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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Croskery's (Andrew) Application [2010] NIQB 129

AN APPLICATION BY ANDREW CROSKERY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] By this application the applicant seeks leave to judicially review decisions of the Queens University of Belfast subject Board of Examiners refusing to reclassify his degree.

[2] Review of assessment decisions are governed by QUB's Study Regulations. The general principles are to be found at Reg 1.3.58, the grounds upon which candidates may apply for a review at Reg 1.3.60 (namely procedural irregularity and/or inadequate supervision of a candidates work) and the review procedures at Regs 1.3.61 – 1.3.69.

[3] In his amended Order 53 statement the applicant challenged the conduct of the reviews alleging a number of procedural flaws which it is unnecessary to examine in detail because of the nature of the legal issues with which this case is concerned.

[4] That there are and have been procedural flaws in the impugned decisions is acknowledged by the proposed respondent firstly, in its letter dated 11 October 2010 and, more recently, it its letter dated 2 December 2010 at p4. As matters currently stand therefore the proposed respondent intends to convene a further meeting of the Board of Examiners and that before that takes place the applicant will be furnished with copies of all further information provided by Dr Mitchell and given an opportunity to comment upon it orally or in writing. Plainly if, as a result of the

further meeting, the applicant's degree is reclassified, as he would hope, this matter may become, from the applicant's perspective, largely academic.

[5] If, however, the existing classification is confirmed, the applicant enjoys, as I understand it, two further rights of appeal – first, to the University Central Student's Appeals Committee, who cannot alter an assessment decision, but who can refer the case back to the Board of Examiners and secondly, to the Board of Visitors whose functions on a valid petition for redress are to see that the statutes and regulations of the university are in themselves fair, have been properly observed and carried out and that natural justice is observed wherever it may apply between the appellant and the university.

[6] Notwithstanding the fact that the Board of Examiners is to reconvene and that there are two potential unexhausted rights of appeal, the applicant presses his case for leave because, he submits, Art 6 is engaged and to ensure that any future hearings are Art 6 compliant and, in particular, that he will have the benefit of legal representation.

[7] If the applicant's Convention Rights, in particular Art 6, are *not* engaged then on the authority of ***Re Wislang's Application*** **[1984] NI 63** and ***Thomas v University of Bradford*** **[1987] AC 795** the matters in dispute would presently fall exclusively within the visitorial jurisdiction of the university – subject only to the *possibility* that any ultimate decision of the Board of Visitors might itself be judicially reviewable.

[8] I am indebted to Counsel on all sides for their clear, helpful and focussed written and oral submissions.

Is Article 6 engaged?

[9] The applicant's central proposition was that those decisions in ***Wislang*** and ***Thomas*** could no longer be regarded as sound law in light of the patriation of the European Convention into domestic law by the Human Rights Act 1998 and, in particular, because it was submitted Art 6 was engaged.

[10] Art 6 provides:

> **"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."**

Strasbourg Jurisprudence

[11] The applicant's Counsel, Mr McGleenan, acknowledged that historically Strasbourg jurisprudence had held that issues relating to elementary, secondary and higher education did not engage Art 6 because they did not involve a determination of civil rights such as to engage Art 6. For example, in the admissibility ruling in ***Andre Simpson v UK*** **[No. 14688/89]** the Commission held that Art 6 was

inapplicable to the laws relating to elementary education. The Commission ruled that:

> **"However, the Commission does not consider that this right under English domestic law or under Art 2 of Protocol No.1 (P1-2) is of a civil nature for the purposes of Art6 para.1 of the Convention. Although the notion of a civil right under this provision is autonomous of any domestic law definitions, the Commission considers that for the purposes of the domestic law in question and the Convention, the right not to be denied elementary education falls, in the circumstances of the present case, squarely within the domain of public law having no private law analogy and no repercussions on private rights or obligations (cf Eur Ct HR, *Deumeland* Judgment 29 May 1986, Series A No.100 pp24-25 paras.71-74). The Commission concludes, therefore, that there is no civil right at issue in the instant case and, accordingly, Art 6 para.1 of the Convention is not applicable to the administrative procedures before the domestic education authorities. It follows that this aspect of the applicant's case must be rejected as being incompatible ratione materiae with the provisions of the Convention, pursuant to Art 27 para 2 of the Convention."**

[12] The second section of the European Court in ***Hanuman v UK*** **[2000] ELR 685,** echoing the ruling of the Commission in ***Andre Smith*** declared proceedings which sought to challenge a decision of the Appeals Committee and Visitor of the University of East Anglia to be inadmissible because they "did not involve the determination of a civil right ... within the meaning of Art 6 of the Convention".

