

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY THOMAS MURPHY FOR
JUDICIAL REVIEW

KERR J

Introduction

[1] This is an application by Thomas Murphy for judicial review of the decision of the Legal Aid Committee of the Law Society refusing legal aid to the applicant to pursue an application for judicial review of the decision of the Parades Commission to restrict the route of Banna Fluit Naomh Phadraig (St Patrick's flute band) on a parade proposed to be held in Kilkeel, County Down on 17 March 2001.

Background

[2] The applicant is the chairman of the committee of the band. It was formed in September 2000. Its members all come from Kilkeel. Most of the members of the band are female and almost all are under the age of fifteen.

[3] On 12 February 2001 the band submitted an application to the Parades Commission to be allowed to parade in Kilkeel on St Patrick's Day, 2001. The Commission appointed a field officer who met with the band committee. Discussions took place about the composition of the band committee and about the perception that the band was a 'republican band'. The committee gave certain assurances which, they suggest, appear to have satisfied the field officer.

[4] The Parades Commission's decision was communicated to the band committee on 9 March 2001. It was to the effect that the parade was prohibited from entering any of the routes that had been notified. An

alternative route was suggested and approved. In summary the Commission's reasons were that the parade would excite significant opposition that would lead to substantial disorder.

[5] On 14 March 2001 the applicant obtained leave to apply for judicial review of the Parades Commission's decision. The grounds on which the application was made may be summarised as follows: -

1. The determination was in breach of the applicant's rights under articles 10, 11 and 14 of the European Convention on Human Rights.
2. The procedure by which the determination was made was unfair.
3. The Commission failed to have regard to a number of what were said to be material considerations.
4. The determination was unfair because it relied on "unstated and unidentified perceptions in the local community.
5. The Commission erred in law in holding that its Procedural Rules (July 1999) precluded it from disclosing certain material to the applicant; alternatively, if the rule had that effect it was ultra vires section 4 of the Public Processions (Northern Ireland) Act 1998.

[6] The applicant applied for legal aid to pursue his application for judicial review on 12 March 2001. On 14 March 2001 a conversation took place between a solicitor on behalf of the applicant and Michael McAllister of the legal aid department about the application for legal aid. It was not granted. On 28 March 2001 the applicant's solicitors wrote to the legal aid department asking for the reasons that legal aid had been refused. On the same date the department wrote to the applicant's solicitors stating that the application had been refused because "it was unreasonable in the circumstances for legal aid to be granted". On 12 April 2001 the applicant's solicitors appealed against the refusal of legal aid.

[7] Following the refusal of legal aid by Mr McAllister and before the appeal was heard by the Legal Aid Committee, protracted exchanges took place between the department and the solicitors about the means of the various members of the band. It was suggested that none of the members of the band was in a financial position to fund an application for judicial review.

[8] The matter first came before the Legal Aid Committee on 4 May 2001. At that time the Committee's principal concern was as to whether it was reasonable that the applicant should receive legal aid and whether the application was being made on behalf of a person in connection with a cause or matter in which a number of persons had the same interest. The applicant's solicitors indicated that they wished to adduce further information

on the financial standing of the five adult members of the band and the appeal was therefore adjourned.

[9] After the first meeting the applicant's solicitors submitted legal aid applications on behalf of the five adult members of the band. Subsequently one of these was withdrawn and of the remaining four three had disposable incomes that were greater than the amount that would have enabled them to obtain legal aid. The Committee felt obliged in those circumstances to refuse legal aid, applying regulation 5 (11) (b) of the Legal Aid (General) Regulations (Northern Ireland) 1965 and article 10 (4) of the Legal Aid Advice and Assistance (Northern Ireland) Order 1981.

The judicial review challenge

[10] For the applicant Mr Treacy QC submitted that the Legal Aid Committee had approached the question whether the applicant was entitled to legal aid in a "mechanistic" way. It had failed to consider the applicant's rights to access to the courts under article 6 of the European Convention on Human Rights. They ought to have taken account of the complex, though plainly meritorious, challenge that was involved in the judicial review application relating to the Parades Commission's decision. Unrepresented, the applicant would not be in a position to properly prosecute the judicial review application.

[11] The applicant further argued that the Committee was in error in concluding that the fact that other members of the band had disposable income above the threshold meant that they were obliged to refuse legal aid. A number of other considerations should have affected this decision. First the applicant's article 6 rights; then the financial standing of the other band members - not merely their disposable income; the likely cost of the proceedings; the level of representation of the Commission; the complexity of the proceedings and the identity of the respondent were all matters that should have been considered.

