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Judgment: approved by the Court for handing down | *Delivered:* **06/01/2017**
(subject to editorial corrections)*

2016 No: 6772/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICTION BY THOMAS GRIEVE FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE DEPARTMENT FOR SOCIAL DEVELOPMENT (SOCIAL SECURITY AGENCY) DATED 7 JANUARY AND 31 MARCH 2016

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COLTON J

Introduction

[1] The applicant in this case sustained personal injuries as a result of an accident in the course of his employment on 18 July 2012. He instructed solicitors to prosecute a claim for damages in the High Court in respect of these injuries. He made an application for civil legal aid for this purpose on 3 December 2014.

[2] This application concerns the calculation by the respondent of the financial contribution the applicant should make to the Legal Services Commission so that he can be granted a Legal Aid Certificate.

[3] The granting of civil legal aid is subject to a financial eligibility test. Article 9 of the Legal Aid Advice and Assistance (Northern Ireland) Order 1981 ("the 1981 Order") provides that one of the criteria for the grant of legal aid in a personal injury case shall be a disposable income which does not exceed £10,955.

[4] Article 21 of the 1981 Order provides for a contribution payable by persons in receipt of legal aid. It states that if the person's disposable income exceeds £3,355 his

maximum contribution shall be one third of the difference between that figure and the person's disposable income.

[5] In this case the ultimate decision in relation to granting civil legal aid to the applicant was that his disposable income was assessed as being £9,728 (ie below the £10,955 figure) and he was therefore offered legal aid subject to a maximum contribution of £2,124 (one third of the difference between £3,355 and £9,728) to be paid at £177 per month.

[6] The applicant accepted this offer without prejudice to a challenge to the assessment. He has been unable to continue the payments pursuant to the offer. The status of that offer is in abeyance with the consent of the parties pending the outcome of this judicial review. The civil action brought by the plaintiff against the employer also remains in abeyance.

The applicant's financial circumstances

[7] The applicant lives with his wife Pauline and their severely disabled son, aged 14. The applicant is not currently working because of the injuries he sustained at work on 18 July 2012. His wife works in a part-time capacity as a housekeeper with the Children's Hospital. His son is a pupil at a Special Educational School but has been unable to attend at the school for a period of time by reason of his disability.

[8] His family's financial circumstances are extremely restricted. He describes living on a "hand to mouth" existence. The family rely on a modest current account overdraft facility with Santander which is reviewed on a monthly basis. The facility is £800 and in his affidavit supporting this application he has exhibited a statement for this account confirming that as of 11 January 2016 the account was £721.10 overdrawn.

[9] The assessment of a claimant's financial eligibility for legal aid is carried out by the Legal Aid Assessment Office and hereinafter referred to as ("the LAAO").

[10] The LAAO (which at the relevant time was part of the Social Security Agency) carries out this task on behalf of the Legal Services Agency Northern Ireland. The LAAO operates within a particular statutory framework namely the Legal Aid (Assessment of Resources) Regulations 1981 ("the 1981 Regulations") and the Civil Legal Services (Financial) Regulations (Northern Ireland) 2015 ("the 2015 Regulations"). The 2015 Regulations apply only to applications for legal aid from 1 April 2015.

[11] In essence the assessment involves a calculation of the applicant's income from which deductions or "disregards" are made pursuant to the relevant regulations.

[12] In this case part of the applicant's income includes Disability Living Allowance ("DLA") to which the applicant is entitled because of his son's disability. Receipt of DLA also entitles the applicant to receive certain uplifts of his Child Tax Credit ("CTC") in the form of a disability and severe disability uplift. In addition the applicant also receives Carer's Allowance ("CA") in respect of his son.

[13] In coming to the calculation of the applicant's disposable income for the purposes of the legal aid assessment the LAAO has disregarded the DLA payments under the 1981 Regulations but not the uplift payments for the disability and severe disability nor the CA payments.

