

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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Drinan's (Padraigin) Application [2014] NICA 7

IN THE MATTER OF AN APPLICATION BY PADRAIGIN DRINAN FOR  
JUDICIAL REVIEW

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Before: Morgan LCJ, Higgins LJ and Coghlin LJ

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**MORGAN LCJ (delivering the judgment of the court)**

[1] This is an appeal by the Northern Ireland Legal Services Commission ("LSC") from a decision of Mr Justice Treacy on 16 October 2012 allowing an application for judicial review by Padraigin Drinan, the respondent, of a decision by the LSC communicated to her on 15 November 2011 refusing to pay fees on foot of a legal aid certificate for representation at the First Tier Tribunal of the Immigration and Asylum Chamber. The basis of the refusal was that the work was carried out by a non-qualified member of staff. Mr Lyttle QC and Mr McLaughlin appeared for the appellant and Mr Bassett for the respondent. We also had a short submission in support of the appeal from the Bar Council. We are grateful to all counsel for their helpful oral and written submissions.

**Background**

[2] The respondent is a qualified solicitor who, in partnership with another qualified solicitor, operates a practice in Belfast which specialises in immigration law. The respondent's firm employs two non-legally qualified staff, one of which is Ms Barbara Muldoon. She has been employed by the respondent since 2002 and has appeared before Immigration Tribunals for many years in numerous appeals. In October 2009 she was accepted as a trainee solicitor under the Solicitors Admission and Training Regulations 1988.

[3] In early June 2010 the respondent spoke by telephone to Paul Andrews, Chief Executive of the appellant, in relation to legal aid bills which had been disallowed by

the appellant because the work was carried out by unqualified members of staff. On 29 June 2010 she wrote to Mr Andrews stating that in order to provide specialist immigration services she had retained the services of Ms Muldoon and Dr Tim Currie who had conducted numerous appeals before the Immigration Tribunals. Neither of these employees was professionally qualified although Ms Muldoon had been accepted as a trainee solicitor in October 2009. The respondent noted that the success rate in her practice was far in excess of that required for accreditation in England and Wales and that there was a shortage of experienced solicitors and counsel in this field in Northern Ireland. She stated that Ms Muldoon and Dr Currie were qualified persons by virtue of section 84 (2) of the Immigration and Asylum Act 1999 ("the 1999 Act") and therefore had a statutory entitlement to conduct the work.

[4] Mr Andrews responded by letter dated 25 August 2010. He stated that the grant of legal aid entitled a funded party to the services of a solicitor to act for them. Accordingly the appellant could not fund someone other than a solicitor directly providing the service for which legal aid had been granted. He concluded that Ms Muldoon and Dr Currie could not be remunerated under the legal aid scheme as they were not solicitors or barristers.

[5] In her affidavit sworn in these proceedings Ms Muldoon explained that the respondent firm had previously acted for a Somali woman, Shamsu Ali, who made an asylum claim. She was granted refugee status. She was the wife of Yusuf Bashir Osman who was also a national of Somalia. Mr Osman applied for entry to the United Kingdom based on ancillary rights he enjoyed arising out of his wife's status as a refugee. That application was refused on 3 November 2009. Mr Osman was granted legal aid on 26 July 2010 to be represented by the respondent in appeal proceedings challenging the decision to refuse him entry clearance before the First-Tier Tribunal of the Immigration and Asylum Chamber.

[6] Ms Muldoon stated that Dr Currie had provided advice to the couple prior to the application being made and had provided a letter to the entry clearance office. Ms Muldoon consulted on those issues and on any instructions that had been received from Ms Ali to ascertain what references she had made to her husband. She then consulted on four separate occasions with Ms Ali through an interpreter. She checked the details by telephone with Mr Osman and arranged to have him sign a confirmation statement. The issue in the case was whether the appellant was lawfully married to a refugee. There was no documentary proof and all of those involved in the marriage proceedings had been displaced, kidnapped or killed as a result of the civil war in Somalia. She conducted research on the legal issues. The marriage had been conducted overseas in a manner that was customary and lawful in the country in which it had taken place but would not have been lawful in the United Kingdom. That bore on the question of whether there was a subsisting marriage.

