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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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DIVISIONAL COURT (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR78
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Before: Deeny LJ and Keegan J

DEENY LJ

Introduction

[1] The application this morning raised a number of interesting points, but as the court is exercising a wide discretion in relation to an issue of costs in a fact specific matter we have concluded that it is not necessary to reserve judgment but to deal with it by way of this *ex tempore* judgment which I deliver on behalf of the court.

[2] The matter arises from the Judicial Review application brought under the title JR78 by the grandmother of an unfortunate child beset by tragic incidents in his life. The Applicant/Next Friend had brought these proceedings with the intention of compelling the Director of Public Prosecutions to make a decision as to whether to prosecute certain persons with regard to injuries to this infant, as he then was, and, as I will discuss in a moment, preferably to make the decision in favour of prosecution.

[3] I will deal with the chronology in a moment, but it was agreed by the parties at the hearing today that the proceedings be dismissed as they have become academic in nature.

[4] Ms Doherty QC appeared for the Applicant and Mr Philip Henry for the Respondent. The Court is grateful to Ms Doherty for her very helpful written and oral submissions, and to Mr Henry for his oral submissions on this issue this morning. The issue that we had to deal with was whether, in the light of the dismissal of the proceedings, we should grant the Applicant's application for costs

against the Respondent in all the circumstances applying today.

[5] The genesis of this application, as Ms Doherty put it, is the Respondent's failure to provide a decision on whether to prosecute following the serious injuries to the infant; but the chronology is not without complexity and I propose to set it out.

[6] The child was born in 2010. Injuries were subsequently sustained but the Public Prosecution Service concluded on 23 October 2012 that a prosecution was not called for. Concern was expressed by a social worker who wrote to the PPS on 13 June 2013 asking for a review of that decision. There was then an investigation of the matter which led to a report from the Safeguarding Board for Northern Ireland relating to failings in the multi-disciplinary care given to this child. The report only became available to the Applicant grandmother in June 2015.

[7] Indeed, the facts are most unusual, in as much as she was not initially aware that she was the paternal grandmother of this child, so she only became involved in its life about 18 months after its birth.

[8] She then took advice and raised with the Public Prosecution Service a request to review the decision, and she was supported in that by the relevant Trust. She had a meeting with an official of the PPS on 4 November 2015 and that case officer assured her that she would make a decision on the matter prior to her departure from the PPS, that is the officer's departure. Regrettably, the officer did not do so before she left in December 2015. A new case officer was appointed by the PPS and by the Director, in fairness to him, but again a decision on this review was not forthcoming. There was an internal transfer of the decision within the PPS and notification of that to the Next Friend, but again no decision. There was a meeting on 9 November 2016 between the Next Friend and the PPS, but again no decision.

[9] The Next Friend, the grandmother, then instructed solicitors who wrote a very proper letter on 6th April 2017 complying with the protocol in place for judicial review proceedings in this jurisdiction. It is regrettable to note that no response was received to that letter. Judicial review papers were then issued pursuant to Order 53 of the Rules of the Court of Judicature on 2 June 2017. On 20 July 2017 the Public Prosecution Service did communicate a decision in a reasoned fashion in a letter to the Next Friend, and that decision was to stand over the earlier decision not to prosecute. The matter was then before this court on 6 September 2016.

[10] Ms Doherty, whom I should say appeared with Ms McCartney for the Applicant, asked for time to consider the decision rather than acquiescing in the immediate application of Mr Henry to dismiss it on the basis that the application was now academic. One of the grounds advanced by Ms Doherty on that occasion was that the Order 53 statement was not solely concerned with delay but extended to the Public Prosecution Service's decision not to prosecute, i.e. the failure to

prosecute as the Next Friend would have it. There were other reasons including, in particular, the opportunity for the Next Friend to meet with the PPS to discuss the matter. The matter was then adjourned until today's date, 4 October 2017, and it remains before the court only on this issue of costs.

[11] The approach to costs in a case of this sort was the subject of judicial consideration by Scott Baker J in R (Boxall) v London Borough of Waltham Forest [2000] AER (D) 2445, and that decision is summarised in Larkin & Scofield, Judicial Review in Northern Ireland: A Practitioner's Guide, relied on by counsel and is to be found at Paragraph 16-09 of that text book or guide. The particularly relevant headings principles identified by Scott Baker J in his judgment are submitted by counsel to be items 5 and 6:

> "5. In the absence of a good reason to make any other order the fall-back is to make no orders to costs.
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> 6. The court should take care to ensure that it does not discourage parties from settling judicial review proceedings; for example, by a local authority making a concession at an early stage".

