

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: 19/12/2003

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN’S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY DAVID NAGRA FOR
JUDICIAL REVIEW

WEATHERUP J

The application

[1] This is an application by a solicitor for judicial review of a decision dated 10 March 2003 by an Appropriate Authority under the Legal Aid and Criminal Proceedings (Costs) Rules (Northern Ireland) 1992.

The statutory scheme

[2] The 1992 Rules were made under Article 36(3) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. Under the 1992 Rules solicitors’ fees and disbursements are determined by an Appropriate Authority. Rule 5 provides that no claim by a solicitor for costs in respect of work done under a criminal aid certificate will be entertained unless the solicitor submits the claim within three months of the conclusion of the proceedings to which the criminal aid certificate relates. Rule 16 provides –

“(1) Subject to paragraph (2), the time limit within which any act is required or authorised to be done may, for good reason, be extended –

(a) in the case of acts required or authorised to be done under rule 13, 14 or 15, by the taxing master or the High Court as the case may be;

(b) in the case of acts required or authorised to be done by a solicitor or counsel under any other regulation, by the appropriate authority.

(2) Where a solicitor or counsel without good reason has failed (or, if an extension were not granted, would fail) to comply with a time limit, the appropriate authority, the taxing master or the High Court, as the case may be, may, in exceptional circumstances, extend the time limit until consider whether it is reasonable in the circumstances to reduce the costs; provided that costs shall not be reduced unless the solicitor or counsel has been allowed reasonable opportunity to show cause orally or in writing while the costs should not be reduced.

(3) A solicitor or counsel may appeal to the Taxing Master against the decision made under this rule by an appropriate authority in respect of proceedings other than proceedings before a Magistrates' Court and such an appeal shall be instituted within 21 days of the decision being giving notice in writing to the Taxing Master specifying the grounds of appeal."

[3] The scheme of the 1992 Rules provides that -

(a) A claim by a solicitor should be made within three months of the conclusion of the proceedings (Rule 5).

(b) The three months time limit may be extended "for good reason" (Rule 16(1)(b)). If so extended the claim is paid in full.

(c) The three months time limit may be extended "in exceptional circumstances" and in that event it will be considered whether it is reasonable to reduce the costs to be paid (Rule 16(2)).

(d) If the time limit is not extended no payment will be made on a late claim.

(e) An appeal from the Appropriate Authority lies to the Taxing Master, except in relation to proceedings in Magistrates Courts (Rule 16(3)).

The Guidelines

[4] The Appropriate Authorities have adopted "Guidelines for enforcement of time limits for submission of costs claims". Paragraph 5 of the Guidelines provides examples of what constitutes "good reason", for example the claim for costs was particularly difficult to prepare or a co-defendant's case was awaiting disposal. The Guidelines state that the examples are by no means exhaustive and that each case must be judged on its merits and that where the solicitor has shown "good reason" his claim for costs must be assessed in full.

[5] Paragraph 6 of the Guidelines provides examples of "exceptional circumstances", for example the solicitor's practice was small and due to illness of a senior member of staff the work of the office was so disrupted that it had become impossible to render bills on time, or the solicitor concludes wrongly that the three months time limit runs from the date the Crown Court proceedings were concluded rather than the date the proceedings in the Magistrates' Court were concluded. Again it is stated that the examples are not exhaustive and each case must be judged on its merits. Paragraph 6 concludes with the words, "There will be certain cases where what constitutes 'exceptional circumstances' may also constitute 'good reason'."

[6] Paragraph 7 of the Guidelines makes recommendations for the reduction of costs where there are "exceptional circumstances", namely a maximum of 5% for bills up to three months out of time to a maximum of 20% for bills submitted up to 12 months out of time. It is further recommended that "Deductions of more than 20% should not be imposed normally. However, there may be cases where claims for costs are submitted so late that higher deductions would be warranted. Any such higher deduction should not exceed 50% of the claim for costs as assessed."

The background

[7] On 16 August 2001 the Legal Aid Department forwarded to the applicant a list of criminal aid certificates in respect of which the applicant had not submitted a claim for costs. This list comprised hundreds of cases and the applicant had been unaware that claims had not been submitted. The applicant's office manager had internal office responsibility for submitting the claims and he had reported to the applicant that all claims had been submitted and that there were delays in the Legal Aid Department in making payments. The office manager left the applicant's employment in January 2002. In February 2002 the applicant commenced the submission of claims and payments were variously made without deduction or with a 10% or 20% reduction.