[7] On 26 August 2010 she attended for the hearing but the immigration judge recused himself as he had been involved in another matter concerning the appellant's wife. She attended again on 4 November 2010 when the matter proceeded and the appeal was successful. She dealt with the question of supervision of her work at paragraphs 22 and 23 of her affidavit.

"22. Ms Drinan delegated the task of representing Mr Osman before the tribunal to me.

23. However, Ms Drinan's involvement in this case was ongoing and continuous. I often discuss matters of law with her and the complexities of individual cases and she often assists in the necessary research. This was also the situation in representing Mr Osman."

[8] This issue was also addressed in Ms Drinan's first affidavit at paragraphs 10-14.

"10. The preparatory work in this particular case was completed by me, the principal of the firm, and Ms Barbara Muldoon. All work was directed and supervised by me although Ms Muldoon appeared before the tribunal.

11. The preparation of this case required the completion of a skeleton argument, the drafting of a witness statement, numerous consultations with both Ms Shamso Ali and Mr Osman and phone calls to a refugee camp in Nairobi, Kenya.

12. I chose to delegate the task of representation at the Tribunal to Ms Muldoon as she has an in-depth knowledge of immigration law and asylum law within this jurisdiction. She is a very able advocate and has always provided an excellent level of client care to appellants.

13. She is also a qualified person to provide immigration services. However, if she had any particular queries about specific points of law or procedure I would assist.

14. I am, and have been for some time, very happy with the level of assistance and advice clients receive

from Ms Barbara Muldoon. This particularly true of her appearances before the Tribunal.”

[9] Following the successful appeal before the tribunal the respondent submitted a report to the appellant at the end of August 2011 claiming a fee of £1698.90. This included a composite fee for an appeal hearing and adjourned hearing before the Immigration Tribunal. The composite fee rates were set by the appellant after a lengthy period of consultation with members of the legal profession in Northern Ireland. On 15 November 2011 she received a remittance advice advising that no fees were payable as in the opinion of the appellant non-qualified staff had completed the work.

### **The relevant statutory provisions**

[10] The provision of legal aid is governed by Part II of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (“the 1981 Order”). Article 9 of the 1981 Order establishes financial limits and Article 10 deals with the scope of legal aid. Article 10(1)(a) establishes that proceedings before the Asylum and Immigration Tribunal are within scope as a result of their inclusion at paragraph 6A of Part 1 of Schedule 1 to the 1981 Order. Article 10 (3) describes the content of legal aid.

“(3) Legal aid shall consist of representation, on the terms provided for by this Part, by a solicitor and so far as necessary by counsel, including all such assistance as is usually given by a solicitor or counsel in—

the steps preliminary or incidental to any proceedings; or

(b) in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings.”

[11] Article 13 provides that a solicitor who has acted for a person receiving legal aid shall be paid for so acting out of the legal aid fund. Article 15 (3) touches on the relationship between a solicitor and a legally aided client.

“15 (3) Where a person is entitled to receive legal aid, advice or assistance he himself shall be entitled to select the solicitor to act for him and, if the case requires counsel, his counsel; but this paragraph shall not prejudice the rights of solicitor or counsel where he has good reason to refuse or give up a case or entrust it to another.”

Article 15A preserves the normal rules with the services of a solicitor given by way of legal aid.

“15A. Except as expressly provided by this Part or by regulations made under it –

- (a) the fact that the services of counsel or a solicitor are given by way of legal aid does not affect the relationship between or rights of counsel, solicitor and client or any privilege arising out of such a relationship; and
- (b) the rights conferred by or under this Part on a person receiving legal aid are not to affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised.”

Article 22 establishes a power to make regulations for preventing abuses by persons seeking or receiving legal aid. The relevant Regulations are the Legal Aid (General) Regulations (Northern Ireland) 1965 (“the 1995 Regulations”) made under the pre-existing legislation. Of significance in this case was Regulation 15(13).

