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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY DANIEL LUNNEY FOR JUDICIAL REVIEW

Before Kerr LCJ and Weatherup J

KERR LCJ

Introduction

[1] This is an application for judicial review of a decision of John Meehan, a resident magistrate, sitting at East Tyrone Magistrates' Court on 17 January 2007, whereby he refused Daniel Lunney's application for criminal legal aid. The applicant had appeared before the court on that date on foot of a summons alleging possession of a controlled drug of Class A and obstruction of police. This was the second occasion on which the case had been listed. Mr Lunney had failed to attend court when it was first listed on 3 January 2007, claiming that he had mislaid the summons and related papers in the matter. An adjournment notice had issued and, on 16 January 2007, the applicant instructed his present solicitors to appear on his behalf.

The reasons for refusal of legal aid

[2] In an affidavit filed in support of the application, Mr Lunney's solicitor, Garrett Greene, of Messrs McCann & McCann has explained that, when he appeared before the magistrate on 17 January, Mr Meehan asked whether the applicant intended to plead guilty or not guilty. The solicitor replied that he needed to consider details of the police interview evidence before he could advise his client on which plea to enter. (This was because

the drugs that were the subject of the first charge had been found in the foot well of a car containing four passengers, one of whom was the applicant.) Mr Greene indicated that he intended to apply for an adjournment of the hearing of the summons and that he wished to apply for legal aid.

[3] According to the solicitor, Mr Meehan stated that he would not grant legal aid and expressed doubt that the expenditure of public funds on this matter was justified. He said that the applicant had had ample time to instruct a solicitor and that he could be advised under the 'green form' scheme. (This scheme operates under the terms of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 whereby clients are initially entitled to receive two hours of advice and assistance at a stipulated hourly rate of payment.) Mr Greene submitted that the green form scheme would not cover travel costs and representation and repeated his view that the applicant could not be properly advised until further inquiries had been conducted. Mr Meehan's riposte was that legal aid would not be granted until the applicant indicated whether he was going to plead guilty or not guilty.

[4] Mr Greene averred that the magistrate then referred to a decision of this court in *Re Havern's application* [2006] NIQB 66 in which Girvan J had held that the grant of legal aid could not be deferred pending a decision on what plea was to be entered but he observed that representation up to the time that such a decision was made could be covered by the green form scheme.

[5] The magistrate did not take issue with Mr Greene's account. He said that he was conscious of what he described as the 'overarching question' of what was required in the interests of justice in deciding whether legal aid should be granted. He had taken into account not only the judgment in *Re Havern's application* but also the earlier decisions in *Re McKinney's application* [1992] 9 NIJB 86 and *Re Moore's application* (1995, unreported). The magistrate also recounted that he had inquired about the time that was available to the applicant before 17 January to obtain legal advice and discovered that the summons charging the offences had been served on the applicant in November 2006.

[6] It appeared to Mr Meehan, he said, that the applicant had failed to give any substantive information about the case and his attitude to it; he had created avoidable delay; and on the second occasion on which the matter came before the court, he ought to have been in a position to indicate the nature of his plea. If he had been prepared to do so, Mr Meehan felt that he would have been in a position to decide whether it was in the interests of justice that he should receive legal aid. In this context, the magistrate had in mind that he had never sent anyone to prison for "simple possession" of ecstasy tablets or obstructing police.

[7] On the subject of the green form scheme, Mr Meehan suggested that his remarks were intended to convey that the scheme "provided cover for the cost of advising the applicant on any matter in criminal proceedings". He did not consider that it was an alternative to granting legal aid. He was aware, he said, that the decision in *Havern* had made it clear that a magistrate should not defer a decision to grant legal aid but should either grant or refuse it. He had concluded, however, that on 17 January 2007, the material that had been provided to him did not warrant the grant of legal aid in the interests of justice. Notwithstanding his refusal of legal aid on that occasion, he was "not closing the door to a future or renewed application … once further information had been provided by the applicant and/or his legal advisers".

Legislative framework

[8] An application for criminal legal aid is made under the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. Article 28 (1) provides: -

> "If it appears to a magistrates' court that the means of any person charged before it with any offence, or who appears or is brought before it to be dealt with, are insufficient to enable him to obtain legal aid and that it is desirable in the interests of justice that he should have free legal aid in the preparation and conduct of his defence before it, the court may grant in respect of him a criminal aid certificate, and thereupon he shall be entitled to such aid".

[9] Article 28 (1) must be read subject to article 31, however. It provides: -

> "If, on a question of granting a person free legal aid under Article 28, 28A, 29 or 30, there is a doubt whether his means are sufficient to enable him to obtain legal aid or whether it is desirable in the interests of justice that he should have free legal aid, the doubt shall be resolved in favour of granting him free legal aid".