[8] By March 2003, when the applicant believed that he had submitted approximately one half of the outstanding claims, he received a letter from the Criminal Aid Manager of the Legal Aid Department requesting his attendance at a meeting of the Appropriate Authority. The letter stated:

“I wish to advise a sample of late submission cases were presented before a panel of the appropriate authority on 3 March 2003. With reference to cases submitted outside the time limit the panel wish to invite you to attend an appropriate authority meeting to discuss the matter. I have been requested by the appropriate authority to enclose a memorandum adopted by the appropriate authority in relation to ‘guidelines for enforcement of time limits for submissions of costs claims’ and I refer you to Rule 16 of the Legal Aid in Criminal Proceedings (Costs) Rules (Northern Ireland) 1992.”

[9] The applicant attended the meeting with the Appropriate Authority on 10 March 2003 and the meeting lasted for 50 minutes. The applicant explained the background problems and indicated that on two occasions he had paid named counsel from his own funds when legal aid payments had not been received and that the applicant found it necessary to arrange additional funding with his bank manager on the basis that payment had not been received from the Legal Aid Department.

The decision

[10] The applicant received the determination of the Appropriate Authority by letter dated 10 March 2003 -

“All such reports which have been received and in which the profit cost is in excess of £100 will be subject to the following reductions; reports over one year and less than two years will be subject to a deduction of 20% from profit costs. Those reports which are over two years will be subject to a deduction of 50%. Reports in which the profit costs is less than £100 will not be subject to deduction.

The appropriate has determined that all outstanding reports including Magistrates’ Court, bails, appeals and Crown Court, must be submitted on or before 30 June 2003 otherwise they will not be accepted, and

such reports received on or before this date will be subject to the deductions as outlined above.”

The grounds

[11] The applicant’s grounds for judicial review were as follows –

“(a) The procedure adopted by the appropriate authority was improper in that no determination was made of whether the applicant had failed to comply with a time limit ‘without good reason’ as required by Rule 16(2) of the Legal Aid and Criminal Proceedings (Costs) Rules (Northern Ireland) 1992.

(b) In reaching its decision the appropriate authority failed to take into account relevant considerations brought to the attention of the appropriate authority by the applicant; these included the circumstances giving rise to the late submission of reports and the fact that evidence would be available from named counsel.

(c) The applicant was not allowed ‘reasonable opportunity’ to show cause why the costs should not be reduced – contrary to Rule 16(2) of the Legal Aid and Criminal Proceedings (Costs) Rules (Northern Ireland) 1992 – in that no opportunity was afforded to him to place the evidence referred to at (b) above before the appropriate authority.

(d) The decision of the appropriate authority is ultra vires in that Rule 16 of the Legal Aid and Criminal Proceedings (Costs) Rules (Northern Ireland) 1992 provides the appropriate authority with the power to extend time limits in respect of reports submitted outside the time limit, but provides no power to impose a deadline in respect of reports not yet submitted.

(e) The guidelines for enforcement of time limits for submissions of costs claims adopted by the appropriate authority and referred to in the letter dated 4 March 2003 are unclear and illogical. Interference with the applicant’s property right (in earned income) by reference to these guidelines

constitutes a breach of Article 1 of the First Protocol ECHR in that the interference is not in the public interest and is not in accordance with accessible and clear conditions provided for by law.

(f) The decision of the appropriate authority is in breach of the applicant's legitimate expectation as to the handling of reports submitted late which arose from the practice of the Legal Aid Department on receipt of reports submitted late in or about February 2002.

(g) The letter dated 10 March 2003 failed to provide the applicant with any or sufficient reasons for the decision of the appropriate authority.

(h) The decision of the appropriate authority is unreasonable and disproportionate."

Respondent's preliminary points

[12] The respondent raised two preliminary points, namely the applicant's delay and the applicant's failure to exhaust alternative remedies.