“No solicitor or counsel acting for an assisted person shall entrust the conduct of any part of the case to any other person save to a solicitor or counsel who is a member of an appropriate panel:

Provided that nothing in this paragraph shall prevent a solicitor from entrusting the conduct of any part of the case to a person who is his partner or who is employed in his office.”

[12] The provision of immigration services is regulated by section 84 of the Immigration and Asylum Act 1999 as amended (“the 1999 Act”).

“(1) No person may provide immigration advice or immigration services unless he is a qualified person.

(2) A person is a qualified person if he is–

- (a) a registered person,
- (b) authorised by a designated professional body to practise as a member of the profession whose members the body regulates,

- (ba) a person authorised to provide immigration advice or immigration services by a designated qualifying regulator,
- (c) the equivalent in an EEA State of-
  - (i) a registered person, or
  - (ii) a person within paragraph (b) or (ba) ,
- (d) a person permitted, by virtue of exemption from a prohibition, to provide in an EEA State advice or services equivalent to immigration advice or services, or
- (e) acting on behalf of, and under the supervision of, a person within any of paragraphs (a) to (d) (whether or not under a contract of employment)."

The First Tier Tribunal permitted Ms Muldoon to conduct the appeal on the basis that she was acting on behalf of and under the supervision of the respondent who as a solicitor fell within section 84(2)(b) of the 1999 Act.

[13] The statutory basis for the funding of legal services in civil proceedings in England and Wales has followed a different path. The scope of the services which may be funded is set out in section 6 (3) of the Access to Justice Act 1999.

- "(3) The Commission may fund services as part of the Community Legal Service by –
- (a) entering into contracts with persons or bodies for the provision of services by them,
  - (b) making payments to persons or bodies in respect of the provision of services by them,
  - (c) making grants or loans to persons or bodies to enable them to provide, or facilitate the provision of, services,
  - (d) establishing and maintaining bodies to provide, or facilitate the provision of, services,

- (e) making grants or loans to individuals to enable them to obtain services,
- (f) itself providing services, or
- (g) doing anything else which it considers appropriate for funding services. ”

The scope of what can be funded by legal aid in England and Wales is, therefore, much broader than that permitted under the 1981 Order and in particular is not confined to representation by a solicitor or counsel.

[14] In respect of those who provide representation before the Asylum and Immigration Chamber the LSC in England and Wales operates the Immigration and Asylum Accreditation Scheme (“the Scheme”) which is compulsory for all immigration and asylum advisers engaged in LSC funded work. Immigration and asylum legal aid providers must have at least one caseworker fully accredited at Level 2 of the Scheme who also holds the additional supervisor’s qualification. The accreditation depends upon success rates in previous appearances. Solicitors, Fellows of the Institute of Legal Executives or non-solicitors employed in a solicitor’s firm may apply for membership of the Scheme. Non-legally qualified persons, suitably accredited, may be remunerated from public funds for appearing before the Tribunal.

### **The decision of the learned trial judge**

[15] The learned trial judge noted that Regulation 15 (13) of the 1965 Regulations made it clear that the solicitor acting for an assisted person could entrust the conduct of any part of the case to a person employed in his office. Where the work was lawfully entrusted to an unqualified person employed in the solicitor's office fees were recoverable under a legal aid certificate. He held that the decision to entrust the conduct of any part of the case and the degree of supervision required is ordinarily a matter for the professional judgement of the solicitor concerned subject to the actual implied consent of the client. Where, as here, the employee was capable of performing the task and was supervised in its execution the solicitor was entitled to be paid.

[16] Although the learned trial judge recorded the appellant as having accepted that Ms Muldoon was all material times a qualified person within the meaning of the 1999 Act it appears that this concession by the appellant was made in respect of her work in the office. It was not conceded that her unsupervised appearance in the tribunal was in accordance with the 1999 Act.

[17] The learned trial judge concluded that he could see no reason why a delegation should not extend to the provision of the representation service before the

tribunal provided the client was aware that the person was a trainee solicitor, agreed to that delegation and was aware of his right to insist on a qualified solicitor. He noted that a solicitor with a paying client could make such an arrangement under existing case law. There was no reason why a legally aided client should be denied a similar advantage if the trainee solicitor had particular expertise.

