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Judgment: approved by the Court for handing down | *Delivered:* **1/5/07**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPLICATION BY LORRAINE McHUGH FOR JUDICIAL REVIEW

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Before Nicholson, Campbell and Sheil LJJ

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CAMPBELL LJ

[1] This is an application by Lorraine McHugh (the appellant), for a protective costs order in advance of the hearing of her appeal from a judgment of Kerr J (as he was then) in judicial review proceedings. The appellant asks for an order that there be no order for costs between the parties irrespective of the disposition of her appeal or for an order that there be no order for costs against her irrespective of the outcome of the appeal.

[2] The appellant, who suffers from multiple sclerosis, applied for judicial review of a decision of Home First Community Health and Social Services Trust (the Trust) not to make arrangements to provide her with assistance for adaptation of her home. She asked for a declaration that the Housing Renovation etc. Grants (Reduction of Grant) Regulations (Northern Ireland) 1997 were ultra vires the Housing (Northern Ireland) Order 1992 and a declaration that a means test, provided for in the regulations, was not compatible with Articles 3, 6 and 8 of the European Convention on Human Rights and Fundamental Freedoms and Article 1 of the First Protocol to the Convention. The judge held that none of these grounds had been made out and dismissed her application.

[3] On 26 November 2004 the appellant gave notice of her intention to appeal against the judgment. In the court below she had received legal aid under the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. However, she found that she was ineligible for legal aid in the Court of Appeal due to an improvement in her financial circumstances. This improvement brought her, by what she describes as "a modest margin", above the threshold for legal aid.

[4] In the affidavit grounding her application, the appellant explains that her funds do not permit her to pay fees to counsel who are acting *pro bono* on

the instructions of the Law Centre (Northern Ireland) which does not make any charge. She states that she would be unable to meet any order for costs made against her.

[5] The appellant asserts that while the appeal is very important to her the issues raised by it will impact on vulnerable members of society in general. She adds that although she has been advised that there is a real prospect that her appeal will succeed she will discontinue it if she does not obtain a protective costs order.

[6] The financial disparity between the parties is stressed by the appellant. The respondents declined an invitation from the appellant's solicitors to agree to no order for costs being made irrespective of the outcome of the appeal.

The arguments

[7] Mr Larkin QC (who appeared with Mr Sayers for the appellant) referred to the general principle, as expressed in Order 62 Rule 3(3), that if the court in the exercise of its discretion sees fit to make any orders as to costs normally it must order that the costs are to follow the event.

[8] He drew attention to the overriding objective, stated in Rule 1A of the Rules of the Supreme Court (Northern Ireland) 1980, which is designed to enable the court to deal with cases justly. Rule IA (2) (a) explains that dealing with a case justly includes, so far as is practicable, ensuring that the parties are on an equal footing. Rule I (A) (2) (c) (iv) makes it clear that dealing with cases justly includes, as far as is practicable, doing so in ways which are proportionate to the financial position of each party.

[9] Mr Larkin referred to *Bolton Metropolitan District Council v Secretary of State for the Environment (Practice Note)* [1995] 1WLR 1176, 1178 where Lord Lloyd of Berwick said:

> "As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule."

[10] He drew attention to the criteria drawn up by the Ontario Law Reform Commission in 1989 and referred to by Lord Phillips of Worth Matravers MR in *R (Corner House) v Trade and Industry Secretary* [2005] 1WLR 2600 at para [42]. Counsel suggested that these might be adopted by a court considering making a protective costs order. The criteria suggested by the Commission were:

(i) the litigation must raise issues of importance beyond the immediate interests of the parties.

(ii) the plaintiff must have no personal, proprietary or pecuniary interest in the outcome, or if such an interest does exist, it clearly does not justify the litigation economically.

(iii) the litigation does not present issues which have previously been judicially determined against the same defendant.

(iv) the defendant must have a clearly superior capacity to bear the costs of the proceedings.

[11] It was submitted on behalf of the appellant that while she has a personal interest in the outcome of the proceedings, there exists also a clear public interest in the resolution of the issues raised and clarification of the duties owed by public authorities under the framework of legislation touching on Disabled Facilities Grants. Therefore the appellant met the governing principles in *R (Corner House) v Trade and Industry Secretary* set out at para [17] of this judgment.

[12] Mr Lavery QC, on behalf of the Trust, accepted that the court was empowered to make a protective costs order. He emphasised that most of the cases in which protective costs orders have been made were cases at first instance such as *Corner House.* Further, they were normally cases involving matters such as planning where there is an obvious general public interest in the outcome. In the present case the issues have been considered by a court which has given a decision. Mr Lavery questioned how far it was necessary, in the general public interest, to continue testing a decision which has been subject to judicial scrutiny. He suggested that in such circumstances it was for the appellant to establish such an interest. He submitted that the appellant does have a significant financial interest in these proceedings though it is a matter for argument as to whether the amount involved would justify the expense of engaging in litigation. In dealing with the question as to what was exceptional about the proceedings Mr Lavery noted that the regulations are not novel having been in existence for some time. If the basis of the appellant's case was that she had to move home, and in doing so leave a house that had already been suitably adapted, few would be likely to be affected in this way.