[12] For the respondent Mr Morgan QC submitted that article 6 of the Convention did not guarantee that legal aid should be available for every form of proceeding. This was not a case that engaged article 6.

[13] He further argued that the Committee was obliged by regulation 5 (11) (b) to take into account the availability of other resources and to decide whether, in light of the alternative means of funding the application, it was reasonable that public funds should be defrayed to support the judicial review application. Viewed in this way, the Committee's decision was unimpeachable.

The statutory provisions

[14] Article 10 (4) of the Legal Aid Advice and Assistance (Northern Ireland) Order 1981 provides: -

“(4) A person shall not be given legal aid in connection with any proceedings unless he shows that he has reasonable grounds for taking, defending or being a party thereto.”

[15] Regulation 5 (11) of the 1965 Regulations provides: -

(11) Where an application is made by or on behalf of a person in connection with a cause or matter in which numerous persons have the same interest and, in accordance with rules of court, one or more persons may sue or be sued, or may be authorised by a court to defend any such cause or matter on behalf of or for the benefit of all persons so interested, the appropriate committee shall refuse the application if they are satisfied-

- (a) that such refusal would not seriously prejudice the right of the applicant; or
- (b) that it would be reasonable and proper for the other persons having the same interest in the matter as the applicant to defray so much of the costs as would be payable from the fund in respect of the proceedings if a certificate were issued.”

Article 6 of ECHR

[16] Article 6 (1) of the Convention provides: -

‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the

private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

[17] The claim to be entitled to legal aid derives from the enshrined right to a fair and public hearing. But, in contrast to the position in a criminal trial, the Convention does not specify that for a trial to be fair, civil claims must be legally aided. Article 6 (3) (c) of the Convention (dealing with criminal proceedings) *does* provide such a right: -

'(3) Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.'

[18] The question whether legal aid should be available for various forms of proceedings has occupied the Strasbourg organs in a number of cases. In *Airey v Ireland* [1979] 2 EHRR 305 the applicant was an unemployed wife and mother seeking a decree of judicial separation from an abusive husband. Her financial circumstances made it impossible for her to fund the proceedings privately and legal aid was not available for civil matters. The Court held that in failing to ensure that there was an accessible legal procedure available to her, the respondent state had breached the applicant's right to respect for her private life under art 8 of the Convention. At para 26 the Court said: -

"Article 6(1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case."

[19] In *Re Lynch's application* [2002] NIJB I held that this passage indicated that the court considered that a requirement to publicly fund civil proceedings would only occur exceptionally and should be confined to those cases where it was essential that the applicant be represented either because she was obliged by law to have a lawyer or where access to a court was rendered ineffective unless such representation was available.

[20] The application for judicial review in respect of the Parades Commission's decision is not without complexity. I do not consider, however, that it is practically impossible for the applicant to present the case without being represented. It is clear that mere difficulties in presenting a case will not of themselves justify the conclusion that the absence of legal aid constitutes a denial of access to the court. In *McVicar v United Kingdom* [2002] ECHR 46311, ECtHR held that although the conduct of a libel trial by the applicant in person 'must have taken a significantly greater physical and emotional toll on [him] than would have been the case in relation to an experienced legal advocate', the lack of legal aid did not give rise to a violation of art 6. The question is whether the applicant is capable of presenting his case. I consider that in this case he is, albeit that he will experience difficulty in doing so.

[21] In light of my conclusion that the applicant's article 6 rights have not been violated by the denial of legal aid, it is unnecessary for me to examine the reasons given by the Legal Aid Committee to ascertain whether they considered the applicant's article 6 rights. Whether or not they had taken those rights into account, it is inevitable that no violation of article 6 would have been found. Even if the Committee had not turned their minds to the human rights dimension, on account of the absence of a violation, their decision is immune from challenge.

Was the question of whether the applicant was entitled to legal aid approached 'mechanistically'?

[22] It is clear that a number of persons shared the applicant's interest in the outcome of the judicial review application. This is clear from the number of band members who applied for legal aid. Some of these subsequently withdrew their applications having resigned from the band. A number who exceeded the legal aid threshold remained as band members, however.

[23] The Legal Aid Committee was bound to take account of the existence of others who were in a position to defray the costs of the proposed litigation. They were required by regulation 5 (11) to do so. Having concluded that it was reasonable and proper that those persons should defray the costs that would otherwise be payable from the legal aid fund, the Committee was obliged to refuse legal aid.

Conclusions

[24] None of the grounds on which judicial review was sought has been made out and the application must be dismissed.