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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JACQUELINE LYNCH FOR JUDICIAL REVIEW

KERR J

Introduction

The applicant Jacqueline Lynch has taken proceedings against Times Newspapers Ltd, the publishers of the Sunday Times newspaper, and the publishers of Magill, a monthly news and current affairs magazine, for defamation. Legal aid is not available for defamation proceedings.

By this application the applicant seeks judicial review of the decision not to provide her with legal aid for the defamation actions. In her Order 53 statement she also sought a declaration that paragraph 3 of Part II of Schedule 1 to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (which excludes defamation from the provision of legal aid) is incompatible with article 6 of the European Convention on Human Rights. That claim was not pursued on the hearing of the application.

The statutory provisions

The relevant statutory provision in Northern Ireland is paragraph 3 of Part II to Schedule 1 of the Legal Aid, Advice and Assistance (Northern

Ireland) Order 1981 which excludes from legal aid "proceedings wholly or partly in respect of defamation". This paragraph also provides that "the making of a counterclaim for defamation in proceedings for which legal aid may be given shall not of itself affect any right of a defendant to the counterclaim to legal aid in the proceedings and legal aid may be granted to enable him to defend such counterclaim".

A scheme for legal aid and advice had been introduced by the Legal Aid and Advice Act (Northern Ireland) 1965. It did not cover defamation proceedings; these were expressly excluded by paragraph 2 (a) of Part II of Schedule 1 to the Act. The 1981 Order repealed and replaced the 1965 Act. In England and Wales the Legal Aid Act 1974 and later the Legal Aid Act 1988 contained provisions excluding defamation from legal aid that are similar to those in force in Northern Ireland.

Factual Background

On 1 December 1999 a surveillance device was discovered in a Ford Mondeo vehicle, registration JUI 3793. The applicant claims that she was the owner of the vehicle. Both Magill and the Sunday Times carried accounts of this incident. In articles published in the newspaper and the magazine the vehicle was referred to as "an IRA staff car".

In a Writ of Summons issued against the Times the applicant claimed damages for libel and an injunction restraining further publication of material defamatory of her. In her statement of claim she alleged that the words of the article meant or were understood to mean that she was a terrorist, a supporter

of terrorism and a member of the IRA; that she allowed her vehicle to be used by or on behalf of the IRA and that she supported violence. Similar claims and allegations were made in the pleadings in the action against the publishers of Magill. In both instances pleadings were signed by junior and senior counsel.

On 22 January 2001 Mrs Lynch's solicitors wrote to the Lord Chancellor, suggesting that the failure to make legal aid available to her for these proceedings was a violation of her rights under article 6 of the European Convention on Human Rights. They also asked for the Lord Chancellor's proposals for "assisting Mrs Lynch in the conduct of the [defamation] case". The Director of Legal Aid for Northern Ireland, Alan Hunter, replied on behalf of the Lord Chancellor on 8 March 2001, refuting the claim that the applicant's Convention rights were infringed. On 20 September 2001 the applicant's solicitors wrote again to Mr Hunter enclosing pleadings in the present judicial review application and invited him to consider these in light of the earlier request. Mr Hunter replied on 11 October 2001 confirming his view that no breach of article 6 of the Convention arose.

In an affidavit filed in support of her application for judicial review Mrs Lynch has said that she will not be able to continue with the libel proceedings without legal aid because of the "complexity and financial implications" involved in a trial of the actions.

The arguments

For the applicant, Mr Treacy QC submits that in practical terms it is impossible for the applicant to prosecute her claims if she does not have legal advice and assistance. If legal aid is not available, she will have to abandon those claims and will therefore be denied access to justice. In support of that submission he draws attention to a number of features of the libel proceedings which, he says, make these cases impossible for a layman to conduct. In particular, the applicant faces defendants of considerable means and resources; both will be represented by experienced solicitors and counsel; the factual and legal issues involved in both cases are complicated and the applicant does not have an academic background and has no legal training.

For the respondent Mr Sales accepts that the presentation of these cases will be difficult for the applicant but he suggests that the real issue is whether the denial of legal aid makes it "practically impossible" for her to proceed. Society is entitled to expect plaintiffs such as the applicant to undertake the presentation of the defamation actions, whatever difficulties that would entail, where the alternative is the diversion of scarce public resources from other deserving needs. To require the authorities to provide legal aid to the applicant would involve a positive obligation in respect of an implied right and the Strasbourg organs have been traditionally reluctant to impose such a duty, not least because the allocation of public resources is a matter for democratic institutions and the courts should be properly deferential to the decisions of the legislature in its prioritisation of public expenditure generally and in the legal aid sphere in particular.

Implied rights

Article 6 of the Convention does not guarantee the right to legal aid for civil proceedings. Article 6 (1) 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."

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."