On the issue of delay, the decision letter was received by the applicant on 13 March 2003 and the application for leave to apply for Judicial Review was lodged on 3 June 2003, so the respondent submits that the applicant failed to apply "promptly" as required by Order 53 Rule 4. After receiving the decision letter the applicant considered proceedings based on racial discrimination and was in contact with the Equality Commission, but on further consideration he decided to proceed by way of Judicial Review. The respondent points to the applicant not including racial discrimination as an aspect of this application for Judicial Review and to the absence of any evidence of discrimination against the applicant or any comparison made with the treatment of any other solicitor and invites the Court to find that the applicant had no reason for failing to apply promptly. I accept the explanation given by the applicant. He was entitled to give consideration to the issue of racial discrimination and in the circumstances I do not consider that the applicant failed to apply promptly. Mr O'Hara QC on behalf of the Appropriate Authority was concerned to dispel any suggestion of racial discrimination. No allegation of racial discrimination was made against the Appropriate Authority in these proceedings, nor was there any evidence of discrimination.

[13] On the issue of alternative remedies, the respondent relies on the applicant's failure to apply to the Appropriate Authority for a review of its decision. On 3 April 2003 the applicant gave notice of intention to appeal the

decision of the Appropriate Authority in relation to specified Crown Court certificates, bail application certificates and appeal certificates. The letter listed approximately 50 cases and the reply indicated that, of those 50 cases, only 7 had been submitted, and of those 7, 4 had been paid without deduction, 1 had yet to be assessed and the other 2 had been paid with deductions. The Appropriate Authority sought clarification as to the scope of the applicant's appeal. The applicant did not reply.

[14] This application is concerned with criminal aid certificate proceedings in Magistrates' Courts. In respect of proceedings, other than those before a Magistrates' Court, a solicitor may appeal to the Taxing Master against a decision of an Appropriate Authority (Rule 16(3)). To the extent that the decision of the Appropriate Authority had any application to Crown Court proceedings the applicant had a right of appeal to the Taxing Master but did not proceed with any such appeal. In respect of proceedings before a Magistrates' Court a solicitor may apply to an Appropriate Authority for a review of its decision "where it has been demonstrated that some error had occurred in the assessment or that a material consideration had either been overlooked by the committee or had not been drawn to its attention," per Kerr J in Madden and Finucane's Application (unreported 27 October 1999). The applicant has not applied for a review of the decision of the Appropriate Authority of 10 March 2003 but it remains open to him to do so. It would appear that there may be some lack of clarity as far as practitioners are concerned in relation to the review of decisions on costs payable under criminal aid certificates. In the circumstances I propose to consider the applicant's grounds for Judicial Review.

The applicant's grounds

[15] Ground (a) "Good reason".

The applicant submits that the Appropriate Authority did not determine whether the applicant had "good reason" for not making the claim within the three month time limit.

I consider that it is implicit in the letter of decision of 10 March 2003 that the Appropriate Authority had decided that there was no "good reason" to extend the three months time limit. The Appropriate Authority went on to consider the next stage of the scheme, namely whether there were "exceptional circumstances" and whether to make reductions of costs. The decision letter set out a scale of reductions. Such reductions were made and it is obvious that the claim for good reason was rejected.

If there is any doubt about that issue in the letter of decision, and I do not accept that there is any doubt, the position is apparent from the respondent's affidavit, at paragraph 10, which states that the Appropriate Authority "were in no doubt that there was no good reason in these cases."

[16] Ground (b) Failing to take into account relevant considerations.

The applicant submits that the Appropriate Authority failed to take into account the circumstances giving rise to the late submission of reports and the fact that evidence would be available from named counsel.

The applicant explained the relevant circumstances to the Appropriate Authority at the meeting on 10 March 2003. His explanation related to the actions of his office manager prior to and after 16 August 2001 when the applicant received the list of cases in respect of which claims had not been submitted. In the six months from August 2001 to February 2002 the applicant carried out an investigation but did not submit any of the outstanding claims. Between February 2002 and March 2003 he submitted approximately one half of the outstanding claims. Between March and June 2003 he submitted the remaining claims. There is no basis for concluding that the Appropriate Authority failed to take into account the relevant circumstances and on the contrary it seems apparent that the Appropriate Authority did take account of the background factors in reaching its decision. They were satisfied that while the circumstances did not amount to good reason they did amount to exceptional circumstances and warranted reductions in costs.

