Neutral Citation No: [2023] NIKB 22 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **SCO12034** *ICOS No:* **21/021744/01** *Delivered:* **13/01/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY
CYRIL GLASS FOR JUDICIAL REVIEW

COSTS RULING

Karen Quinlivan KC and Malachy McGowan (instructed by KRW Law, solicitors) for the applicant
Tony McGleenan KC and Philip McAteer (instructed by the Solicitor to the HIA Redress Board) for the respondent

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SCOFFIELD J

Introduction

[1] I previously gave judgment in the above application for judicial review and ruled on the substance of the applicant's challenge: see [2022] NIKB 2. I quashed the single judicial member's final determination and remitted the matter to the Redress Board for a re-determination of the appeal by another SJM. As a result of the grant of that relief the applicant submits, unsurprisingly, that he has been successful in his application and that he ought to be awarded his costs of these proceedings against the respondent. The respondent resists this application and submits that, in the circumstances outlined below, there should be no order as to costs between the parties or, in the alternative, an order that the respondent pay only a portion of the applicant's costs, and certainly no more than 50% of those costs.

Relevant principles

[2] There is little dispute about the relevant legal principles applicable to the award of costs in applications for judicial review in this jurisdiction. Although Lord Lloyd of Berwick famously said that "the fundamental rule is that there are no

rules" (endorsed by the Court of Appeal in Northern Ireland in *Re SOS (NI) Limited's Application* [2003] NIJB 252, at 256), a variety of guiding principles appear from decided cases. As Lord Lloyd went on to counsel, costs are always in the discretion of the court and must be addressed on a case-by-case basis, so that practices should not be allowed to harden into rules.

[3] With that caveat, the starting point is RCJ Order 62, rule 3(3) which provides as follows:

> "If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

[4] The following basic position emerges from an analysis of this provision. First, the court has a discretion as to whether or not it makes any order as to the costs of the proceedings. Second, if the court decides to make an order, the usual order will be that costs follow the event. Third, the court may make a different order where it appears to it that, in the circumstances of the case, a departure from the usual order is warranted. Where it does so, its order may relate either to the whole or any part of the costs, thus providing the court with a wide power to meet the justice of the situation as the judge assesses it.

[5] The basic position described above has been the subject of a considerable degree of discussion and elaboration, including by way of judicial reflection on how the flexibility inherent in the court's discretion should be applied in different cases. McCloskey J (as he then was) carried out a characteristically detailed review of the authorities on costs in judicial review proceedings in *Re YPK and Others' Applications* [2018] NIQB 1. At para [5], he set out what was described as the code of principles derived from *Boxall and another v London Borough of Waltham Forest* [2000] All ER (D) 2445 (which reflected the position in Part 44.3 of the Civil Procedure Rules applicable in England and Wales):

> "(1) The court has discretion as to —
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs—

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

…

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including—

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and …

(5) The conduct of the parties includes —

(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;

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

[6] The above propositions also reflect the general approach in Northern Ireland, albeit they are not spelt out in such detail in Order 62 of the Rules of the Court of Judicature here. What are more commonly known as "the *Boxall* principles", providing guidance for cases where judicial review proceedings have been resolved without a full hearing but where the parties have not agreed a position on costs, are set out at para [21] of the judgment of Scott Baker J in the *Boxall* case and are not directly relevant for present purposes. A considerable amount of the case law in the field of judicial review costs relates to such an instance, where the court has not had the benefit of hearing and determining the case and where there may be competing

public interest considerations as to where costs should fall after the proceedings become unnecessary.