[13] The method used to assess how much an applicant for a grant should contribute was to assess how much they could, with their income, raise by way of mortgage. Given the limited resources available to the Trust it was argued that this was a fair method of means testing. Furthermore it is not possible to say how many applicants have applied for these grants and been turned down on this ground

[14] Mr Lavery referred to the judgment of the Court of Appeal in *R (Corner House) v Trade and Industry Secretary* at para [75] as providing examples of orders that have been made in other cases.

> "A PCO can take a number of different forms and the choice of the form of the order is an important aspect of the discretion exercised by the judge. In the present judgment we have noted: (i) a case where the claimant's lawyers were acting pro bono, and the effect of the PCO was to prescribe in advance that there would be no order as to costs in the substantive proceedings whatever the outcome (*R Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1296); (ii) a case where the claimants were expecting to have their reasonable costs reimbursed in full if they won, but sought an order capping (at £25,000) their maximum liability for costs if they lost *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2712 (Admin); (iii) a case similar to (ii) except that the claimants sought an order to the effect that there would be no order as to costs if they lost (*R v Lord Chancellor, Ex p Child Poverty Action Group* [1999] 1 WLR 347; and (iv) the present case where the claimants are bringing the proceedings with the benefit of a CFA, which is otherwise identical to (iii)."

[15] Mr Maguire QC, who appeared for the Department for Social Development, made the following submissions:

(i) despite the widening of the field in the last twenty years of those who come within the description of an interest party in judicial review proceedings the appellant would always have come within the description of someone having a direct interest in these proceedings.

(ii) protective costs orders represent a major development in judicial review but do not benefit those who are pursuing a private interest.

(iii) all developments in the law begin from a baseline and this is identified as being where the applicant has no private interest in the outcome. The seminal authority is *R v Lord Chancellor, Ex p Child Poverty Action Group* where Dyson J said at page 353 the "essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case." This

observation was endorsed by the Court of Appeal in *Corner House* at para [73] of the judgment.

(iv) this is not an appeal which requires resolution in the public interest.

[16] In his reply Mr Larkin said that if the *Corner House* principles are followed with regard to an absence of personal interest this will exclude Convention cases where the applicant has to be "a victim "of a breach. He went on to suggest that the baseline should no longer be taken from *Ex p Child Action Poverty Group* but from the overriding objective.

Conclusion

[17] It is only in exceptional circumstances that protective costs orders are made. The principles in *Ex p Child Poverty Action Group*, as revised by the Court of Appeal in England and Wales in *Corner House*, provide guidance as to when such circumstances may be said to have arisen. They are found at para [74] and are as follows:

(1) "A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent (s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

(2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."

We observe that as these are guiding principles it does not follow, for example, that the fact that the applicant has a personal interest in the proceedings means that this must invariably amount to a complete bar to making a protective costs order.

[18] The appellant comes within some of the guiding principles as she has secured *pro bono* representation and has indicated that if she does not achieve a protective costs order she will not pursue her appeal. Principles (i) (ii) and (iii) present her with greater difficulty. Because of her medical condition she needs to have work carried out to her home and this gives her a significant

interest in the outcome of the proceedings. In an article entitled *Protective Costs Orders* by Stein and Beagent [2005] JR the authors indicate that at one end of the spectrum is the public law case where the individual claimant seeking the order is the only person to benefit from the litigation. The boundaries, they suggest, may be more blurred where a claimant is bringing a claim which, if successful, will lead to direct personal benefit to the claimant but the issues raised are of real public importance. If such an approach is adopted this is not a case which comes within the boundary despite any personal interest of the appellant by reason of issues of real public importance. A statement that the issues will impact on vulnerable members of society is insufficient to provide the basis for the private interest of the appellant in the outcome to be disregarded as being incidental to an issue of general public interest.

[19] Protective costs orders were made in *R(CND) v Prime Minister* where the issue was the legality of the war in Iraq and in *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1296, where the issue was the fairness of arrangements for processing asylum- seekers' claims. These two examples illustrate the type of case where such an order is appropriate. The *Child Poverty Action Group* wished to challenge the way in which the Lord Chancellor exercised his statutory power in relation to the extension of legal aid to cover at least some cases before social security tribunals and commissioners and it was decided that such an order was not appropriate. Although that decision was given prior to the overriding objective being included in the rules we agree with Richards J. in *R v Hammersmith and Fulham BC Ex p Council for the Protection of Rural England* [2000] Env LR 544 where he said that the relevant aspects of the rule are embedded in the principles stated in *Child Poverty Action Group.* This latter case provides an example that is much nearer to the present case than those mentioned earlier where a costs protection order was made.

[20] In the result we are not satisfied that the issues raised in this appeal are of general public importance or that the appellant has no private interest in the proceedings. This is not therefore one of those exceptional cases where it is appropriate to make a protective costs order and the application must be dismissed.