If the matter were in doubt, and I do not accept that there is any doubt, the respondent's affidavit at paragraph 9 states that the background matters relied on by the applicant were taken into account by the Appropriate Authority.

[17] Ground (c) "Reasonable opportunity to show cause"

The applicant submits that there was no opportunity afforded to him to place the evidence before the Appropriate Authority that the applicant had made payments to named counsel in respect of outstanding payments due under criminal aid certificates.

In the respondent's affidavit at paragraph 8 it is stated on behalf of the Appropriate Authority - "nor did we doubt or challenge his (the applicant's) statements that he had paid the two counsel named in the note of the meeting". There was no need to call further evidence to establish this point as it was accepted by the Appropriate Authority. The applicant was not denied any reasonable opportunity to show cause why the costs should not be reduced on this ground.

Further the respondent's affidavit states that during the meeting the applicant did not suggest that he had any other information that he could put before the Appropriate Authority.

[18] Ground (d) The imposition of a deadline.

The applicant submits that the Appropriate Authority does not have power to impose a deadline in respect of the submission of claims.

By the letter of decision of 10 March 2003 the Appropriate Authority required all outstanding reports to be submitted before 30 June 2003 "otherwise they will not be accepted". In the event the applicant submitted all outstanding claims before 30 June 2003 so there were no claims that were not accepted by the Appropriate Authority.

The Appropriate Authority must consider each claim for costs on its individual merits. When an applicant submits a common reason for delay in a number of cases the Appropriate Authority may determine the validity of that common reason and should remain open to consideration of the application of its decision to each case. When that common reason also applies to a number of claims which have yet to be submitted then equally the Appropriate Authority are entitled to determine the ongoing validity of that reason and whether it might cease to be acceptable as a good reason or as an exceptional circumstance and again the Appropriate Authority must remain open to consideration of the application of its decision in individual cases. The Appropriate Authority must not close the door to consideration of future claims. To declare that future claims "will not be accepted" is to indicate that they will not be considered. To declare that all late claims submitted after a specified date "will not be accepted" is not within the powers of the Appropriate Authority under Rule 16.

[19] Ground (e) Article 1 of the First Protocol.

The applicant submits that the Guidelines are not clear and accessible for the purposes of Article 1 of the First Protocol of the European Convention on Human Rights.

Article 1 provides for the peaceful enjoyment of possessions. The applicant claims that Article 1 is engaged in the present circumstances in relation to the impact of the decision on his earned income. It is provided by Article 1 that no one shall be deprived of his possessions except in the public interest "and subject to the conditions provided for by law." A deprivation of property by the State must have a basis in national law that is accessible, sufficiently certain and provides protection against arbitrary abuses (Clayton and Tomlinson, *The Law of Human Rights*, paragraph 18.67). The applicant complains of a lack of clarity in the Guidelines where at paragraph 6 it is stated that there will be certain cases where what constitutes "exceptional circumstances" may also constitute "good reason".

The legal framework is set down in the 1981 Order and the 1992 Rules. These provisions comply with the requirement of legal certainty required for the purposes of Article 1 of the Protocol 1. The Guidelines adopted by the

Appropriate Authority represent proposals as to how decision makers might exercise powers rather than the defining statement of the legal position and are designed to maintain a consistency of approach to the exercise of those powers. Given the status of the Guidelines I do not accept that they are capable of offending the requirement for legal certainty for the purposes of Article 1 of Protocol 1.

The applicant submits that the sentence to which objection is taken indicates that in certain cases “exceptional circumstances” may be considered before “good reason” and that that is confusing and indeed an incorrect approach. The overall structure of the Guidelines makes it clear that “good reason” is the first consideration that, if established, carries no penalty and that “exceptional circumstances” is a second consideration, and if established may carry a penalty by way of reduced costs. I read the impugned sentence as meaning that the examples of “exceptional circumstances” may also amount to examples of “good reason”, and if established as good reason they would carry no penalty. The impugned sentence is referring to the nature of the examples and not to the order in which the decisions are taken. Even if the Guidelines are taken as a defining statement of the legal position rather than the decision makers proposals for the consistent exercise of powers I do not accept that the impugned sentence offends the requirement of legal certainty for the purposes of Article 1 of Protocol 1.