[18] The judge considered that the extension of the pool of eligible representatives in immigration proceedings was an important policy objective of the 1999 Act which would be imperilled if legal aid funding were not available in a case of this type. Secondly, he concluded that the unavailability of legal aid in the circumstances would affect the relationship between solicitor and client resulting in the client in practice being denied the immigration services of a qualified person within the 1999 Act. He considered that this offended Article 15A(a) of the 1981 Order.

### **Submissions**

[19] The appellant submitted that Regulation 15 (13) of the 1965 Regulations contained a general prohibition on entrusting the conduct of any part of the case to a person other than a solicitor or counsel. To interpret the proviso so as to permit delegation to persons who are not legally qualified at all and not acting under the direct supervision of a solicitor would undermine the policy of the general prohibition. It would in effect enable non-qualified persons to act as a solicitor which is a criminal offence under the Solicitors (Northern Ireland) Order 1976.

[20] Government had a choice as to how it might fund representation before the Immigration Tribunal. It could have chosen to fund such representation by a dedicated immigration advice agency, accreditation or the support of professional immigration practitioners. In this jurisdiction it was decided to fund such representation through legal aid which consists of representation by a solicitor and where necessary counsel. It was not intended to fund unsupervised representation by non-legally qualified persons.

[21] The judge was wrong to conclude that a solicitor could entrust part of a case to non-legally qualified staff. The issue was whether there has been lawful delegation so that it remained the position that the solicitor could be said to be providing the service. A privately paying client may enter into an agreement with a solicitor that the service will be provided by a non-legally qualified person within the firm but a solicitor providing services for a legally aided client can only claim from the legal aid fund for services provided by the solicitor.

[22] The appellant agreed that a policy objective of the 1999 Act was to increase the pool of eligible representatives in immigration cases. It did not follow, however, that payment under the legal aid scheme was to be made for non-legally qualified staff. Such a scheme might have been introduced by way of accreditation as happened in England and Wales but in Northern Ireland it remained the position

that public funding under legal aid was only available for services provided by solicitors and counsel. It was wrong, therefore, to transpose the policy objectives of the 1999 Act into the interpretation of the 1981 Order.

[23] The extent to which a solicitor may delegate the provision of services was considered in Pilbrow v Pearless De Rougemont [1999] 3 All ER 355. The submission that a solicitor acting on foot of a legal aid certificate cannot transfer the conduct of part of the case to a non-legally qualified person did not offend Article 15A of the 1981 Order. A legally aided client was not free to negotiate the terms of the retainer so as to be paid out of the legal aid fund for services provided by non-legally qualified personnel.

[24] The respondent submitted that Regulation 15(13) of the 1965 Regulations expressly permitted the delegation of any part of the case to a person employed in the solicitor's office. Advocacy was part of the case. The choice to delegate a particular task to an employee is a choice for the respondent subject only to the condition that the individual performing the task is qualified, capable and supervised and the client has consented to this course of action.

[25] The respondent also maintained that Ms Muldoon was at all times a qualified person within the meaning of section 84 of the 1999 Act and was adequately supervised. That supervision was sufficient for the purposes of the 1981 Order so that the client was at all times represented by the respondent.

[26] Article 15A(a) of the 1981 Order was explicit in putting a legally aided client in the same position as a private payer. Legal aid did not affect the normal rules. The client expressly gave his consent to Ms Muldoon rather than the respondent addressing the Tribunal on his behalf. In those circumstances the delegation of that function to Ms Muldoon was appropriate.

### **Consideration**

[27] By virtue of Article 10 (3) of the 1981 Order legal aid consists of representation by a solicitor or, where necessary, counsel. There is, therefore, a fundamental difference between the scheme for public funding of representation in Northern Ireland and that in England and Wales. That background informs the proper interpretation of Regulation 15(13) of the 1965 Regulations. Clearly the Regulation cannot provide a basis for extending the scope of legal aid beyond representation by a solicitor. It would not be open to a solicitor or client relying upon legal aid funding to enter into an agreement whereby the client was represented by a non-legally qualified person. Any such agreement would not constitute representation by a solicitor.