ECtHR has held that a right to legal aid in non-criminal proceedings may be implied – see for instance *Airey v Ireland* [1979] 2 EHRR 305. But whether such a right will be implied depends on the particular circumstances

of the individual case. In this context, the observations of Lord Bingham of Cornhill in *Brown v Stott* [2001] 2 WLR 817, 835 B to D provide a salutary reminder of the limitations of the Convention as a redress for all ills: -

> "The convention is concerned with rights and freedoms which are of real importance in a modern democracy governed by the rule of law. It does not, as is sometimes mistakenly thought, offer relief from 'The heart-ache and the thousand natural shocks That flesh is heir to'.
>
> In interpreting the convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus particular regard must be had and reliance placed on the express terms of the convention, which define the rights and freedoms which the contracting parties have undertaken to secure. This does not mean that nothing can be implied into the convention. The language of the convention is for the most part so general that some implication of terms is necessary, and the case law of the European Court shows that the court has been willing to imply terms into the convention when it was judged necessary or plainly right to do so. But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept. As an important constitutional instrument the convention is to be seen as a 'living tree capable of growth and expansion within its natural limits' (*Edwards v A-G for Canada* [1930] AC 124 at 136 per Lord Sankey LC), but those limits will often call for very careful consideration. "

The limitations to be placed on rights implied into the Convention has been recognised by ECtHR in *Golder v UK* [1975] ECHR 4451. That case

involved the refusal by the Home Secretary of a prison inmate's request to consult a solicitor with a view to instituting libel proceedings against a prison officer who had made (and later withdrew) allegations that the applicant had been involved in a disturbance in the prison. It was held that although the right of access to the courts was not expressly stated in article 6(1), it formed an aspect of the basic single right contained in the article. At paragraph 38 the court said: -

> "38. The Court considers, accepting the views of the Commission and the alternative submission of the Government, that the right of access to the courts is not absolute. As this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication."

The type of limitation that would be implied was described by the court in referring to observations made about rights under article 2 of the First Protocol to the Convention in the *Belgian Linguistics case* [1968] ECHR 1474 where it was said (in paragraph 5): -

> "5. The right to education guaranteed by the first sentence of Article 2 of the Protocol by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention."

In *Golder* the court said "these considerations [*i.e.* the regulation of rights by the state according to needs and resources] are all the more valid in

regard to a right which, unlike the right to education, is not mentioned in express terms". The approach to the question whether an asserted right should be implied must therefore be guided by the consideration that changing priorities and varying demands on finite public resources may impel a different answer from time to time.

The area of discretionary judgment

The implication of rights or rather, their recognition as necessary concomitants of the express rights guaranteed by the Convention, is also affected by the consideration that democratic institutions such as Parliament should be accorded an appropriate area of discretionary judgment in relation to spending priorities. In the field of civil litigation ECtHR has been ready to recognise that not every form of proceeding can be state funded in the guise of protection of an article 6 right. Thus in *Sheffield and another v United Kingdom* [1998] ECHR 22985 (a case involving a claim that the respondent State had failed to accord appropriate recognition to a person's post-operative gender) on the complaint that the State had failed to show respect for the applicants' private life ECtHR said: -

> "52. The Court reiterates that the notion of "respect" is not clear-cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention

> (see the above-mentioned *Rees* judgment, p. 15, para. 37; and the above-mentioned *Cossey* judgment, p. 15, para. 37)."

Although expressed in a different context, this principle reflects the Court's attitude that, in the field of social policy, the democratic institutions of the state should be taken to represent the wishes of the community at large. On that account, the area of discretionary judgment on matters such as the deployment of public funds must be recognised and courts should be appropriately reluctant to substitute their views as to the disbursement of those funds for those of the legislators. This is particularly so where acceptance of the validity of the right claimed would require the state to take positive measures.

The reason for particular care in the recognition of rights which impose positive duties on the state is precisely because the interests of the individual who asserts the right may not always chime with the interests of the community as a whole and the reconciliation of those interests – or the choice between them – is pre-eminently one to be made by democratic institutions. The present case exemplifies the principle. If legal aid is to be made available for defamation actions such as the applicant's, that may involve diverting public funds from other claims upon them.

The test to be applied

The question whether legal aid should be available for various forms of proceedings has occupied the Strasbourg organs in a number of cases, many of them involving defamation actions. In *Airey v Ireland* 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 article 8 of the Convention. At paragraph 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."

It is clear from this passage 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.

In *W v United Kingdom* Application No. 10871/84, the applicant claimed that the non-availability of legal aid for defamation proceedings was in violation of his article 6 rights. The European Commission on Human Rights said: -

> "The Commission notes that even where legal aid may be available for certain types of civil action, it is reasonable to impose conditions on its

> availability involving, inter alia, the financial situation of the litigant or the prospects of success of the proceedings (cf. No. 8158/78, Dec. 10.7.80,D.R. 21 p. 95). The Commission considers, similarly, that, given the limited financial resources of most civil legal aid schemes, it is not unreasonable to exclude certain categories of legal proceedings from this form of assistance."

