA. Finally, I consider this to be a paradigm case for giving full effect to the principle that public authorities should not be dissuaded by the prospect of costs orders at this stage of judicial review proceedings from taking sensible, reasonable and pragmatic steps which bring about consensual resolution. For these reasons an award of costs against EA would be quite inappropriate.

The Public Funding Factor Generally

[13] The factor of public funding is worthy of brief comment. The materials before the court indicate that the Applicant is a legally assisted litigant. Article 11(1) (d) and (e) of the Legal Aid, Advice and Assistance (NI) Order 1981 (the "1981 Order") provides:

> *"11. - (1) Where a person receives legal aid in connection with any proceedings-*
>
> *(d) any sums recovered by virtue of an order or agreement for costs made in his favour with respect to the proceedings shall be paid to the legal aid fund;*
>
> *(e) his liability by virtue of an order for costs made against him with respect to the proceedings shall not exceed the amount, if any, which is a reasonable one for him to pay having regard to all the circumstances, including-*
>
> *(i) the means of all the parties; and*
>
> *(ii) the conduct of all the parties in connection with the dispute."*

Article 16 (1) – (3) are also noteworthy:

> *"16. - (1) Where a person receives legal aid in connection with any proceedings between him and a person not receiving legal aid (in this Article and Article 17 referred to as "the unassisted party") and those proceedings are finally decided in favour of the unassisted party, the court by which the proceedings are so decided may, subject to the provisions of this Article. make an order for the payment to the unassisted party out of the legal aid fund of the whole or any part of the costs incurred by him in those proceedings.*
>
> *(2) An order may be made under this Article in respect of costs if (and only if) the court is satisfied that it is just and equitable in all the circumstances that provision for those costs should be made out of public funds; and before making such an order the court shall in every case (whether or not application is made in that behalf) consider what orders should be made for costs against the person receiving legal aid and for determining his liability in respect of such costs.*

> *(3) Without prejudice to paragraph (2), an order shall not be made under this Article in respect of costs incurred in a court of first instance, whether by that court or by any appellate court, unless-*
>
> *(a) the proceedings in the court of first instance were instituted by the party receiving legal aid; and*
>
> *(b) the court is satisfied that the unassisted party will suffer severe financial hardship unless the order is made."*

[14] I have considered certain other pieces of the statutory jigsaw. Article 17(7) of the Access to Justice (NI) Order 2003, under the rubric of "Terms of Provision of Funded Services", provides:

> *"Except so far as regulations otherwise provide, where civil legal services have been funded by the Department for an individual, sums expended by the Department in funding the services (except to the extent that they are recovered under Articles 18 to 20), and other sums payable by the individual by virtue of regulations under this Article, shall constitute a first charge-*
>
> *(a) on any costs which (whether by virtue of a judgment or order of a court or an agreement or otherwise) are payable to him in respect of the matter in connection with which the services are provided, and*
>
> *(b) on any property (of whatever nature and wherever situated) which is recovered or preserved by him (whether for himself or any other person) in connection with that matter, including any property recovered or preserved in any proceedings and his rights under any compromise or settlement arrived at to avoid or bring to an end any proceedings."*

In passing, the relevant measure of subordinate legislation is the Civil Legal Services (Statutory Charge) Regulations (NI) 2015, which does not appear to contain anything germane to the present enquiry.

[15] Article 5(4)(b) of the 1981 Order is the enabling power for regulations making provision "*… as to the procedure to be followed in applying for approval, the criteria for determining whether approval should be given* ***and the conditions which should or may be imposed***." [Emphasis added.] The relevant measure of subordinate legislation is the Legal Advice and Assistance Regulations (NI) 1981. Regulation 17(4) provides:

> *"The appropriate authority may grant an application for approval in whole or in part and it may impose such conditions as to the conduct of the proceedings to which its approval relates as it thinks fit, and in particular it shall he a condition of every approval that the prior Permission of the appropriate committee shall be required-*
>
> *(a) to obtain a report or opinion of an expert; or*
>
> *(b) to tender expert evidence; or*
>
> *(c) to perform an act which is either unusual in its nature or involves unusually large expenditure;*
>
> *unless such permission has been included in the grant of approval.."YPK*

[16] Colloquial expressions such as "*duty to the fund*" are familiar to both courts and practitioners. But what exactly do they mean, as a matter of law? Some judicial exploration and clarification of this issue is probably overdue.