[14] The applicant complains that both these payments should have been disregarded for the purposes of calculating his disposable income. Had they been disregarded his contribution would have been significantly reduced (or removed entirely depending on how many of the benefits were disregarded).

The relief sought by the applicant

[15] The applicant seeks the following relief:

> "(a) An order of *certiorari* to bring up into this honourable court and quash the decision of the Social Security Agency ("the SSA") to have regard to the disability and severe disablement elements of child tax credit when assessing a contribution payable towards a civil legal aid certificate.
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> (b) An order of *certiorari* to quash the decision of the SSA to have regard to Carer's Allowance when assessing the aforementioned contribution.
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> (c) Declarations that the SSA has:
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> (i) breached the applicant's Article 6 rights;
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> (ii) breached the applicant's rights pursuant to Article 1 to Protocol 1 of the Convention ("A1P1");
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> (iii) discriminated against the applicant, contrary to Article 14 of the Convention; and
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> (iv) erred in the manner in which it has exercised its discretion under the Legal Aid (Assessment of Resources) Regulations

(Northern Ireland) 1981 ("the 1981 Regulations").

(d) An order of *mandamus* directing the SSA to remake its decision in accordance with the law.

…

(h) Such further and other relief as the court may deem appropriate."

Considerations of the Issues

[16] Because the application for legal aid was made on 3 December 2014 the applicable regulations to be applied in relation to financial eligibility were the 1981 Regulations.

[17] The starting point is that the 1981 Regulations require all "income" to be taken into account for the purposes of assessment save for that which is expressly to be disregarded.

[18] At the hearing there was some debate about whether or not the CTC and CA received by the applicant was income for the purposes of the Regulations. Having regard to the authorities cited to me in *O'Kane's Application* [2014] NIQB and *Fleming* [2006] NIQB 68 it seems clear to me that this should be treated as income under the Regulations. Indeed, ultimately I understand that this was not really a matter of dispute. The dispute concerns whether or not those payments should be disregarded in coming to the calculation of what is disposable income for the purposes of eligibility.

[19] The 1981 Regulations set out a series of welfare payments and other allowances which should be disregarded for calculating the disposable income of the person concerned. This list includes disability living allowance. It does not include the CTC payments or CA payments.

[20] However, Schedule 1 of the Regulations sets out rules for computating disposable income. Paragraph 1 of Schedule 1 provides:

> "The income of the person concerned from any source shall be taken to be the income which that person may reasonably be expected to receive (in cash or in kind) during the period of computation, that income and the absence of other means of ascertaining it being taken to be the income received during the preceding year."

Crucially for the purposes of this case paragraph 14 provides that:

> "In computing the income from any source there shall be disregarded such amount if any as the assessment officer considers to be reasonable having regard to the nature of the income or to any other circumstances of the case."

The Applicant's Case

[21] There are two themes to the applicant's arguments. The first is that in the circumstances of this case and in particular having regard to the applicant's limited family income, the discretion provided in Schedule 1 Paragraph 14 should have been exercised in favour of disregarding the CTC and CA payments. He points out that the respondent has a broad and unfettered discretion to disregard any source of income when calculating disposable income for the purposes of the means assessment in a legal aid application. In exercising that discretion the respondent may disregard such amounts as it considers reasonable having regard to the nature of the income or to any other circumstances of the case. It follows therefore the respondent's decision maker was possessed of the discretion to disregard the disability and severe disability elements of CTC and CA. With respect to the latter the applicant points out that under the 2015 Regulations which came into effect on 1 April 2015 CA is now an automatic disregard.

