Neutral Citation No: [2022] NIKB 13 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **COL11948** *ICOS No:* **2021/76468/01** *Delivered:* **19/10/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY OMAR MAHMUD FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION MADE BY THE CIVIL LEGAL AID APPEALS PANEL

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Mr Frank O'Donoghue KC with Mr Robert McTernaghan (instructed by MacElhatton & Co, Solicitors) for the Applicant
Mr Philip Henry (instructed by the Departmental Solicitors Office) for the Respondent

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COLTON J

Introduction

[1] The applicant in this case faced considerable procedural difficulties.

Supporting Affidavit

[2] Firstly the applicant failed to file a grounding affidavit with the Order 53 Statement as required by Order 53 Rule 3 of the Rules of the Supreme Court. Notwithstanding this the court did grant leave on the papers. It did so on the basis of an Order 53 Statement which fully set out the background and the relief sought. In his characteristic fashion Mr Henry, rather than invite the court to reconsider leave, took a pragmatic view and directed that his client write to the applicant's solicitor inviting her to serve an affidavit after leave had been granted. An affidavit was filed on behalf of the applicant on 4 November 2021 but it related to an ancillary matter concerning the background to the applicant and did not form an evidential basis for the application.

[3] Mr O'Donoghue KC in his equally characteristic fashion, accepted responsibility for the failure to ensure that the appropriate affidavit was filed with the Order 53 Statement. In fact, an affidavit had been prepared and sworn by the applicant's solicitor on 29 September 2021 sufficient to set out the factual basis for the application but had not been served with the papers, as she awaited approval from Mr O'Donoghue.

[4] The court deprecates the practice whereby Order 53 applications are brought in the absence of affidavits sworn by the applicant in person. Whilst it is not a requirement that the affidavit be sworn by the applicant, if it is not this is a matter which can be taken into account in evaluating evidence or, if appropriate, determining the issue of relief.

[5] In the circumstances of this case I am satisfied that it is appropriate to proceed on the basis of the material that has been provided in support of the Order 53 application. I have come to this conclusion because the factual circumstances to this case are not in dispute. I am satisfied that there is nothing the applicant could add to the application. I am also influenced by Mr O'Donoghue's indication to the court, in the best traditions of the Bar, that irrespective of the outcome of this particular application he will appear on behalf of the applicant in the appeal which forms the background to this dispute.

Delay

[6] The second significant issue raised by the respondent is the question of delay.

[7] This application involves a challenge to a decision of the Civil Legal Services Appeal ("the Panel") made on 25 June 2021 conveyed to the applicant on 28 June 2021.

[8] Order 53 Rule 4(1) of the Rules provides:

> "Delay in applying for relief
>
> 4-(1) An application for leave to apply for judicial review shall be heard within three months of the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made."

[9] The proceedings were issued on 1 October 2021. The court considers that the grounds for the application first arose on 28 June 2021 and so the application is outside the three month period, which expired on 28 September 2021.

[10] In these circumstances the applicant requires an extension of time to proceed with the application and should provide a basis on which the court can conclude there is "good reason" to grant such an extension.

[11] Again, characteristically Mr O'Donoghue accepted responsibility for this oversight. The applicant's solicitor also addressed the question of delay in the affidavit sworn on 29 September 2021 in the following way:

> "6. I accept that there has been delay in presenting the PAP letter and this application. This has been caused by reason of the following:
>
> (a) The solicitor dealing with this case is on furlough only working one day per week and has only been working one day per week from 18 January 2021 to date, at the time of swearing hereof. She is the only immigration solicitor in the firm, and on the one day week she works has to cover a plethora of tasks.
>
> (b) Our client suffers from a myriad of both physical and mental health conditions. Also due to the pandemic we had difficulty facilitating a meeting with our client.
>
> 7. In acknowledging that delay has occurred I respectfully submit that neither the Agency nor the Panel has been prejudiced by the delay and that the court should extend time to determine the merits of the application. The issue raised in this application involves an important point of principle for legal practitioners, namely the circumstances in which it can be considered lawful and within the bounds of rationality with the Agency or the Panel having granted a certificate for Senior Counsel in the lower court; and having accepted that the appeal is of sufficient merit to justify the grant of legal aid; can nonetheless remove the applicant's access to representation by Senior Counsel."