[17] Clearly, every publicly funded litigant must act in accordance with the provisions of the 1981 Order and all subordinate measures made thereunder. There is also a duty to act in accordance with all conditions attaching to the grant of legal aid. However, it is not clear to the court that either the 1981 Order or any of the subordinate measures devised thereunder obliges a publicly funded litigant to pursue an application for costs against the other party or parties in circumstances where either the relevant legal challenge has been overtaken and rendered moot by supervening events (as here) or where consensual *inter-partes* resolution becomes achievable for whatever reason.

[18] The next step in the analysis raises a question of pure fact. In the present case A's legal representatives considered it their duty to apply for costs against both Rs in circumstances where the judicial review application was no longer being pursued, having been rendered academic. The belief that such a duty existed was made clear to the court by counsel for A. However, no evidence was produced that there was a condition in A's grant of legal aid to this effect. Nor was there any evidence that the LSA had issued an instruction to this effect. This encouraged the court to probe a little deeper.

[19] I considered it both fair and prudent to give notice to the LSA that the court was considering this issue, inviting representations. Its Chief Executive replied in writing. The response was prompt, informative and comprehensive and the court records its gratitude to the Chief Executive for this co-operation.

[20] The Chief Executive's response includes the following noteworthy passages:

> *"Whilst under the prevailing legislation there is no specific measure to draw your Lordship's attention to, there is an inherent duty on the part of practitioners in a legally aided matter to protect the interests of the fund and in fact the duties and responsibilities of legal representatives of a legally aided client are in no way different from those owed to a privately paying client and accordingly it would rarely, if ever, be necessary to add this as a written condition in the grant of legal aid. Indeed to have a generic approach of making this a condition of each grant of legal would be counter-productive as this could result in inappropriate applications being made routinely. ….*
>
> *As a general point, the Agency's view is that in all proceedings including Judicial Reviews, unnecessary costs should not be incurred."*

Pausing at this juncture, the first sentence in this passage is the Chief Executive's direct response to the court's observation that it had been unable to identify any statutory provision imposing on the representatives of a legally assisted person a duty to apply for costs against another party or parties in the context of either consensual resolution or the case becoming academic. This would appear to be a correct statement of the law.

[21] The Chief Executive then expresses the view of the LSA that, in the present case, SENDT ought to have taken the step which it ultimately took at the PAP stage. The Chief Executive continues:

> *"Speaking generally, it would be the Agency's view that if the proposed respondents in any threatened judicial review, responded by granting the request, if properly warranted, or by providing a reasoned, compelling explanation why same could not or would not be provided then legal aid would not be granted if this rendered the application incapable of passing the "Merits" test."*

The Chief Executive's letter continues:

> *"When a legally aided case comes to an end the Solicitor must of course report the result of the case to the Agency. In the instant case the applicant's Solicitor would be saying that they had "won" the case in the sense that they would be reporting that the Education Authority had provided what been sought through the Judicial Review application….*

> *If a Solicitor had advised that they had won and yet they were claiming their fees from the Legal Aid fund then to protect the Legal Aid fund the Agency would have to establish why a successful party had to meet its costs.*"

[22] Next, having adverted to the Boxall** "fall back" principle, namely that in the absence of good reason to make any other order the court should make no order as to costs *inter-partes*, the Chief Executive continues:

> "*…. the Agency's contention would be that there is a "proper basis to exercise the court's discretion to depart from the standard position" when the legal aid fund is being called upon in a situation where the legally aided party has succeeded as the public purse is exposed to costs if this is not the case.*"

**(see R (Boxall) v Waltham Forest LBC (2001) 4 C.C.L. Rep. 258).

The letter continues:

> "*Against this background the Agency considers that legal representatives of a legally aided party must at least apply for costs if in any way successful. It is a matter for the court whether it would be appropriate given the facts of the case to award costs. ……*
>
> *If the court greets their application for costs by advising that there is no proper basis to exercise the court's discretion to depart from the standard position that there would be no order as to the costs at this stage and/or that the timing of the concession of the Respondent did not add to the costs imposed then the representative's duty is discharged and the Agency will accept this.*"

The Chief Executive describes as the only conceivable exception to the above receipt of a "*very persuasive*" opinion of counsel sufficient to warrant an appeal against a court's ruling of no order as to costs *inter-partes*.

[23] With reference to the latter suggestion, the Chief Executive will doubtless be alert to two realities. First, there is no right of appeal to the Court of Appeal against a costs order of the High Court only. Such an appeal lies with permission of the court below only: see section 35 (2) (f) of the Judicature (NI) Act 1978. Second, the law reports are awash with cautionary statements that given the breadth of the judicial discretion in play, interference by an appellate court with a costs order will be very exceptional.