[22] At this stage I should point out that this entire issue was the subject matter of prolonged correspondence and review before the final position of the respondent was confirmed on 31 March 2016. Originally the Legal Services Agency for Northern Ireland ("LSANI") refused the applicant's application for legal aid by letter dated 19 May 2015. There followed a series of challenges, reviews and recalculations culminating in a decision of 7 January 2016. That decision resulted in an offer of legal aid subject to a maximum contribution from the applicant of £2,124 to be paid at the rate of £177 per month. In short this was confirmation of the previous offers. At that stage the applicant issued judicial review proceedings and the matter was listed for the purpose of a leave application on 14 March 2016. The matter was adjourned when the proposed respondent indicated to the court that it intended to carry out a further review of the impugned decisions. At a further hearing on 4 April 2016 when the matter was mentioned before the court the respondent informed the court that the review had been completed, and that the decisions were unchanged. In coming to this decision the respondent avers that it took into account the Order 53 Statement and skeleton argument in support in coming to its decision. It is that decision which is now under challenge.

[23] This is relevant because in terms of the CTC the original materials did not disclose any evidence of an exercise of discretion and it was only after the initial judicial review papers were lodged that the respondent says it did consider the exercise of its discretion but decided not to do so.

[24] In relation to both of the payments under consideration in this case the applicant says that the failure to exercise the discretion was unlawful and irrational.

[25] Interlinked with this argument the second submission on behalf of the applicant is that the contribution of £2,124 constitutes a "possession" within the meaning of Article 1 of Protocol 1 ("A1P1") of the Convention. It is argued that the article is engaged and in fact breached. The respondent has acted in a manner which deprives the applicant of that possession and has done so in a discriminatory manner on grounds of disability.

[26] I turn first to what can be described as the irrationality/unlawfulness argument pursuant to common law. The respondent submits that the impugned decision could not be so described. The respondent has a broad discretion which is vested expressly in the assessment officer alone and will necessarily involve a question of judgment for that officer. In terms of both benefits the applicant points to his very difficult financial circumstances, his low income and complete lack of capital as factors which should be taken into account. In particular with regard to CA he places particular emphasis on the fact that as of 1 April 2015 this benefit is automatically disregarded. In terms of the CTC uplifts he argues that there were very strong grounds for the exercise of discretion in favour of disregarding these. The gateway to these uplifts is the disability payments which are made to the applicant's family for the purposes of assisting their severely handicapped son. The purpose of the enhanced income is to meet the financial burdens of caring for a severely disabled child.

[27] I have considered the basis upon which the respondent asserts it has exercised its discretion as set out in correspondence and in affidavit evidence. This is succinctly set out in paragraph 8 of the affidavit of Carol Deery sworn on behalf of the respondent as follows:

> "The impugned decision of 31 March 2016 acknowledges that CA is not disregarded under the 1981 Regulations but would now be disregarded under the 2015 Regulations. The LAAO consider that the starting point must be the applicable regulations, in this case the 1981 Regulations. However, the LAAO also recognises that CA is now treated different (sic) under the 2015 Regulations, by Regulation 36(e) of same. As such the LAAO specifically considered the exercise of discretion as to whether or not CA should be disregarded in any event. The impugned decision also deals with the issue of CTC. The LAAO position here is that CTC are not disregarded under either the 1981 or 2015 Regulations. As such CTC have not been disregarded. Again the LAAO considered the exercise of their discretion but this did not lead to a different result in all of the circumstances."

[28] The issue in relation to CA is developed further at paragraph 15 as follows:

> "On the issue of CA the LAAO have to apply the applicable regulations. CA is not disregarded under the applicable 1981 Regulations. The fact that CA is now disregarded under the new 2015 Regulations was *specifically* taken into account by the LAAO in the assessment that is now under challenge. The LAAO came to the view that it was reasonable to apply the 1981 Regulations notwithstanding the change made by the 2015 Regulations (which do not apply to this assessment). To hold otherwise would be to give the 2015 Regulations a retrospective effect that the legislature did not provide for within those 2015 Regulations and which would run, I am advised, contrary to fundamental legal principles."

[29] In dealing with CTC the respondents point out that these payments are not expressly disregarded under either the 1981 or 2015 Regulations. The respondents point out that CTC is a different form of payment than DLA. DLA is not a means tested benefit whereas entitlement to CTC is (in effect) means tested pursuant to Section 7 of the Tax Credits Act 2002. The respondent emphasises that CTC is properly considered as income. However, this is not in dispute. What is argued is that the benefit payment should be disregarded for the purposes of the assessment.