[12] Since that, as Ms Doherty draws to our attention, there have been two decisions in the Court of Appeal in England. One is R (Bahta) v The Home Secretary [2011] EWCA Civ 895 where Pill LJ drew attention to the importance of a respondent replying to a letter issued on foot of the pre-action protocol which in England is set out at CPR Rule 44.3(5).

[13] I bear in mind the later submission of Mr Henry that a degree of caution is warranted with regard to comparisons between England and Wales and our own jurisdiction. As has been pointed out judicially the way in which the applications are processed in both jurisdictions differs to some degree.

[14] Ms Doherty also drew the Court's attention quite properly to the further decision of the Court of Appeal in England in R(M) v Croydon London Borough Council [2012] 1 WLR 2607; [2012] EWCA Civ 595, a decision of Lord Neuberger of Abbotsbury, Master of the Rolls at the time, Lady Justice Hallett and Stanley Burnton LJ. In that case the claimant had arrived in the United Kingdom from Afghanistan. There was an issue, which was important for how he should be treated by the local authority in whose area he found himself, as to whether he was twelve or fourteen years of age. By the time of the substantive hearing of the case, that is after leave had been granted by Judge McMullan QC on 26 July 2010, the local authority were prepared to concede that he was, in fact, twelve contrary to their earlier estimation; but Lindblom J, when the matter came on for substantive hearing then and the issue was conceded, declined to make an order for costs against the local authority.

[15] As the headnote records, quoting and synthesizing a number of paragraphs in the judgment of Lord Neuberger, the Court of Appeal allowed the appeal and said:

> "That the general rule in civil litigation, stated in CPR Rule 44.3(2), that a successful party who obtained all the relief he sought, whether by consent or after contested hearing, was entitled to be paid his costs by the unsuccessful party unless there was good reason to the contrary, applied in the Administrative Court just as much as to other parts of the civil justice system and it made no difference that the defendant was a public body; that where a claimant obtained only some of the relief which he sought, the position on costs would depend, for example on which party was the more successful, or, even if the claimant was accepted as the successful party, there might be an argument as to the importance of the issue, or costs relating to the issue in which he had failed; that each case turned on its own facts so that a case might have an unusual feature which could justify departing from what would otherwise be the appropriate costs order; that, therefore, the judge had adopted the wrong approach in making no order for costs; that since the claimant had succeeded on the only real issue in the case he should normally have been awarded his costs, but the circumstances, including the change in the perceived law by the Supreme Court, were such that it was appropriate to reduce the award of costs in his favour; and that accordingly the local authority would be ordered to pay 50% of the claimant's costs up to the date he was given permission to proceed with his claim for judicial review and 100% of his costs thereafter."

[16] So one notes several points there; that they are dealing with this case not at the leave case but at the substantive case; secondly, that a view in law had changed; and thirdly, that in their view the applicant there had succeeded in full.

[17] Those two Court of Appeal cases were cited to Treacy J in McTaggart's Application [2012] NIQB 79 and he correctly says that the earlier decision in Boxall, to which I referred, must be read in the light of the Bahta decision. He did not address the decision in M in any detail. His conclusion in that case is to be found at paragraphs 11 and 12 which I will read in a moment. They reflect the fact that he accepted the submission of Mr Sayers of counsel that while his client had conceded the matter at the leave hearing, after a shortish adjournment, that was because they had ascertained there had been a material misunderstanding of fact by the respondent.

[18] His Lordship found as follows at [11]:

> "I accept the respondent's submission that it has responsibly and promptly resolved the matter without the need for the leave application having to be moved by counsel and, crucially, that it did so in respect of an issue which was not expressly raised in the pre-action correspondence or the Order 53 statement. Such resolution is not to be discouraged and has in this case taken place before the court has had an opportunity to hear submissions on the particular circumstances of the case.
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> [12] In the circumstances I accept that good reason does not exist to depart from the fall-back position described in the fifth Boxall principle which is to make no order to costs between the parties."