[7] At para [18] of his decision in *YPK*, McCloskey J also noted with approval the guidance provided by the English Court of Appeal in *M v London Borough of Croydon* [2012] EWCA Civ 595 as to how the general costs principles are to be applied in the context of judicial review. The main effect of the decision in *M* was said to be "to generally align the principles governing the award of costs in ordinary civil litigation with those applicable in judicial review proceedings." The following guiding principles were also set out:

> "(i) Where a claimant has been wholly successful whether following a contested hearing or via settlement "… it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary": see [61].
>
> (ii) In a case where the claimant succeeds in part only following a contested hearing or via settlement, the court will normally evaluate the factors of "… how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim": see [62]. The court's evaluation of such questions will be greatly facilitated where the case has proceeded to the stage of substantive judicial adjudication. But the judicial task will be altogether more difficult in cases where the claimant's partial success arises through the mechanism of consensual resolution. In the latter type of case "… there is often much to be said for concluding that there is no order for costs": see [62].
>
> (iii) In cases where a compromise which does not "actually reflect the claimant's claims" is struck, the court "… is often unable to gauge whether there is a successful party in any respect …. Therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some cases it may well be sensible to look at the underlying claims and enquire whether it was tolerably clear who would have won if the matter had not settled": see [63].

[8] Whereas the code set out at para [5] above draws a distinction between the party who is successful and the party who is unsuccessful, the guidelines set out in the para above draw a distinction between a claimant who is wholly successful and one who is successful only in part (or by means of a negotiated resolution). The question of who has been successful will, in most cases, be relatively easy to resolve. Success does not require an applicant to have succeeded in obtaining the *entirety* of what he sought. A common sense approach, or 'real world' analysis, is required. Where an applicant has obtained substantially what he sought, he will be generally be viewed as successful (see *AL (Albania) v Secretary of State for the Home Department* [2012] EWCA Civ 710, at para [27]; and *R (Patel) v Secretary of State for the Home Department* [2020] EWCA Civ 74, at para [21]).

[9] But there is still what Lord Neuberger (at para [60] of his judgment in the *M* case) described as a "sharp difference" between cases where the applicant was wholly successful and those where they have succeeded only in part. Where an applicant for judicial review is wholly successful after a full hearing, there is a strong presumption that a full costs award will follow the event. Where the applicant is only partially successful, the situation is more complex and may call for a more detailed evaluation.

[10] The applicant in the present case relies upon the comment of Pill LJ in *R (Bahta) v SSHD* [2011] EWCA Civ 895, at para [65], to the effect that when *relief* is granted, the respondent bears the burden of justifying a departure from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party. The grant of relief is usually a clear indication of the applicant having been successful. It does not of itself, however, indicate whether or not the applicant has been wholly successful or only successful in part. Where the applicant has secured relief following a contested hearing, for my part I consider it highly likely that he or she will recover at least some element of their costs. Indeed, the burden of showing that a full costs award in their favour should not be made will fall on the respondent. That will require an evaluation of the factors mentioned at sub-para (ii) of the passage quoted at para [7] above.

[11] Although the authorities are replete with references to judges taking a proportionate approach to costs disputes, and generally viewing matters in the round rather than unnecessarily adding to the overall costs by way of protracted costs arguments, they should "not too readily be deterred" (see *Bahta* at para [68]). The cases also clearly show that such an evaluation will be much more easily conducted where a full hearing on all issues has been held. In those circumstances, there should be no need for satellite arguments as to who would or should have succeeded and on which grounds: that argument will have been had.

The parties' submissions on costs

[12] In support of its contention that the applicant should not recover any costs, or a moiety of them at most, the respondent relies upon the following issues:

(a) The applicant succeeded only "on a limited basis" and "in the very particular circumstances of this case, and not without some hesitation" on the part of the court (see paras [80] and [107] of the main judgment).

(b) Correspondingly, the respondent succeeded on all other arguments in the case, including in relation to the preliminary decision to refuse to direct an oral hearing (see paras [71]-[72] and [107]); the decision to decline to admit the additional statements which were provided late (see paras [87]-[99] and [107]); the issue of whether there had been a 'finding against' the applicant (see para [78]); any suggestion that an application under the HIA redress scheme must be taken at its height unless an oral hearing was convened (see para [79]); the arguments that the SJM had had no or inadequate regard to the Hart Report or that that report itself provided a proper reason for earlier non-disclosure (see paras [84]-[85]); the consideration of the significance of the applicant's history given to Dr Mangan (see para [104]); and the consideration of evidence which the applicant had given to the Hart Inquiry (see para [106]).