[12] Having considered the affidavit and having heard submissions from Mr O'Donoghue I am persuaded to extend the time within which the application can be brought.

[13] I do so for a number of reasons. Firstly, the delay is minimal – a number of days outside the three month period. Secondly, I am satisfied that there were particular circumstances relating to the professional representatives involved in the

matter which, although unfortunate, have explained the particular reasons for the delay. I also consider that the case itself raises a unique point, not previously litigated to my knowledge, in this jurisdiction.

The Application

[14] The applicant challenges the refusal by the Panel to grant legal aid for senior counsel, to prosecute his case in the Court of Appeal.

Background

[15] The applicant issued proceedings seeking a judicial review in respect of decisions of the Secretary of State for the Home Department in which he refused the applicant's fresh application/further submissions in support of his asylum claim on 25 August 2018 and refused the applicant accommodation and ancillary support pending the determination of his fresh application/further submissions.

[16] Leave was granted and the matter proceeded to a substantive hearing over three days before temporary High Court Judge Mr Justice Friedman which resulted in a lengthy written judgment – *In Re Omar Mahmud* [2021] NIQB 6.

[17] The applicant was successful in respect of his challenge to the second decision but his challenge to the first decision was dismissed.

[18] The applicant has appealed that dismissal and the matter is currently awaiting hearing in the Court of Appeal, pending the outcome of this application.

[19] When the matter was before Mr Justice Friedman the applicant had the benefit of legal aid and was represented by junior and senior counsel.

[20] The applicant applied for legal aid to pursue his appeal. On 26 May 2021 an emergency legal aid certificate was issued limited to solicitor and junior counsel. There was some confusion about the status of the application but in any event on 28 May 2021 the Legal Services Agency (LSA) determined the application in a written letter to the applicant's solicitor. The relevant portion states:

> "… Your request has been considered and I have to inform you that a decision has been made to refuse the request for the following reason(s):
>
> > It is considered on the information available that there was insufficient factual or legal complexity to warrant a higher level of representation at the leave application given the nature of the proceedings in the tier of court stated and the circumstances of the case,

> namely that junior counsel appeared with senior in the lower court and is well aware of the issues at this stage, as described in your application."

[21] The effect of this decision is that the applicant is entitled to legal aid to pursue his appeal but with solicitor and junior counsel only. Unlike in the lower court he will not have the benefit of a legal aid certificate to provide for senior counsel.

[22] This decision was appealed by letter from the applicant's solicitor of 1 June 2021 and was considered by the Panel on 25 June 2021. The Panel's decision is contained in a letter of 28 June 2021. The appeal was refused on the following grounds:

> "It is considered from the information available that there is insufficient or legal complexity to warrant a higher level of representation given the nature of the proceedings in the tier of court stated and the circumstances of the case as described in your application.
>
> The Panel carefully considered all the information provided on behalf of the applicant and particularly noted the skeleton argument provided by Counsel and the notice of appeal. The grounds of appeal at the Court of Appeal are limited to:
>
> (i) The LTJ erring in law in not finding that the Home Office did not misdirect themselves in law.
>
> (ii) The LTJ erred in law in rejecting the medical evidence available to the Home Office decision-maker was sufficient to raise a prima facie case capable of meeting the article 3 ECHR test in accordance with the AM case.
>
> (iii) Even if the Court of Appeal accepts that this evidence did not satisfy the test in AM, the LTJ should have remitted the decision back to the Home Office having regard to the fact that AM changed the domestic law test.
>
> Therefore, this is not a re-run of the original case. Para 143 of the substantive judgment was referred to in support of the complexity of the appeal, however read in context this paragraph relates to a part of the decision not

> being appealed (damages in relation to the asylum support). This appeal therefore only concerns whether the decision-maker had applied the correct legal test and it has not been demonstrated that there is sufficient legal and factual complexity to warrant the use of public funds for senior counsel in this instance."

[23] There is no further internal appeal against the refusal.

[24] It is this decision which is challenged in these proceedings.