In *Munro v UK* [1987] 52 DR 158 the applicant had been the personnel and management services officer with a local authority. He was dismissed after a period of sickness absence. He wished to claim damages for libel in relation to the contents of two letters written to the applicant's union and the Department of Education. The applicant complained that the lack of legal aid for defamation proceedings deprived him of the right to a fair trial. The Commission accepted that the applicant had insufficient means to pay for the services of professional legal advisers and that it was unreasonable to expect him to undertake defamation proceedings unrepresented because such proceedings were extremely complex. It nevertheless concluded that no violation of article 6 arose. In the following passage of the judgment the Commission recognised that regard must be had to different considerations from those that were relevant in a petition for judicial separation (as in the *Airey* case): -

> "The general nature of a defamation action, being one protecting an individual's reputation, is clearly to be distinguished from an application for judicial separation, which regulates the legal relationship between two individuals and may have serious consequences for any children of the family. Defamation proceedings are moreover inherently risky and it is extremely difficult accurately to predict their outcome.

> The Commission recognises, furthermore, that the nature of a claim of defamation is such that it may easily be open to abuse. As a result there is an objective risk that proceedings for defamation may be unreasonably or abusively pursued. This is reflected in the common practice of Member States of the Council of Europe to adopt special procedures to guard against such abuses."

From these decisions it may be seen that the nature of the proceedings is an important factor in deciding whether the lack of legal aid will deprive the applicant of a fair trial as required by article 6 of the Convention. Defamation proceedings, although important to protect one's reputation, are not to be regarded as akin to judicial separation since the latter involve the regulation of relations between individuals and may have implications for the children of the union. The fundamental importance of these factors distinguishes cases of this type from others.

It would appear, therefore, that article 6 of the Convention will require that legal aid be available only where it is impossible as a matter of practicality for a litigant to have access to the courts without it and where a matter of fundamental importance is at stake.

Is it practically impossible for the applicant to proceed with her claims?

The applicant has averred that she will not proceed with her actions for defamation unless she has legal representation and that she cannot afford this unless legal aid is available. Her claim that she would be unable to undertake the cases herself cannot, of itself, establish that it is impossible for her to proceed, however. That claim must be examined objectively.

Defamation is undoubtedly a more complex area of law than many others. In a report prepared for the applicant Geoffrey Bindman, an experienced solicitor, has described the difficulties that this form of proceeding can pose for an inexperienced litigant. It is clear, however, 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 article 6.

The question is whether the applicant is capable of presenting her case, albeit with difficulty. In this context, the assistance that the court is bound to afford the applicant is relevant. In *Webb v UK* [1984] 6 EHRR 120 the Commission stated: -

> "In the notion of a fair hearing article 6 (1) of the Convention does not guarantee that both parties to any proceedings must necessarily be represented by counsel or granted legal aid to that effect. No such rigid principle is contained in, or implied by, this provision which does, however, require that the proceedings taken as a whole must be fair. As a result, the task of the judge or judges in proceedings to which article 6 (1) applies is never passive, but includes the ultimate responsibility for ensuring fairness of the proceedings whether or not the parties are represented, and this safeguarding principle is especially relevant in contested proceedings where one of the parties appears in person."

In the present case the applicant will have to establish that the articles refer to her. If she is correct in her assertion that she is the registered owner of the vehicle described as an IRA staff car, this should not present a substantial difficulty. She will also have to show, however, that the articles are defamatory of her and that they are capable of bearing the meanings that have been attributed to them in the statements of claim. This will not be an easy task. Moreover, the applicant may be required to deal with interlocutory matters such as replying to notices for further and better particulars that will not be familiar to her. Mr Treacy has pointed to the applicant's lack of education compared with the applicant in *McVicar* and has suggested that this disadvantage will render it impossible for the applicant in the present case to cope with the foreseeable demands of the litigation.

I do not accept this argument. The applicant has had the benefit of counsel to draft the pleadings that have been issued on her behalf to date. It will not be easy for her to complete the replies to notices for particulars but it will be by no means impossible. Likewise, while the presentation of her case will be difficult, it certainly could not be regarded as an impossible task even for someone of her limited educational background. In this context, the judge of trial will be obliged to ensure that the applicant's lay status is not exploited by her opponents. While he may not act as an informal advocate for the applicant, he must ensure that she is not placed at a disadvantage simply because she is a layman. It will be his duty to explain in readily comprehensible terms the steps that the applicant must take and the

significance of any application made by the defendants to the actions. I am thus satisfied that, although the applicant will have difficulty in preparing and presenting her case, this is not a practically impossible task.

Conclusions

I am satisfied that the further preparation and the presentation of the applicant's claims against the Sunday Times and Magill, while they will undoubtedly be difficult, lie well within her capabilities, especially with the assistance that the court must properly give her. I do not consider, therefore, that the absence of legal aid for her defamation actions constitutes a violation of her article 6 rights. The application for judicial review must therefore be dismissed.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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