[28] We do not consider that this position is altered by the terms of Article 15A of the 1981 Order. That Article establishes that where the services of counsel or a

*solicitor are given by way of legal aid* that does not affect the relationship between the rights of counsel, solicitor and client or any privilege arising out of such a relationship. The important point is that legal aid can only consist of representation by a solicitor or counsel. In so far as the learned trial judge took the view that this provision enabled a client to agree with the solicitor that he would be represented by a non-legally qualified person we consider that he was in error. We entirely accept that a privately paying client may agree with a solicitor to be represented by a non-qualified person but a solicitor acting on foot of a legal aid certificate who provides such services cannot be funded under the legal aid scheme.

[29] We agree with the learned trial judge that section 84 of the 1999 Act was intended to broaden the scope of those who could provide representation in the Asylum and Immigration Chamber. That could not, however, affect the interpretation of the statutory remit of legal aid set out in Article 10(3) of the 1981 Order.

[30] The issue in this case is the extent to which a solicitor providing representation under a legal aid certificate can delegate part of the work or entrust the conduct of part of the case to another while still providing that representation. It is common case between the parties that the solicitor is entitled to delegate or entrust the conduct of part of the case in certain circumstances. That is recognised in Regulation 15(13) of the 1965 Regulations. The general restriction on entrusting the conduct of any part of the case is consistent with the intention of the 1981 Order that representation shall be provided by a solicitor and/or counsel. The proviso enables the solicitor to entrust the conduct of the case to a person who is his partner and clearly, therefore, professionally qualified.

[31] The proviso also provides that the solicitor may entrust the conduct of part of the case to a person employed in this office. Such a person may be professionally qualified but non-legally qualified staff are not excluded. Some assistance as to the circumstances in which the delegation can be made to non-legally qualified staff can be obtained from the decision of the Court of Appeal in Pilbrow v Pearless De Rougemont [1999] 3 All ER 355. In that case a client telephoned a firm of solicitors requesting an appointment to see a solicitor about a family matter. He was referred to a non-legally qualified employee of the firm. Although the work was carried out competently he was dissatisfied and queried his bill. When he discovered that the person conducting his case was not legally qualified he refused to make any further payments.

[32] The court considered that the contract was one for the provision of legal services by a solicitor and that the conduct of the work by a non-legally qualified person constituted non-performance. The court recognised that the right to delegate work to employees such as typists or legal executives would often be implied. It considered, however, that the right was dependent upon the actual or implied consent of the client. In that case it was suggested that the solicitor could either have

persuaded the client to have the work carried out by the non-legally qualified person or alternatively have done it himself while seeking advice from the non-legally qualified person.

[33] We have set out in paragraph 27 above why we consider that it is not open to a legally aided client to receive public funding for work that he agrees should be carried out by non-legally qualified persons. The express agreement of the client for the provision of such services cannot engage the obligation to provide public funding for those services. Public funding for delegated work can only be secured where the work and the circumstances in which it is carried out can be implied into the provision of representation by the solicitor. That follows not from the solicitor and client relationship but from the statutory limitation in Article 10(3) of the 1981 Order.

[34] There was no dispute between the parties that in respect of the work carried out in the office Ms Muldoon was at all material times under the supervision of the respondent and we are prepared to accept that delegation of that work in those circumstances was permissible. There is, however, no evidence of any direct supervision of the conduct of the hearing. Ms Muldoon conducted the hearing entirely on her own. The client did not receive representation by a solicitor but rather was represented by a non-legally qualified person. Payment for such services does not fall within the legal aid scheme.

[35] We wish to make it clear that throughout this case it has been acknowledged that Ms Muldoon provided a perfectly competent and appropriate level of service for the client. It is accepted that she has a particular expertise in relation to immigration matters. We have no doubt that if the accreditation scheme applying in England and Wales had operated in this jurisdiction the firm would have been entitled to be publicly funded for her work. This case may raise an issue for the legislature as to whether in this specialist area of work non-legally qualified personnel should benefit from public funding but it would be entirely inappropriate for us to express any view on that.

## **Conclusion**

[36] For the reasons given we allow the appeal.