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IN THE HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

Before Kerr LCJ, Sheil LJ and Gillen J

KERR LCJ

Introduction

[1] The appellant is a solicitor practising in Londonderry who has conducted numerous legally aided cases over several years. Under the Legal Aid and Criminal Proceedings (Costs) Rules (Northern Ireland) 1992, costs in respect of work done under a criminal legal aid certificate were determined by an 'appropriate authority' which was a committee of persons selected from a panel appointed by the Lord Chancellor. Claims were to be made within 3 months of the conclusion of the criminal proceedings to which they related, subject to a dispensing power that we will discuss in greater detail below. The appropriate authority has adopted guidelines for the enforcement of the time limits and we shall also consider these.

[2] In June or July 2001 the legal aid department of the Law Society of Northern Ireland was in correspondence with the appellant about certain civil aid certificates and this sparked an inquiry into criminal legal aid certificates which resulted in the appellant being informed on 16 August 2001 of a large number of criminal cases in which no application to the appropriate authority had been made. Some nine hundred cases extending over a period of seven years were involved. The appellant has claimed that the failure to apply was the fault of an office manager who had told him that the applications had been made and that payments had not been received because the legal aid department had been guilty of delay in processing the claims.

[3] By his own account, the appellant began to submit applications to the appropriate authority for the missing cases in February 2002. The

applications made at this time related to cases that had been completed in 1998 or 1999. The appellant asserts that some of the claims were met in full and in others deductions ranging from 10% to 20% were made. On 4 March 2003 the legal aid department wrote to the appellant inviting him to attend a meeting with the appropriate authority to discuss late applications. (At that time the appellant was continuing to make applications but had not applied for an extension of time within which to do so.) The meeting took place on 10 March 2003. The panel consisted of Denis John Ryan, a retired civil servant, who has sat as a member of the appropriate authority on many occasions and Nigel Broderick, an experienced solicitor. During the meeting the appellant disclosed that there were still between 250 and 300 reports outstanding. Mr Ryan and Mr Broderick decided that there should be a reduction in the fees recoverable by the appellant. They fixed the rate of reduction at 20% on profit costs for bills submitted more than 12 months and up to 24 months out of time and 50% for reports that were over two years late. Claims for less than £100 were not reduced.

[4] The appellant challenged the decision of the appropriate authority in an application for judicial review and Weatherup J, in a reserved judgment delivered on 19 December 2003, dismissed the application. This appeal is against the judgment of Weatherup J.

The 1992 Rules

[5] The 1992 Rules were made under Article 36(3) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. 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 and shall 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 why 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."

The guidelines

[6] Although the guidelines were adopted in April 1988 for the purpose of implementing the predecessor to the 1992 Rules, the Legal Aid in Criminal Proceedings (Costs) Regulations 1988, they continued to be applied by the appropriate authority in relation to the 1992 Rules.

[7] Paragraph 4 of the guidelines suggested that, to avoid difficulties on assessment, a solicitor should apply for an extension to the three months time limit (which also featured in the 1988 Regulations) before submission of the costs claim. Examples of what would constitute 'good reason' for the purposes of regulation 15 (the equivalent of rule 16 of the 1992 Rules) were given in paragraph 5 of the guidelines. These included that the claim for costs was particularly difficult to prepare; or that a co-defendant's case was awaiting disposal; or that there was a genuine misunderstanding about the submission of a claim where, for example, an inexperienced member of staff failed to realise that a separate claim had to be submitted; or where an appeal had come on so quickly that the solicitor could not release his papers for assessment. The guidelines made clear that the examples are by no means exhaustive and that each case must be judged on its merits.

[8] Paragraph 6 of the guidelines is in the following terms: -

> "6. Where the solicitor has failed to show 'good reason', the [appropriate authority] must then go on to consider whether there are 'exceptional circumstances' which would justify extending the time limit …"

The following examples of 'exceptional circumstances' are then given: -

> "(a) the size of the claim is such that disallowance of all of the solicitor's costs would represent too harsh a penalty. The legal aid committee consider that this provision should be construed liberally, so as to include any claim for costs in excess of £100;
>
> (b) the solicitor's practice is a small one and, due to the illness of a senior member of staff, the work of the office has become so disrupted that it has become impossible to render bills on time;
>
> (c) the solicitor concludes wrongly that the three-month time limit runs from the date the Crown Court proceedings were concluded rather from the date the proceedings in the magistrates' court were concluded;
>
> (d) there has been a major upheaval in the solicitor's practice or destruction of the solicitor's premises;
>
> (e) the solicitor goes on holiday and hands his practice over to a locum who fails to submit bills on time.
>
> These examples are not exhaustive and each case must be judges on its merits. There will be certain cases where what constitutes 'exceptional circumstances' may also constitute 'good reason'."