[30] In particular it also places emphasis on the fact that CTC is not disregarded in either the 1981 or the 2015 Regulations. The fact that other disability related allowances are disregarded in both regulations indicates that the omission of CTC is a deliberate decision by the legislature.

[31] Overall it is argued that the adjudicator was perfectly entitled to come to the judgment that neither benefits should be disregarded.

[32] The difficulty I have with this submission is that the respondent throughout merely asserts that it considered the exercise of its discretion but decided not to disregard the benefit. In relation to the CA insofar as any reason is given for this judgment the only one offered is that to do so would be to give retrospective effect to the 2015 Regulations.

[33] In the approach to the CTC again the respondent refers to the fact that the benefit is not disregarded in either the 1981 or the 2015 Regulations.

[34] What I take from the respondent's approach to this matter is that they have slavishly followed the regulations by only disregarding those benefits which are expressly to be disregarded. There is no indication as to what factors it takes into account in considering whether to exercise what is clearly a broad discretion. I have

no idea of the reasons why the discretion was not exercised in this case. There is no indication in the papers what sort of factors might be taken into account in considering the exercise of this discretion. Indeed, insofar as any reasons are given it seems to me the reason for not disregarding the CA was that this would give retrospective effect to the 2015 Regulations. This reflects an erroneous approach to the exercise of the discretion. What is argued on behalf of the applicant is the fact that CA is now expressly disregarded is a compelling factor to be weighed in the exercise of the adjudicator's judgment. The fact that the respondent rely on this argument reinforces the perception that there was no real consideration of the discretion but rather a mechanistic approach to the entire exercise. In relation to the CA issue the respondent argues that so far as the impact of the 2015 Regulations is concerned there will always be hard cases on either side of the necessary line drawn between cases that fall under old regulations and cases to be dealt with under new regulations. However, that ignores the fact that in this case the respondent has a discretion. In exercising that discretion it seems to me it was perfectly entitled and should take into account the fact that very shortly after this application was made the regulations were changed to automatically disregard CA. This does not mean an automatic retrospective application of the 2015 Regulations. This is not a case where there might be a concern about a "flood gates" argument. The number of applications to be considered in this category by definition must be limited and identifiable. The proper exercise of the discretion should take into account the rationale for adding CA as a benefit to be now automatically disregarded in coming to a decision in this particular case.

[35] The issue in relation to CTC is perhaps more difficult but again I am left with the impression that no attempt was made to look at the precise circumstances of the applicant's case to consider whether or not the CTC payments should be disregarded. The adjudicator appears to have simply looked at the regulations and applied the disregards rigidly.

[36] For these reasons I have come to the conclusion that the common law case is made out and that there has been an unlawful and irrational exercise of the respondent's discretion in this case.

[37] I turn now to the convention argument. In summary the applicant's argument runs as follows. The contribution of £2,124 constitutes a "possession" within the meaning of A1P1. He therefore argues that this Article is engaged because the impugned decision interferes with "the peaceful enjoyment of his possessions". In the circumstances of this case he goes on to argue that the enjoyment of this possession is linked to Article 14 of the Convention which states:

> "**Article 14**
>
> ***Prohibition of Discrimination***

> The enjoyment of the rights and freedom set forth in this Convention, shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[38] He also points out that in the interpretation of Article 14 the court should have regard to Article 3.1 of the UN Convention on the Rights of the Child which provides:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

[39] He also refers to Article 7.2 of the UN Convention on the Rights of Persons with Disabilities which provides:

> "In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration."

[40] He relies on the decisions in Mathieson v Work and Pensions Secretary [2015] UKSC 47 and Hurley and others v Secretary of State for Work and Pensions [2015] EWHC 3382 to argue that there has been a breach in this case. In Mathieson the Supreme Court examined the decision where a severely disabled child's Disability Living Allowance had been suspended in accordance with Rules which indicated that same should take place as a result of him having been an NHS inpatient for more than 84 days. It was held that the provision of that living allowance fell within A1P1. A1P1 having been engaged, it was then possible to consider whether there was a breach of the right not to be discriminated against on grounds of disability contrary to Article 14. The court held that there had been such discrimination in that case.