(c) In addition, the criticism of the applicant's claim as it related to his experience in Lisnevin, albeit pursued relatively faintly, was rejected entirely (see paras [101]-[102]).

(d) Even in respect of the issue upon which the applicant did succeed, I considered that this "arose in part, if not largely, because of the way in which the claim was initially presented and then only developed at a later stage" (see paras [107] and, earlier, [72], [83] and [86]). It was this wholly avoidable means of presenting the claim which gave rise to the SJM's concerns which, in turn, resulted in, or at least significantly contributed to, the impugned decision being taken in the way and in the result that it was.

[13] In support of his contention that he should be awarded the full costs of the proceedings, the applicant makes the following points:

(a) He says that he was substantially successful in relation to what he sought to achieve, namely the setting aside of the SJM's decision.

(b) He further contends that his primary complaint was always that he had not been awarded compensation in relation to the sexual abuse he had endured in Rathgael (as noted at para [80] of the judgment); and his submission was that the manner in which that decision had been reached had been procedurally unfair, particularly as his request for an oral hearing had been refused. He says that he has been vindicated in this primary complaint on that central ground.

(c) The argument in relation to abuse at Lisnevin was always very much a lesser element of the case, as acknowledged by counsel and recorded in the judgment (see para [102]).

(d) The issue of the admission of written statements was secondary or ancillary to the issue of whether an oral hearing should have been afforded.

Consideration

[14] In the present case, the applicant has plainly been successful. However, in my view he has not been "wholly successful." This cannot be determined simply by asking the question whether the applicant has achieved the primary relief sought. Taking an extreme case, if an applicant sought an order of certiorari on 20 pleaded grounds and lost on 19 of those but succeeded in obtaining the remedy sought on one limited ground only, he could hardly be said to have been wholly successful in the proceedings. The assessment of whether an applicant has been wholly successful involves some consideration not only of whether they have achieved the primary forms of relief sought but also whether they succeeded on the preponderance of grounds upon which relief was sought.

[15] In addition, as the discussion above illustrates, in a case of partial success, the court should evaluate a variety of factors, including how reasonable the applicant was in pursuing the unsuccessful aspects of his claim; how important those were, compared with the successful aspects of his claim; and how much, if at all, the costs were increased as a result of the claimant pursuing the unsuccessful aspects of the claim. I reject the applicant's submission that, in the circumstances of the present case, it would not be consistent with the overriding objective to engage in close scrutiny of which grounds of challenge were successful and which were not, and to apportion weight to those. Having heard and determined the full claim, where there has been no element of compromise to the proceedings, the court is well placed to conduct such an evaluation. In addition, the costs argument in this case was (sensibly) agreed by both parties to be capable of being dealt with by way of short written submissions only (for which I am grateful).

[16] The Judicial Review Court in this jurisdiction does not regularly make 'split' costs orders where only a proportion of costs are awarded. A recent example is *Re SEAT and Woods' Application* [2021] NIQB 93, in which the provisional indication as to the costs outcome set out at para [127] was later reflected in the ultimate outcome following a fully contested costs application. The successful applicant was awarded only 50% of their costs. One of the reasons why such orders are relatively rare is because, often, judicial review hearings in this jurisdiction are dealt with in a one-day or two-day hearing and it is difficult to say that the pursuit of the unsuccessful grounds added materially to the length of the proceedings. However, the length of the proceedings is not the only proper measure of how, and the extent to which, over-enthusiastic pleading may add to the costs of proceedings. Unmeritorious grounds nonetheless required to be considered by all parties,

answered in evidence and/or submissions, and adjudicated upon by the court (unless abandoned before or at hearing). There is a recent tendency in many judicial review cases to adopt a 'kitchen sink' attitude to pleading (with *Re Tesco Stores' Application* [2022] NIKB 9 being a recent but rare instance of judicial plaudit for such temptation having been resisted in the context of a planning judicial review: see para [3].)