[10] It appears to us, therefore, that, where a magistrate decides that the person charged does not have sufficient funds to pay for legal representation, he should refuse legal aid only where he is in no doubt that the interests of justice do not require that the defendant should be legally aided. In the present case it is not in issue that the applicant did not have sufficient means to fund his own legal representation. The magistrate should only have

refused to grant legal aid, therefore, if he was satisfied that it would be unquestionably not desirable in the interests of justice that it be granted.

The magistrate's discretion

[11] It has been observed (in *Re McCauley's application* [1992] 4 NIJB 2) that article 28 gives a wide discretion to a magistrates' court. But it has been, apparently, the practice of magistrates in this jurisdiction to exercise that discretion according to criteria laid down by a committee presided over by Lord Widgery in 1974 or thereabouts. Those criteria, which have been termed the Widgery criteria, were incorporated into the Legal Aid Act 1988 and section 22 (2) sets them out. It has since been repealed but had originally provided: -

> "(2) The factors to be taken into account by a competent authority in determining whether it is in the interests of justice that representation be granted for the purposes of proceedings to which this section applies to an accused shall include the following—
>
> (a) the offence is such that if proved it is likely that the court would impose a sentence which would deprive the accused of his liberty or lead to loss of his livelihood or serious damage to his reputation;
>
> (b) the determination of the case may involve consideration of a substantial question of law;
>
> (c) the accused may be unable to understand the proceedings or to state his own case because of his inadequate knowledge of English, mental illness or other mental or physical disability;
>
> (d) the nature of the defence is such as to involve the tracing and interviewing of witnesses or expert cross-examination of a witness for the prosecution;
>
> (e) it is in the interests of someone other than the accused that the accused be represented."

[12] While there is nothing untoward about magistrates having regard to these factors to guide the exercise of their discretion in this area, they ought not to treat the criteria as providing a comprehensive charter of all that may

need to be assessed in order to determine whether the interests of justice require that legal aid be granted. Moreover, application of these criteria must not be permitted to derogate from scrupulous adherence to the statutory enjoinder that where there is a doubt whether a defendant's means are sufficient to enable him to obtain legal aid or whether it is desirable in the interests of justice that he should have free legal aid, the doubt must be resolved in favour of granting the application.

Discussion

[13] In this case the magistrate was required to make a decision as to whether the interests of justice demanded that criminal legal should be granted; as he has accepted, he could not defer that decision - *Re Havern's application*. The paramount issue, in interests of justice terms, was clearly whether the applicant should be legally represented on the trial of the charges that he faced. The magistrate was told by the applicant's solicitor that he required to investigate those charges further before he could give confident advice. The basis for this was plain to see. Drugs found in the foot well of the car might or might not be associated with the applicant. It is not only unsurprising that Mr Greene wished to see the interview notes before advising the applicant on his plea; this is precisely the sort of preparatory investigation that one would expect of a conscientious solicitor.

[14] It is, undoubtedly, relevant to the issue that he had to determine that the magistrate had not imposed sentences of imprisonment on offenders charged with offences similar to those that the applicant faced. There are two issues to be addressed on this aspect of the case, however. Firstly, the absence of this type of disposal previously could not be taken as an infallible prediction of the sentence to be imposed on the applicant. The circumstances surrounding possession of drugs can vary enormously and at the stage that the magistrate was considering the matter, a sentence of imprisonment was at least a distinctly possible option. Secondly, conviction of a drugs offence, whatever the penalty, is a serious matter. It could well affect future employment prospects; it would undoubtedly have an impact on how the applicant would be regarded by law abiding members of the community; and it can have an adverse effect on a person's ability to obtain a visa to travel to certain countries.

[15] Mr Meehan appears to have been exercised by the fact that the applicant had not given sufficient information to his solicitor and that he had created 'avoidable delay'. The relevance of these matters to the applicant's entitlement to legal aid is not easy to find. Even if it were the case that the applicant had not been forthcoming to his legal adviser about his involvement in the alleged offences (and we tend to think that this is an area into which a magistrate should be loath to inquire) it could not provide a reliable answer as to whether the interests of justice required that he receive legal aid. On the

issue of creating avoidable delay, it does not seem to us that this is in any way material to the essential issue that the magistrate had to determine. It is, of course, reprehensible for a defendant to fail to obtain legal advice promptly or to neglect to provide his solicitor with sufficient instructions to allow for the preparation of any possible defence but such omissions may not be punished by withholding legal aid to which the offender would otherwise be entitled.

[16] The question that the magistrate had to address was 'is there a doubt as to whether it is desirable in the interests of justice that the applicant should have free legal aid'. In our judgment, given the material that was available to the magistrate at the time that this decision had to be made, this question admitted of only one answer. The applicant was entitled to legal aid and this should have been granted.

Conclusions

[17] We have concluded that there was no basis on which the magistrate could have reasonably refused to grant legal aid to the applicant. We will therefore make an order of certiorari quashing his decision to refuse it.