Neutral Citation No. [2010] NIQB 53 | *Ref:* **TRE7835**

Judgment: approved by the Court for handing down | *Delivered:* **27/04/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Magennis's (Feargal) Application [2010] NIQB 53

AN APPLICATION FOR JUDICIAL REVIEW BY FEARGAL MAGENNIS

TREACY J

Introduction

[1] By this judicial review the applicant challenges a decision of the Legal Services Commission dated 12 February 2009 whereby the Legal Aid Appeal Committee ("the Committee") refused the applicant legal aid to appeal to the Court of Appeal against the judgment of Mr Justice Weatherup in ***Magennis*** **[2008] NIQB 97**.

Judicial Review Grounds

[2] The applicant's grounds of challenge are that:

(i) The Committee took into consideration an irrelevant, immaterial and inaccurate consideration by giving weight to a concern that the success of the appeal would "bring down" the Child Support Agency;

(ii) The Committee erred in concluding that it was not reasonable in the circumstances that the applicant should receive legal aid;

(iii) The Committee ignored a relevant factor in that they failed to have due regard to the proper basis of the appeal as formulated in the Notice of Appeal.

Background

[3] The background to the present application is that the applicant had previously brought a judicial review before Weatherup J challenging decisions of the Child Support Agency and the Department of Social Development ("the Department") that he should continue to pay child maintenance at the rate of 30% of his net weekly income under the Child Support (NI) Order 1991 ("the 1991 Order") rather than the rate of 15% under the amended scheme contained in the Child Support Pensions and Social Security Act (NI) 2000 ("the 2000 Act"). The provisions of the 2000 Act, which would have resulted in a payment at the lower rate only applied to new cases commenced after 3 March 2003 whereas the applicant's case had commenced prior to that date.

[4] The Department made the Child Support (Transitional Provisions) Regulations (NI) 2001 which provided that maintenance payments under the 1991 Order may be superseded by a new amount or transitional amount. These Regulations have never been commenced.

[5] The applicant's son was born on 2 August 1994 and the applicant continues to be eligible to pay maintenance at the higher rate.

[6] The full background to the judicial review application and the reasons for its rejection are contained in the judgment of Weatherup J in ***Re Magennis*** **[2008] NIQB 97.**

Issue

[7] The central issue before Weatherup J was whether or not there was a reasonable relationship of proportionality between the means employed by the State to take income from the applicant and the legitimate aim of increasing parental responsibility for child support. At para.28 of his judgment Weatherup J stated:

> **"[28] It will be assumed, as in Burrows v United Kingdom, that there has been an interference with the applicant's peaceful enjoyment of property by the deduction of payments under the 'old' 1991 scheme. The deductions are in accordance with law. Further, the deductions are in the public interest in**

> **reducing taxation and increasing parental responsibility. The issue is whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim. The means employed include the executive decision making that has resulted in a failure to implement the legislative scheme under the 2000 Act, as it might otherwise apply to the applicant, and thereby reduce the applicant's liability."**

[8] The issue between the parties was a narrow one with the department resisting the proportionality challenge on the basis that it was administratively impossible for the computer systems to be put in place which would allow, in Northern Ireland, the transfer of "old" 30% cases to a "new" 15% rate. At paras.32-34 Weatherup J stated:

> **"[32] The Executive has identified that the transfer of old cases to a new scheme requires the existing system to be working well, the computer system being able to cope with the transfers and the old cases being in a fit state to transfer. These requirements impact on the particular judgment of the Minister as to the commencement of the transfer of old cases to a new scheme by raising issues relating to effective administration, both of the Child Support system and of the computer system, to the financial resources to be applied to both and to judgments of the legislature as to the content of the Child Support scheme. The court must recognise the constraints and judicial intervention that apply where decision making in the elected arms of government concerns issues of effective administration, financial resources and political judgment. These are issues where, to adopt the words of Laws LJ, "… the decision making power of the elected arms of government is all but at its greatest, and the constraining role of the courts … as correspondingly modest.**
>
> **[33] That the relevant authorities have been unable to get to grips with the statutory child support system since its introduction is apparent from consideration of the history of the scheme. That the bulk transfer of old cases into the new**