[41] In Hurley the applicants were carers for their ill grandmothers who therefore received carer's allowance. The impact of the benefit cap was that they received reduced housing benefit payments and therefor a reduced income overall. This was found to engage A1P1 and amounted to discrimination contrary to Article 14. Carers allowance should not have been included.

[42] Having introduced the scheme for assessment the state is under an obligation to ensure that it is administered without discrimination on Article 14 grounds and thus it falls within the scope of that Article. If this argument is accepted then the

state must find an objective and reasonable justification for the difference of treatment.

[43] The difference of treatment alleged is that the applicant will be treated differently from a family of similar means but without a disabled child.

[44] He argues that in the exercise of its discretion the respondent should have acted so as to avoid what he alleges is a breach of A1P1 and Article 14.

[45] The respondent says that the factual scenarios in Mathieson and Hurley were completely different in that they both involved the actual removal of a benefit. The facts of this case are a significant step removed from those scenarios. The respondent does not accept that this case falls within the scope of A1P1. In any event even if it does, it is not accepted that a requirement to make a contribution to legal aid amounts to a denial of the peaceful enjoyment of the applicant's possessions. The respondent restates the position that in particular CTC is a different benefit from DLA and is a means tested benefit. Those benefits which are automatically disregarded under both the 2015 and 1981 Regulations are in fact not means tested. The CTC benefits provide additional income to DLA. They are to be primarily understood as a stable form of income for a family. In terms of the comparison suggested by the applicant it is contended that this simply does not withstand scrutiny. In this case the applicant's household income is provided from his wife's wages and benefits paid to the household, some of which are provided as a result of the fact that the applicant's son has a disability. The comparator family's income might be made of wages and other benefits. As the contribution to legal aid would be the same in either case (as based on a similar income) the applicant has not established any relevant difference in treatment with any form of comparable scenario.

[46] Whilst this issue raises interesting arguments I am not persuaded that the applicant is entitled to relief under these grounds. It seems to me that this argument is an attack on the Regulations themselves. I do not believe that a matter as fundamental as this would be left to the discretion of an adjudicator applying the financial assessment. If Mr Herraghty is right in his submissions then CA and CTC uplifts would need to be disregarded in all cases irrespective of the precise scenario confronted by the adjudicator. The legislature has apparently made a deliberate decision not to expressly disregard CTC payments. If it is contended that CA and CTC should be disregarded on Convention grounds then in my view this is a challenge to the Regulations themselves. If it were established to the satisfaction of the court that A1P1 and Article 14 were engaged then justification for the way in which the Regulations have been drafted would fall to the Department of Justice and not the respondent in this case. I have therefore come to the conclusion that this is not a matter which properly falls under the exercise of the discretion in the 1981 Regulations but amounts to a challenge to the Regulations themselves and could only be dealt with under such a challenge. Accordingly, I refuse a judicial review under the Convention grounds.

[47] Having regard to my findings I make the following order:

(a) An order of certiorari to quash the decision of the SSA to have regard to the disability and severe disablement elements of child tax credits payable to the applicant when assessing a contribution payable towards a Civil Legal Aid Certificate.

(b) An order of certiorari to quash the decision of the SSA to have regard to carers allowance paid to the applicant when assessing the aforementioned contribution.

(c) A declaration that the respondent has erred in the manner in which it has exercised its discretion under the Legal Aid (Assessment of Resources) Regulations (Northern Ireland) 1981.

(d) An order of mandamus directing the SSA to remake its decision by referring the matter to a different adjudicator.

[48] In closing I would like to thank Mr David Herraghty BL who appeared for the applicant and Mr Stephen McQuitty who appeared for the respondent for their excellent written and oral submissions in this matter.