[13] However, as Mr McGleenan pointed out, the decision in ***Simpson*** which underpinned the decision in ***Hanuman*** was reviewed by the European Court in ***Emine Arac v Turkey*** **(9907/02, 23 September 2008)**. In that case the applicant sought to enrol in the Faculty of Theology of Marmara University. For that purpose she provided, among other materials, an identity photograph which showed her wearing a headscarf. The university informed her that the identity photograph she had supplied did not comply with the regulations in force and that where this was the case the person concerned could not be enrolled. The applicant lodged an application for judicial review with the Istanbul Administrative Court requesting that the refusal of the authorities be set aside as being in breach of her rights. In its judgment the Administrative Court rejected the application finding that the authority's refusal had been in accordance with the regulations in force. The Court considered, in particular, that the applicant had submitted an identity photograph

which did not conform to the regulations which stipulated that "photographs must show the subject facing forward and be less than six months old so that the person concerned is readily identifiable; the head and neck must also be uncovered". Following an appeal by the applicant on points of law the Supreme Administrative Court upheld the judgment. Before the ECHR the Turkish Government had argued that Art 6(1) was inapplicable and relied upon the decision in ***Simpson.*** The ECHR said the dispute between the applicant and the Turkish authorities "related to the actual existence of the right asserted by the applicant to continue to the University studies ...". Consequently the Court said at para 17 that it "must simply ascertain whether Ms Arac's right to continue her theology studies was a civil right within the meaning of Art 6(1)".

[14] The Court further stated:

> **"18. The Court reiterates that, although it has found the concept of "civil rights and obligations" to be autonomous, it has also held that, in this context, the legislation of the State concerned is not without importance (see *Konig v Germany*, 28 June 1978, 89 Series A No 27). Whether or not a right is to be regarded as civil within the meaning of that term in the Convention must be determined by reference not only to its legal classification but also to its substantive content and effects under the domestic law of the State concerned. Moreover, the Court, in the exercise of its supervisory function, must also take account of the object and purpose of the Convention (see *Perez v France* [GC] No 47287/99, 57, ECHR 2004-I).**
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> **19. The court observes at the outset that, in view of the working of Art 42 of the Turkish Constitution the applicant, who was a student in the Faculty of Theology of İnönü University, could make an arguable claim that Turkish law conferred on her the right to enrol in the Faculty of Theology of Marmara University provided she satisfied the statutory conditions. She was refused enrolment not because she failed to satisfy one of these conditions but because of her failure to comply with a formal requirement laid down by the regulations in question.**
>
> **20. According to the Government, the regulation of enrolment in higher education establishments was a matter falling within the sphere of public law. In the Court's view, however, this public-law aspect**

does not suffice to exclude the right in question from the category of civil rights within the meaning of Article 6(1). It further points out that in several cases (see, in particular, *Konig* and *Le Compte, Van Leuven and De Meyere, Benthem v The Netherlands*, 23 October 1985, Series A, No 97 and *Feldbrugge v The Netherlands*, 29 May 1986 Series A, No 99) State intervention by means of a statute or delegated legislation has not prevented the Court from finding the right in issue to have a private and hence civil character. Proceedings which fall within the sphere of "public law" in the domestic legal order may come within the scope of Art 6(1) where their outcome is decisive for civil rights and obligations.

21. In addition, in *Kök v Turkey* (No.1855/02, 36, 19 October 2006) the Court found Art 6 to be applicable to a dispute concerning the setting aside of the authorities' refusal to authorise the applicant to practise a medical specialisation. It also found that, where a State confers rights which can be enforced by means of a judicial remedy, these can, in principle, be regarded as civil rights within the meaning of Art 6(1) (see along the same lines *Tinnelly & Sons Ltd & Ors & McElduff & Ors v UK* , 10 July 1998, 61, *Reports of Judgments and Decisions* 1998-IV).

22. It is important also to emphasise that Ms Arac was not affected in her relations with the public authorities as such, acting in the exercise of discretionary powers, but simply in her personal capacity as the user of a public service. Hence, she was challenging the regulations in force, which she considered prejudicial to her right to continue her studies in a higher education establishment.

23. Furthermore, in its recent case law the Court, leaving the door open for the application of Art 6 to the right to education, has consistently examined whether proceedings concerning the regulations on higher education conform to the requirements of Art 6(1) (see, by way of example, *Mürsel Eren v Turkey* (dec.) No.60856/00, 6 June 2002; *D H & Ors v The Czech Republic* (dec.) No.57325/00, 1 March 2005; and *Tig v Turkey* (dec.) No.8165/03, 24 May 2005).