> **system would lead to additional administrative confusion is also apparent. That, as a result of the failure to transfer the applicant's case to the new scheme, the applicant has been placed at a financial disadvantage is not in question. The relevant Minister is best placed to determine when the transfer of old cases to the new scheme may take place. That the relevant Minister has judged that that point has never been reached is beyond doubt.**
>
> **[34] The applicant's challenge is limited to interference with the right to property under Article 1 of Protocol 1. The applicant is one of a substantial number of persons adversely affected by the failure to implement a transfer to the new system, who include not only non resident parents who would incur reduced liability but also resident parents who have not secured increased payments. In effect the failure to commence the transfer has been occasioned by the practical impossibility to date of achieving the purpose of the legislation. This is an instance where, to apply the words of Lord Mustill, the child support system has administrative flaws that make it positively undesirable to implement a provision involving the transfer of old cases to a new system, until such time as that can be carried out effectively. The balance of community and individual interests must fall in favour of maintaining the existing system until it is capable of accommodating the transfer of old cases to a new system. The applicant has not established a breach of Article 1 of Protocol 1. The application for judicial review will be dismissed."**

[9] The applicant had been in receipt of a legal aid certificate for the High Court proceedings and was required to make a contribution to the costs of the case. He completed a fresh application for full legal aid for the purposes of the appeal on 25 September 2008 supported by an Opinion on the merits by Senior and Junior Counsel. After having set out paras.32-34, which they describe as the key findings of Weatherup J, the Opinion states as follows:

> **"3. It is clear from these passages … that the Court was entirely accepting of the merits of the applicant's argument. He was satisfied that the**

CSA's failure to "get to grips" with establishing a computer system for the transfer of cases (over a period of 7 years) had resulted in significant financial disadvantage to the applicant (and many thousands of others in a similar position). It should be noted that some of those who are disadvantaged as a result of this administrative ineptitude will be parents who are overcharged and that others will be children who are under resourced.

4. The central finding of the Trial Judge was that the balance of community and individual interests lay in maintaining the current, inequitable system. The legal prism which resulted in this finding was that of proportionality. The applicant argued that the requirement to pay an additional 15% above that which Parliament required was an unlawful and disproportionate interference with his property rights pursuant to Art 1 of the First Protocol … This was, and remains, the net issue in the case. The appeal against the first instance decision contends, essentially, that the Learned Judge has struck the wrong balance and taken the wrong approach to proportionality.

5. The Notice of Appeal submitted by the applicant advances the following central arguments:

> **(i) The Ruling mandates the CSA and Department to continue to fail to introduce a system in accordance with the express intention of Parliament;**
>
> **(ii) The justification for that failure is administrative ineptitude in the purchasing, design or acquisition of an appropriate computer system over an 8 year period;**
>
> **(iii) The consequence of that administrative ineptitude is that the appellant (and many thousands like him) continue to be deprived of 15% more of their net income than Parliament intended.**

> **6. This is an appeal against the judicial review decision. The appeal will proceed as a rehearing on the central issue. The Trial Judge took a particular view of the approach to proportionality on the facts of this case. There is every prospect that the Court of Appeal will adopt a different assessment of the issues to be weighed in the proportionality balance. The moral weight of the appellant's argument will inevitably increase because even now, seven months after the ruling of the Court, no adequate or appropriate system has been put in place.**
>
> **7. The appeal raises issues of general public importance. To what extent are public authorities entitled to rely upon delay and mal-administration as a justifiable basis for denying vindication of Convention rights? To what extent should the Court subject resource and administrative decisions to anxious scrutiny where proportionality arguments are deployed by public authorities? Can the express will of Parliament be subverted by purely administrative considerations where Convention rights are in play?**
>
> **8. These issues arise in the present appeal. The appeal enjoys a reasonable prospect of success."**

[10] A Notice of Appeal against the judgment dated 23 October 2008 was issued. The grounds of the appeal are:

> **"1. There has been an interference with the applicant's peaceful enjoyment of property, namely, his income, by the deduction of payments under the "old" 1991 scheme.**
>
> **2. On the issue of whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim, the Learned Trial Judge held, at para.34, that the balance of community and individual interests must fall in favour of maintaining the existing system until it is capable of accommodating the transfer of old cases to a new system.**

3. In so holding, the … Judge has effectively given the respondents unlimited rights to continue to fail to introduce and implement a scheme in accordance with the intentions of Parliament. The effect of this is that notwithstanding the clear parliamentary intention, the administrative flaws and problems relied on by the respondents have deprived and will continue to deprive the applicant indefinitely of a proportion of his income which was not intended by Parliament.

4. In dismissing the application for a judicial review the … Judge has in effect accepted administrative failures and ineptitude as a legitimate basis for continuing to deprive the applicant of his income."