[24] The letter from the Chief Executive raises several interesting issues, inviting the following reflections. It suggests to the court that, in certain respects, the approach and policy of the LSA may be inappropriately rigid, or absolutist. There is little evidence of flexibility and no apparent appreciation of the hallowed British Oxygen principle which prohibits inflexible rules and policies fettering discretions in the realm of public law: British Oxygen Company Limited v Board of Trade [1971] QB 610. This assessment is reinforced by the author's portrayal of the "standard position."

[25] Nor does the letter disclose any acknowledgement or appreciation of the overriding objective. The ingredients of the latter which have particular purchase in the context under consideration are proportionality, limited court resources and the parties' duty of assistance to and co-operation with the court.

[26] This latter duty is emphasised in this court's recently delivered judgment in YPK and Others v Secretary of State for the Home Department [MCCL10532] / [2018] NIQB 1 at [19]:

> *"… in cases where the pursuit of either leave to apply for judicial review or substantive relief becomes academic, the need for the court to adjudicate on costs issues should arise only as a matter of last resort. Practitioners please take careful note! This may be viewed through the prism of the overriding objective, which imposes strong duties of co-operation and assistance on all litigants."*

The judgment in YPK undertakes, at [5] – [21], a comprehensive review of the principles governing the award of costs in judicial review proceedings. The LSA will take cognisance of this.

[27] YPK and Others has a strong resonance in the context of the legal aid issues which the court has proactively raised in the present case. In YPK there were ten challenges to immigration decisions, all of which were rendered moot by supervening events. None of these cases had proceeded any worthwhile distance in the court process. All of the applicants were informed of a fresh decision whereby the respondent had undertaken to rescind the impugned decision and, upon receipt of such further evidence or representations as might be provided, make a new one. All of the applicants applied for costs against the respondent. The court decided that there was no merit in nine of these applications and dismissed them. One (only) of the ten applicants succeeded in its quest for costs. One of the unsuccessful applicants was in receipt of a letter from the LSA containing the following passages:

> *"We reiterate that legal aid funding is to ensure access to justice and it is imperative that costs due to the Legal Aid*

Fund as a result of a successful outcome to proceedings instituted by the applicant should be recovered …..

We note ……. that the reason the judicial review hearing is rendered academic is because an alternative solution has been offered with regard to making further submissions to the Secretary of State for the Home Department ….

This outcome would not have been achieved but for the judicial review proceedings issued by public funding ….

The legal aid merits test for judicial review is predicated on there being a successful outcome for the applicant ….

Therefore I confirm that the Agency will require the applicant to seek the costs herein."

Letters of this kind are, I apprehend, routinely deployed by the LSA.

[28] The above letter provides a vivid illustration of the court's gentle observations relating to the LSA's recent letter. The success rate for the LSA in the legal aid satellite sideshow which developed was a miserable 10%. In nine of the ten cases, the public authority respondent incurred substantial irrecoverable costs in achieving litigation success on the costs issue. "litigation success" in this context denotes nom order as to costs *inter – partes*: a notably limited form of "success". The investment of judicial and other resources was considerable and, in the circumstances, utterly disproportionate. From the judicial perspective, it entailed several *inter-partes* listings before the court, a direction for the provision of a specially compiled bundle of papers, the investment of many hours reading this bundle and other papers, skeleton arguments prepared by a total of four counsel, the preparation of a lengthy judgment and, ultimately, a listing for handing down. It is clear to the court that all of this was driven by an inflexible LSA mindset shaped by an inappropriate fixation with a very narrow canvass.

[29] It seems clear from all of the above that the LSA undertakes no assessment of the subtleties and nuances which are frequently attendant upon the notion of "success" for the legally assisted litigant. Second, there is no acknowledgment of the overriding objective or the specific duty of assistance to, and cooperation with, the court which this imposes upon <u>all</u> litigants, irrespective of publicly funded status. Third, it is evident that the LSA does not attempt any analysis of how the open textured principles governing costs in judicial review are likely to be applied by the court. Nor, it seems, does the LSA invite the views of the legally assisted party's representatives on this discrete issue. All of these recent cases demonstrate that there is a nettle of some substance which this court would now expect the LSA to begin grasping.

Conclusion and Order

[30] As the terms of my ruling above make clear, I consider that the costs application on behalf of A was entirely devoid of merit. The three components of the final Order of the court are:

(a) A dismiss of the application for leave to apply for judicial review.

(b) No order as to costs *inter-partes*.

(c) Taxation of A's costs as an assisted person.