[9] Paragraph 7 of the guidelines dealt with suggested deductions from costs. It provides: -

> "Where the [appropriate authority] decide that there were 'exceptional circumstances', they must then go on to consider whether to impose a penalty for late submission. When the only 'exceptional circumstances' are that the bill exceeds £100 the Legal Aid Committee recommend that the following tariff scale of deductions be imposed: -

a) A maximum of 5% for bills submitted up to three months out of time;
b) A maximum of 10% for bills submitted up to six months out of time;
c) A maximum of 15% for bills submitted up to nine months out of time;
d) A maximum of 20% for bills submitted up to twelve months out of time.

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 decision of the appropriate authority

[10] The appropriate authority's decision was explained in the affidavit of Mr Ryan as follows: -

"10. When the applicant left the meeting on 10 March 2003, Mr Broderick and I considered the facts in the context of rules 5 and 16 and the [guidelines], the delays and the explanation offered by the applicant. Given that there was no dispute about the reports being late, we first considered whether there was 'good reason' within rule 16 (1). We were in no doubt that there was no good reason in these cases. The excuses given by the applicant did not remotely match any of the examples given in the [guidelines] nor did they fall within any sensible definition of 'good reason'.

11. We turned then to the question of exceptional circumstances. We were quite satisfied that none of the examples given in paragraph 6 of the [guidelines] was apposite. With considerable hesitation, however, we concluded that there was perhaps sufficient in what we had been told about the applicant's problems, despite his own culpability and opportunities to put matters right, to regard them as somehow exceptional and, therefore, not disallow his claims in full. I believe that this conclusion on our part was extremely generous to the applicant.

> 12. Having decided on exceptional circumstances, we then turned to consider what reductions, if any, there should be. On that issue, we had no doubt that there should be deductions in view of the volume of claims involved, the extent of the delay over an exceptionally long period and the exceptional thinness of the 'exceptional circumstances'. It will be noted from paragraph 7 of the [guidelines] that the recommendations about deductions go up to a maximum of 20% for bills submitted up to 12 months out of time but that bills can be so late that up to 50% can be warranted. Again, I believe that we were generous to the applicant by restricting deductions so that reports over one year and less than two years late were made subject to a deduction of 20% from profit costs while only reports which are over two years late would be subject to a deduction of 50%."

The appeal

[11] For the appellant Mr McCollum QC advanced four principal arguments. These may be summarised as follows: -

1. The appropriate authority ought to have concluded that there was 'good reason' for the delay in submitting the claims.
2. Mr Ryan and Mr Broderick misconstrued or alternatively misapplied the guidelines.
3. The decision to make deductions at the rate chosen by the appropriate authority was irrational.
4. The deductions constituted a breach of the appellant's rights under article 1 of the first protocol to the European Convention on Human Rights; alternatively, the appropriate authority failed to consider the appellant's rights under this provision.

Good reason

[12] This argument was not pursued to any significant extent. We consider that Mr McCollum was wise not to press it. None of the examples given in paragraph 5 of the guidelines bore any resemblance to the situation that the appellant had to deal with. His office manager had misled the appellant as to the true position about the applications to the appropriate authority but this cannot begin to excuse his failure to discover before August 2001 what had in fact happened. Mr Nagra should have had in place a system that would have allowed ready verification of compliance with the 1992 Rules. We consider that this is a fundamental requirement for every solicitors' firm engaged in

this type of work. It is not acceptable that one individual within a firm be given sole responsibility for this important assignment without any means of checking that applications are made in accordance with rule 5.

[13] In any event, Mr Nagra's unexplained failure to deal with the matter expeditiously once he learned of his office manager's default removed any possibility that this case could be treated as qualifying for the 'good reason' exemption. He was well aware of the three-month time limit. He should have acted with dispatch as soon as he knew that a vast number of applications had not been made. As we have pointed out, the guidelines offer advice to solicitors that they should apply for an extension before submission of the costs claim. Any conscientious solicitor confronted with the situation that faced the appellant in August 2001 should have immediately applied for an extension and should have begun the process of applying in the neglected cases immediately. Instead, Mr Nagra allowed a further six months to elapse before he began to make applications and by March 2003 some 250 to 300 remained outstanding. In our judgment the finding that the appellant had not showed good reason for his delay was inevitable.