> **24. Accordingly, given the importance of the applicant's right to continue her higher education (as regards the key role and importance of the right of access to higher education, see *Leyla Şahin v Turkey* [GC] No.44774/98, 136, ECHR 2005-XI), the Court does not doubt that the limitation in question, imposed by the regulations in issue, fell within the scope of the applicant's personal rights and was therefore civil in character.**
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> **25. In light of the foregoing, and given that the lawfulness of proceedings concerning a civil right was capable of being challenged by means of a judicial remedy, of which the applicant made use, the Court considers that a dispute ("contestation") concerning a "civil right" arose in the instant case and was determined by the administrative court. Art 6(1) is therefore applicable in the present case."**

[15] The applicant also relied on the recent decision by the Grand Chamber of the European Court in ***Orsus v Croatia*** **[2010] (15766/03)**. In that case the Court stated at para 104:

> **"In its judgment *Emine Arac v Turkey* (No. 9907/02, 23 September 2008) the Court explicitly recognised, for the first time, that the right of access to higher education is a right of a civil nature and, in so doing, it abandoned the case law of the Commission (*Andre Simpson v the United Kingdom, ...)* which had concluded that Art 6 was inapplicable to proceedings concerning the laws on education (on the ground that the right not to be denied primary education fell within the domain of public law). The Court considers that the same reasoning applies *a fortiori* in the context of primary education (*argumentum a maiore ad minus).***"

Discussion

[16] I do not accept that it follows from the European Court's recognition that the *right of access* to higher (and primary) education is a right of a civil nature engaging Art 6 that the determination of the applicant's *degree classification* similarly engages Art 6. In my view there is nothing in the jurisprudence to support the proposition that the assessments and/or the procedures for determining disputed degree assessments and classifications fall within Art 6. The assessments themselves are

plainly a matter of academic specialised judgment and whilst the outcome of the procedures for determining disputed classifications is a matter of considerable import for an individual they are not concerned (as the recent ECHR authorities were) with determining rights of access or any other civil right within the meaning of Art 6. The assessments and, more importantly for present purposes, the reviewing supervision of the relevant subject Board of Examiners, which is made up of senior academics in the relevant subject field, does not, in my view, involve the determination of any civil right and the recent authorities do not support the proposition contended for by the applicant.

[17] Accordingly, I do not accept that Art 6 is engaged in this case and, on the authority of ***Wislang*** and ***Thomas*** the matters in issue presently fall within the exclusive visitorial jurisdiction of the University.

Art 2 First Protocol

[18] For the sake of completeness I should say a little about this ground. The applicant relied in his written submissions on Art 2 of the First Protocol but these were not developed in oral submissions before me at the reconvened leave hearing. Indeed, Mr McGleenan frankly recognised that this was the weaker component of his case.

[19] Art 2 of the First Protocol, entitled "Right to Education", provides as follows:

> **"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."**

[20] As noted by Clayton and Tomlinson, *The Law of Human Rights* 2nd Ed at para 19.04 the inclusion of this provision in the first protocol was controversial and the right is more limited than that in the Universal Declaration of Human Rights or in the International Covenant on Economic, Social and Cultural Rights. It was couched in negative terms – "No person shall be denied the right to education". Individual rights may vary in accordance with the standards applied to different educational levels. For example, where the State provides a primary or secondary education system, it must necessarily offer universal access to it; by contrast, for higher education it is acceptable that enrolment is restricted to those who are capable of benefiting from what is provided, although such restrictions must have a proper legal basis in order to prevent the arbitrary interference with the right to education – see Clayton and Tomlinson para 19.71; ***Glazewska v Sweden*** **[1985] 45 DR 300;** ***Eren v Turkey*** **[2006] ELR 155.**

[21] It is clear that this article is concerned with denial of rights to education. Plainly the applicant has had access to and has exercised his right to third level

education. Art 2 P1 says nothing about rights to degrees or other academic qualifications much less to their academic assessment. In my view it is not engaged in this case.

Conclusion

[22] Accordingly, I conclude that neither Art 6 nor Art 2 of Protocol 1 is engaged and that the matter in dispute remains exclusively within the jurisdiction of the Board of Visitors. In cases where Convention rights are not engaged ***Wislang*** and ***Thomas*** remain good law. Accordingly, leave is refused.