[11] Following a legal aid appeal hearing on 30 January 2009 the Legal Services Commission wrote on 6 February 2009 informing the applicant as follows:

"I refer to the appeal to the Legal Services Commission against the application for an Appellate Certificate in this case and wish to inform you that the appeal was considered by the Appeals Committee on 30 January 2009 and was refused on the grounds that:

(1) You have not shown reasonable grounds for taking steps to assert or dispute the claim, or for taking, defending or being a party to the proposed proceedings; and

(2) It appeared unreasonable, in the particular circumstances of the case, that you should receive legal aid."

[12] Following the grant of leave in the present judicial review the Chairman of the Legal Aid Committee swore an affidavit in which he stated, inter alia, as follows:

"3. The Committee carefully considered the Opinion of Counsel … The Committee was of the opinion that the core submission within Counsel's Opinion was not that there had been an inherent flaw in the

decision of Mr Justice Weatherup in his dismissal of the original review but rather that on appeal the Court of Appeal might take a different view of the matter.

The Committee concluded that as there was no apparent error in the Court's decision that to grant an Appeal Certificate when the applicant hoped that the Court of Appeal would reach a different view was inappropriate. …"

The Applicant's Submissions

[13] In relation to the second and third grounds of challenge the applicant submitted that the averment from the Committee Chairman exposed two errors on the part of the Committee. First, that they had wrongly concluded that Counsel's Opinion had failed to identify an error in the first instance decision. The applicant contending that para.4 of the Opinion [set out above] had identified with precision the error complained of. Secondly, that the Committee had erroneously formed the view that the appeal was a speculative attempt by the applicant brought to the Court of Appeal in the hope that a different view would be taken. The Committee, they submitted, appeared to have misunderstood the fact that an appeal against a judicial review judgment proceeds before the Court of Appeal by way of a rehearing of the issues. This was addressed in para.6 of Counsel's opinion. That opinion did not suggest that the Court of Appeal might take a different view of that matter but rather that the Court of Appeal would adopt a different assessment of the issues to be weighed in the proportionality balance.

Respondent's Submissions

[14] Mr Larkin QC, on behalf of the respondent, contended that in light of the contents of paras.3 and 6 of the Opinion that it was open to the Committee to consider that the applicant had not shown a sufficient flaw in the judgment of Weatherup J to merit the grant of legal aid for an appeal against it. He also submitted that the Committee's refusal was a reasonable and legally correct decision on the materials presented to it and that the application should therefore be dismissed.

Conclusion

[15] The Committee had before it an Opinion signed by the Senior and Junior Counsel who appeared in the original judicial review before Weatherup J. Both Counsel are very experienced in the field of judicial review and appropriate weight should be accorded to the joint Opinion of experienced Counsel. That is not to say that the Opinion of Counsel is definitive but nonetheless it is to be accorded due weight and in this case the Opinion was, of course, to be read together with the Notice of Appeal and the judgment of the Court below. In my judgment the Committee fell into error in failing to recognise that, contrary to the respondent's contention, the applicant had, with sufficient clarity, identified what they submitted was the flaw in the decision in respect of which they sought legal aid to appeal against. This is clear from the terms of the Opinion set out above whether read alone or together with the Notice of Appeal both of which were before the Committee. The issue on appeal is the same net, but important, issue which was before the first instance Judge. An appeal hearing is a rehearing and in appeals involving Convention rights and proportionality issues it is by no means uncommon for the Appellate Court to conclude that the wrong balance had been struck. This is not sought to be achieved on a speculative basis that the Court of Appeal might simply take a different view of the matter but follows from the fact that a different outcome may arise if the Court of Appeal adopt a different assessment of the issues to be weighed in the proportionality balance.

[16] What is more, the Notice of Appeal and the Opinion rightly drew attention to the potential importance of the case and some of the important questions that the Court of Appeal are likely to be confronted with when, on the rehearing, they address the issues of proportionality and carry out their own assessment.

[17] In relation to the first ground of challenge [see para 2(i)] the short answer is provided by para.4 of Mr McMahon's affidavit. In that paragraph the Chairman makes it clear that whilst there may have been matters raised in the discussion between Committee members and the applicant's solicitor, Ms McFettridge, they played no part in the Committee's decision making which was confined to those matters referred to in para.3 of his affidavit [the material part whereof has been set out above]. The Court accepts this firm denial on oath that these matters were not taken into account and rejects the first ground of challenge.

[18] Accordingly, it is for these reasons that I previously quashed the decision of the Committee.