The misapplication of the guidelines

[14] Discussion of this argument must begin with a clear recognition that the appropriate authority was not bound to follow the guidelines. As their title suggests, the purpose of the guidelines was to provide general direction to the authority in dealing with delays in the submission of claims. It would have been open to them to conclude that the guidelines were not applicable in the appellant's case but it is clear from Mr Ryan's affidavit that he and Mr Broderick purported to follow the guidelines and we must therefore examine whether they applied them properly.

[15] Mr McCollum made two principal criticisms of the authority's use of the guidelines. First, he suggested that the authority failed to recognise that the appellant was to be treated as coming within the exceptional circumstances category in respect of all claims over £100. Secondly, he claimed that they misapplied paragraph 7 by imposing the maximum deduction in relation to the older claims for which the appellant was least culpable.

[16] It is convenient to deal with the second of these arguments first. Although no explicit finding was made by the appropriate authority as to the level of culpability of the appellant for any particular period of default in making the necessary applications, it is feasible to suppose that he is less blameworthy for the period when the lapse began than for the later period when the failure to submit the claims should have become more obvious. It does not follow, however, that the authority was bound to adjust the rate of deduction to reflect this pattern. The culpability of the appellant was but one factor to be considered. There is an obvious and compelling public interest in

ensuring strict compliance with the time limit for submitting applications for the payment of costs from public funds. That interest is compromised if a failure to make application is overlooked or dealt with unduly leniently. Even if it is the case that the appellant's default in respect of the older claims is to be regarded more benevolently as regards his personal responsibility, the public interest in dealing firmly with a failure to apply promptly may well be judged to outweigh that consideration, especially where the failure extends over a number of years.

[17] It should in any event be noted that the sliding scale in paragraph 7 of the guidelines does not have direct application to the appellant's case. This scale is said to apply when the only 'exceptional circumstances' are that the bill exceeds £100. In the present case the appropriate authority had included the appellant's case in the exceptional circumstances category for a different reason *viz* "there was perhaps sufficient in … the applicant's problems … to regard them as somehow exceptional." Paragraph 7 could only be applied by way of analogy therefore but there is nothing in Mr Ryan's affidavit to suggest that it was applied in any different way – see paragraph 12 of his affidavit quoted at [11] above. We therefore reject the second argument based on the authority's use of the guidelines.

[18] It is necessary now to look at the first of the appellant's arguments in relation to the guidelines. Mr Ryan has averred that the authority was satisfied that none of the examples in paragraph 6 applied in the appellant's case. Mr McCollum submitted that in this conclusion the authority had plainly fallen into error since the first example given was where the size of the claim was such that disallowance of all of the solicitor's costs would represent too harsh a penalty and the legal aid committee had indicated its view that this provision should be construed liberally, so as to include any claim for costs in excess of £100. Most of Mr Nagra's claims exceeded that figure.

[19] The description of a claim of more than £100 as an 'exceptional circumstance' is perhaps somewhat misleading but, as Mr O'Hara QC for the respondent was driven to accept, the authority's conclusion that none of the examples in paragraph 6 fitted the appellant's case cannot be sustained. Plainly, many of his claims have a value greater than £100. As the guidelines stand, this circumstance brought those claims within the first example outlined in paragraph 6. It would have been open to the authority to disregard the contents of the paragraph. Indeed, it would have been entirely unsurprising if it had done so given that the guidelines were drawn up fully sixteen years ago. It is clear, however, that the authority sought to apply paragraph 6 but has failed to do so correctly.

[20] The authority's misconstruction of paragraph 6 does not necessarily render its decision amenable to judicial review. If this court was satisfied that the authority would have reached the same conclusion if it had applied the

paragraph correctly, it would be open to us, in the exercise of our discretion, to refuse the application to quash the decision. It appears to us to be eminently possible that the authority would have reached the same conclusion if it had acknowledged that the appellant's claims for the most part exceeded £100 and were therefore within the first example contained in paragraph 6. We cannot be satisfied, however, to the requisite level of proof that this would have been the result. In that event, we have concluded that the authority's decision must be quashed and to that extent the appeal must be allowed.

Irrationality

[21] This argument can be disposed of briefly. The decision of the appropriate authority cannot plausibly be said to be unreasonable, much less irrational. Much of Mr McCollum's argument on this aspect concentrated on what he suggested was the anomaly of Mr Nagra having to bear a heavier penalty for the older claims than those of more recent vintage. This argument depends for success on the predominance of the appellant's culpability to determine the level of deduction. For the reasons given earlier, we reject this approach.