[20] Ground (f) Legitimate expectation.

The applicant submits that he has a legitimate expectation based on the determinations of the Appropriate Authority in respect of claims submitted from February 2002.

In the applicant’s affidavit at paragraph 7 the applicant states that the claims submitted from February 2002 all concerned cases from 1998 or 1999 and that there was no consistent approach and the payments was variously made without reduction or with a 10% reduction or with a 20% reduction. The Guidelines set out a tariff scale of deductions that might be imposed if exceptional circumstances are established, based on the period that the bills were submitted out of time. There is no inconsistency in varying the penalty according to the period of delay. The applicant was entitled to apply to the Appropriate Authority for review of the determinations made by the Appropriate Authority before March 2003 but did not do so.

The pre March 2003 determinations did not create any legitimate expectation as to the manner in which later determinations might be made other than perhaps the expectation that the Appropriate Authority would apply the recommendations made in paragraph 7 of the Guidelines. It is apparent from the Guidelines that the longer the delay the larger may be the reduction in costs. The applicant was entitled to apply to the Appropriate Authority for review of any individual case where he considered that the effect of the decision of 10 March 2003 might give cause for review. The applicant has not done so. The applicant can have no legitimate expectation

that the reductions applied in cases decided before March 2003 would necessarily be the same as reductions applied in cases decided in or after March 2003.

[21] Ground (g) Reasons.

The applicant submits that no sufficient reasons were given for the decision of the Appropriate Authority.

There is no general obligation on the Appropriate Authority to give reasons for their decisions unless requested to do so, per Kerr J in Madden and Finucane's Application (Unreported 27 October 1999) at page 11, or the case falls into an exceptional category, per Kerr J in Jordan's Application [2002] NIJB 332 at paragraphs [13] to [18]. The applicant did not make a request for reasons and the case does not fall into any exceptional category.

In any event I am satisfied that the reasons for the decision are apparent. The decision involved reduced costs for claims over £100 and over one year late. In effect the applicant was granted an extended period to clear the backlog of claims. The office manager's conduct was the explanation for the background to the problem and the scale of the backlog was the explanation for the later delay in processing the late claims. At the time of the decision the Appropriate Authority was dealing with the issue of the backlog of cases at least one year late. The Appropriate Authority made the judgment that the applicant's explanation was not a good reason but that it did amount to exceptional circumstances. This conclusion necessarily involved some criticism of the applicant's management of the problem.

[22] Ground (h) Unreasonable and disproportionate.

The applicant contends that the decision cannot be sustained on grounds of reasonableness and proportionality.

When the Appropriate Authority was considering the outstanding claims in March 2003 a period of 19 months had elapsed since the applicant first had notice of the outstanding claims and at that stage one half of those claims had not been submitted to the Appropriate Authority. Paragraph 9 of the respondent's affidavit describes the applicant's approach to the problem as being "extremely tardy". It is the responsibility of the solicitor to process these applications and it is apparent that the Appropriate Authority considered the volume of outstanding claims as part of the exceptional circumstances warranting an extension of time and at the same time warranting a reduction in costs to reflect the finding as to the nature of the applicant's response.

In addition the Appropriate Authority concluded that the applicant was not without blame in allowing the situation to develop in that the volume of outstanding cases indicated that the applicant had no basis for assuming that all reports had been submitted by the office manager and in any event it was the applicant's responsibility to ensure that the reports had

been submitted. It is less clear that the applicant ought to have been aware of the failure to submit reports during the period prior to August 2001 as the numbers involved were a very small proportion each week of the overall volume of such work. He was aware during that period that there was a shortfall in legal aid receipts but the applicant attributed the problem to delays in the processing of the claims by the legal aid authorities. The office manager would seem to have encouraged the applicant in that mistaken belief. However there remained grounds for criticism of the applicant's management of the problem. The Appropriate Authority decided to make deductions based on the length of delay. The decision to proceed on that basis and the manner in which the deductions were implemented represented an entirely reasonable and proportionate approach.

[23] Accordingly I do not accept the applicant's grounds for Judicial Review. The respondent has made clear in the course of the hearing that the applicant retains a right to apply for review of the decision of the Appropriate Authority and if a ground for review exists it will be considered. I dismiss the application for Judicial Review.