[19] Professor Anthony in his book on Judicial Review in Northern Ireland helpfully refers to an earlier decision not noted by counsel, but appropriate for this Court to refer to and that's a decision of Gillen J (as he then was) in Re: Saeed Ullah [2007] NIQB 45. Mr Ullah was somebody who belatedly noticed that there was a policy or finding in his favour and when this was drawn to the attention of the Home Secretary there was a period of delay of more than six months before they accepted the point and conceded the leave application and released Mr Ullah from detention. Gillen J followed a decision of Brook J in R (Royal Borough of Kensington and Chelsea [1995] 27 HLC 602 and gave Mr Ullah his costs against the respondent but not from the beginning, only from 5th February 2007 which was the date of the pre-action protocol letter. I think it is proper for me to quote what the judge said at, coincidentally, paragraph 11:

> "For the removal of doubt I wish to make it clear that this case is not an indication that costs will be awarded where responsibly and properly respondents concede in a sensible way a point raised in the proceedings once these had been properly considered. The courts will always be keen to encourage resolution of cases at the earliest stage possible and, particularly at the leave stage, this will as a general rule not lead to an award of costs. Respondents must not see this judgment as a cause for concern that early concession will lead to an expensive wrangle over costs."

[20] On foot of that we then turn to the response of Mr Philip Henry on behalf of the Respondent to this application, the Public Prosecution Service. He drew our

attention to some of the points in M which I have set out above and, without disrespect to some other submissions, he made one telling point in particular. It was his submission that the Applicant here has not succeeded in whole. She has succeeded only in part. Looking at the Order 53 statement it was not only that she was complaining of the failure of the Director of Public Prosecutions to make a decision but that she was criticising him for not making a decision to actually prosecute those whom the Next Friend regarded, and others would appear to have regarded, as the wrong doers in this situation. We accept that submission. It accords with Ms Doherty's own submission at the earlier adjournment of the matter and it is a point that has to be taken into account therefore.

[21] We then have to consider how to exercise our discretion with regard to this issue of costs on the specific facts. We note that Mr Henry drew our attention, as I have referred, to the English Court of Appeal's decision to award 50% of the costs in M up to the leave stage, but in effect what Ms Doherty was saying was that she had not one but two strong points in her favour. The first one was the very considerable delay in the Public Prosecution Service dealing with this case. I have mentioned the assurance that a decision would be made as long ago as December 2015 and the failure to honour that assurance. However, the delay continued for a long time after that, and that is a free standing and significant point. Secondly, as she reminds us, when her solicitors did write a pre-action protocol letter on 3 April 2017 they got no response at all. They were therefore not only merely entitled but, in effect, obliged to bring the judicial review proceedings that followed. It is important to bear that in mind.

[22] We have taken those two points into account and the two points which might weigh against it; namely that the Applicant's application also extended to the merits of the reviewed decision because she was challenging the failure to review the decision to a point of a fresh decision, but also that we are only at the leave stage. In that regard we are in a different position from the Court of Appeal in England in M v Croydon London Borough Council because leave had been granted in that case earlier on. Our view of the matter is that the issue can properly be dealt with by awarding the Applicant two-thirds of her costs of this application.

[23] We say just a word more. The approach in the Judicial Review Court in this jurisdiction, as we understand it, has been that costs are not normally awarded at the leave stage. That has a number of advantages. Amongst those it has an advantage for applicants who are not denied access to justice by being deterred from bringing a leave application conscious that they may face a stiff bill in costs from a respondent if they fail to get leave. It is true to say that many applicants enjoy the benefit of Legal Aid and some have commercial interests behind them but some do not, and so it is a virtue of the present system that applicants who fail to get through the leave stage are not normally penalised on costs.

[24] It is virtuous for the respondents also. It means that public bodies have the incentive of saving costs and making sensible concessions at the leave stage or other

early stage of proceedings. It also recognises the reality that these applications by definition are being brought against public bodies. Almost always therefore procedures will have to be adopted within those public bodies before a fresh decision can be taken. They will have to take advice internally and usually, at least often, externally from counsel or at least from solicitors as to the strength or weakness of their legal position. It is reasonable that they should have done so by the leave hearing, but it might be harsh on them on occasions to have expected to be done before that. A further advantage of continuing the present practice of not normally awarding costs at the leave hearing is that it avoids an already busy Judicial Review Court spending time on satellite issues of costs.

[25] On the other hand, it is right to say that an applicant who fails to act "promptly" in accordance with Order 53 runs the risk of being turned away by the court. It follows in fairness that a public authority should also act promptly in response to the pre-action protocol letter. If it fails to respond promptly it puts itself at the risk of paying costs ultimately.

[26] However, as we have indicated, we do not consider that this is the case in which to decide if that general and present practice in the general judicial review court should change. We exercise a discretion in this case in the way indicated against the exceptional factual matrix of very considerable delay and an absence of response to the letter against this being the leave stage and not a complete success on the part of the applicant.