[22] It appears to us that a sliding scale of deduction based on the period of delay in making the necessary claims is entirely justifiable. It is not difficult to envisage the logistical difficulties created in checking claims for proceedings that have been completed a substantial time before the claims are made. Moreover, it is important for the success of the scheme generally that long delayed claims should be penalised more severely. The method adopted by the appropriate authority seems to us to be sensible on that account.

[23] Mr McCollum suggested that there was no evidence that the appropriate authority had taken into account that the appellant was less blameworthy in relation to the earlier claims. We do not accept that proposition. In the first place, there is ample evidence that the question of the appellant's culpability was present to the minds of the appropriate authority – see in particular paragraphs 9 and 11 of Mr Ryan's affidavit. But in any event, it is for the appellant to establish that the appropriate authority failed to have regard to this factor. In *Re SOS Ltd's application for leave to apply for judicial review* [2003] NICA 15, dealing with the incidence of the burden of proof in an application for leave to apply for judicial review, where it was suggested that the decision maker had failed to have regard to a relevant consideration, the Court of Appeal stated: -

> "It is for an applicant for leave to show in some fashion that the deciding body did not have regard to such changes in material considerations before issuing its decision. It cannot be said that the burden is imposed on the decider of proving that he did do

> so. There must be some evidence or a sufficient inference that he failed to do so before a case has been made out for leave to apply for judicial review."

This principle applies *a fortiori* to the substantive application for judicial review. We do not consider that it has been shown that the appropriate authority left this factor out of account.

Article 1 of the First Protocol

[24] The first protocol to the European Convention on Human Rights and Fundamental Freedoms provides in article 1: -

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[25] In *Sporrong and Lönnroth v Sweden* [1982] 5 EHRR 35, ECtHR observed that this provision comprises three distinct rules. The first states the principle of peaceful enjoyment of property. The second deals with deprivation of possessions and subjects it to certain conditions. The third rule recognises that states are entitled to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for that purpose – paragraph 61. The requirement that a measure be in the 'general interest' is expressly mentioned in relation to the third rule, but is inherent in article 1 of the protocol as a whole. However, the scope of review of the object or purpose of a legislative measure or other interference with property is limited. ECtHR has accorded to national authorities a wide margin of appreciation in implementing social and economic policies, and their judgment as to what is in the public or general interest will be respected unless that judgment is 'manifestly without reasonable foundation' – see *James v United Kingdom* [1986] 8 EHRR 123, paragraph 46. This approach finds expression in the domestic setting in the principle that has come to be known as 'the area of discretionary judgment' in, for instance, such cases as *R v DPP ex parte Kebilene* [2000] 2 AC 326. The courts will be reticent in interfering with a decision by the state as to the need for a particular type of tax or penalty.

[26] In the field of social or economic measures, ECtHR has also recognised that the taking of, or other interference with, property may serve a legitimate objective in the public or general interest even if it does not directly benefit the community as a whole but advances the public interest by benefiting a section of the community - *Allard v Sweden* (24 June 2003), paragraph 52.

[27] An interference with property must not only be in the public or general interest, it must also be proportionate. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The person affected must not be made to bear 'an individual and excessive burden' – *Sporrong* at paragraphs 69 and 73.

[28] We did not receive argument on the question whether costs payable on foot of an application to the appropriate authority constitute property for the purpose of article 1 of the first protocol and do not wish to express any concluded view on that matter. We are satisfied, however, that, if they should be so regarded, no breach of the article arises in this instance. We consider that the provision requiring that there be prompt application for the disbursement of public funds is clearly in the general interest and certainly in the interests of a section of the public, namely, the legal profession. The burden that the appellant has been required to bear by the deductions that have been made on his claim for costs do not appear to us to be in any way disproportionate, bearing in mind the need to maintain the efficacy of the scheme for payment of these costs and the obvious need to encourage celerity in the submission of applications.

[29] The applicant's claim that the deductions proposed by the appropriate authority are in breach of his rights under article 1 of the first protocol must therefore be dismissed. In light of that finding, we are satisfied that the issue of whether these rights were considered by the appropriate authority does not arise. In any event, no evidence has been produced that the authority failed to have regard to them.

Conclusions

[30] For the reasons given in paragraphs [20] and [21] above we consider that the decision of the appropriate authority cannot stand. We will therefore allow the appeal and quash the decision. It will be necessary for the matter to be considered by a differently constituted appropriate authority. It should approach the entire question of the payment of the appellant's costs afresh unencumbered by the earlier decision. In particular it will be open to the new authority to consider whether exceptional circumstances arise at all in this case, and if so, whether and at what rate deductions should be made.