[17] As in many things, there is a balance to be struck. In *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507, at 1522-3, Lord Woolf MR expressed the view that courts should be "more ready to make separate orders which reflect the outcome of different issues." One suggested reason for this was that "if you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so." At the same time, parties should not be unduly discouraged from arguing points which turn out to be unsuccessful but which it was not unreasonable for them to pursue, particularly if they raise public law issues which may have a wider significance (see, for instance, *R (Munjaz) v Mersey Care NHS Trust* [2003] EWCA Civ 1036, at para [89]). It is for this latter reason that a view is often properly taken 'in the round' about the award of full costs to a partially unsuccessful applicant.

[18] The leave stage is to some degree designed to weed out grounds which are hopeless or, to perhaps put it another way, to identify the stones which clearly need not be turned. However, there are limits to how effective the leave filter may be in this aspiration. Where a case clearly raises arguable grounds, it is often consistent with the overriding objective to grant leave without devoting too much time and resource to identifying and refusing leave on the outlying grounds. In this jurisdiction, the partial refusal of leave may also be appealed to the Court of Appeal as of right, which runs the risk of additional costs and delay to reinstate a ground which is perhaps just arguable. In the present case, the order granting leave contained the following rider:

> "Although there is considerable overlap between many of the applicant's pleaded grounds, and some of them appear stronger than others, the Court does not intend to parse the grounds of challenge at this stage and leave is granted on all grounds. In granting leave, the Court takes into account that this application appears to be the first judicial review application challenging the recently commenced system for the provision of compensation to victims and survivors of historical institutional abuse under the 2019 Act and the public interest in an early determination being made of the correctness in law, or otherwise, of the approach being adopted by the Redress Board to the system for appeals under the provisions of the Act."

[19] The grant of leave on a particular ground does not therefore automatically signify either that it will be reasonable to pursue that ground at hearing or that no adverse costs consequences will follow if it is pursued unsuccessfully. There is an obligation on legal representatives on all sides to keep their clients' case under review as the evidence develops and the opposition's arguments are disclosed, and upon the parties to be realistic in the grounds which are pursued.

[20] The applicant also contended that the making of a split costs order in a case such as the present would create uncertainty for public law litigants in future cases, with a potential to create a greater burden on courts if there was a need to forensically scrutinise each ground relied upon for the purpose of costs determinations. In my view, the prospect of significant uncertainty in that event is limited. As noted above, a case where a full costs order is not warranted after a substantive hearing will usually not require significant further argument, since the trial judge will already be well aware of the issues in the case and how they were dealt with. Indeed, the unsuccessful party taking up the burden to oppose a full costs award against it will often, if not always, be prompted to do so by judicial comment contained within the court's substantive judgment (as appears to have been the case here). A mathematical approach is also plainly not required and will rarely be appropriate.

[21] The authorities also show that the conduct of a party, or their representatives, in the course of *or prior to* the litigation may be relevant to the costs disposal. Most obviously, that will now relate to a party's compliance or non-compliance with pre-action protocols. However, it may also relate to conduct which contributed to the need for the proceedings.

[22] In the present case, I consider there to be significant force in the respondent's arguments summarised at para [12] above, most of which are drawn from my own observations in the substantive judgment in this case. The applicant was plainly the successful party but was not wholly successful. Indeed, he was unsuccessful on many more issues than those on which he succeeded. That said, he succeeded on what may be thought to be his main point. Several of the grounds upon which he was unsuccessful were not unreasonably pursued. However, the challenge related to his time in Lisnevin was in reality hopeless and should have been abandoned rather than pursued faintly. His points related to the leaving out of account of the Hart Report and the taking into account of his evidence before the HIA Inquiry were also, in my view, highly ambitious. The meat of the case was the issue of whether an oral hearing should have been convened. As I made clear in the judgment, it also seemed to me that the SJM's scepticism about what that would add, or as to whether such a hearing should be convened, arose, at least in significant part, because the applicant's application for redress was not fully and clearly set out from the start.

Conclusion

[23] Taking all of the above into account, I consider that the appropriate costs order to meet the justice of this case is that the respondent should bear 50% of the applicant's costs of these proceedings (such costs to be taxed in default of agreement). I will so order; and make a further order for legal aid taxation of the remainder of the applicant's costs.