Grounds of challenge

[25] At the hearing Mr O'Donoghue raised the issue of the original decision where reference was made to level of representation "at the leave application." Indeed, the decision letter had highlighted this in bold. Mr O'Donoghue correctly points out that it appeared from this that the decision-maker believed, erroneously, that there was a leave application required in the proceedings before the Court of Appeal. This is obviously not the case and therefore it was submitted that the original decision-maker misdirected himself. However, the answer to this is that this error did not appear in the decision of the Panel. The applicant's right of appeal ensured that a fresh determination of the matter was made and there is no evidence to suggest that this error influenced the decision of the Panel. Indeed, it is significant that in the letter from the applicant's solicitor challenging the original decision no reference was made to this error. Therefore, the court does not consider that this is a valid ground for a challenge to the impugned decision.

[26] In reality this case is a classic rationality challenge. In short, the applicant argues that no Panel, properly directing itself to the relevant issues could rationally have decided that senior counsel should not be permitted under the legal aid certificate for the appeal hearing.

Statutory Framework

[27] The funding for civil legal services by the Department of Justice is provided for in the Access to Justice (Northern Ireland) Order 2003.

[28] The 2003 Order establishes a comprehensive legal aid scheme for Northern Ireland. It came into operation on 1 April 2015. The new framework, as amended and supplemented by the Legal Aid and Coroners Courts Act (Northern Ireland) 2014, changed the way that legal aid was administered by replacing the Legal Services Commission with the Legal Services Agency, which is an executive agency at the Department of Justice. Agency decisions are made on behalf of the Director of Legal Aid casework, who is required to act independently and may not be given any direction or guidance on the Department in relation to individual cases.

[29] Article 11 provides:

> "11. Funding of civil legal services by Department -
>
> (i) Civil legal services shall be funded by the Department out of monies appropriated for that purpose by Act of the Assembly.
>
> (ii) In funding the civil legal services the Department shall aim to obtain the best possible value for money."

[30] Article 14 provides:

> "14. Decisions about provision of funded services
>
> (1) …
>
> (2) …
>
> (2A) A grant of representation for an individual for the purposes of proceedings –
>
> (a) shall not be made unless the individual shows there are reasonable grounds for taking, defending or being a party to the proceedings;
>
> (b) may be refused if, in the particular circumstances of the case, it appears unreasonable that representation should be granted."

[31] It will be seen that provision is made for individuals to apply to the Legal Services Agency for legal aid. Entitlement to legal aid depends on meeting financial criteria and establishing reasonable grounds for taking, defending or being party to the proceedings. Thus, there is both a "financial" test and a "merits" test to be met for an entitlement to legal aid.

[32] Ancillary to this is the degree or level of representation to which an applicant may be entitled. Legal aid may be granted to solicitor only, solicitor and junior counsel or solicitor, junior and senior counsel. Representation may be granted up to a certain stage in proceedings, for example up to a leave stage in a judicial review hearing or up to and including the obtaining of expert evidence or discovery in a civil action.

The Agency has wide powers to place limitations on any certificate granted. The 2003 Order provides that:

> "The (Agency) may fund representation for an individual for a limited period, for the purposes of specified proceedings only, or for the purposes of limited aspects of proceedings, and may amend, withdraw or revoke the representation, or vary or remove any limitation imposed on the representation."

[33] Appeals against decisions of the Agency are provided for the in the Civil Legal Services (Appeals) Regulations (Northern Ireland) 2015.

[34] Regulation 4 confirms that appeals are permitted when the individual is dissatisfied with the level of representation provided, such as the refusal to include senior counsel in this case:

> **"Decisions against which an appeal lies**
>
> 4-(1) This regulation applies to decisions made, by or on behalf of the Director, under Article 14(2)(a)(i) of the Order –
>
> (a) as to whether to fund, continue to fund, civil legal services for an individual by way of representation (higher courts);
>
> (b) as to the level of representation authorised for that individual.
>
> (2) Where an applicant is dissatisfied with the Director's decision, the applicant may appeal that decision to an appeal panel."

[35] Regulation 10 deals with the procedural requirements for making an appeal. Panels comprise of a presiding member who must have been in legal practice for seven years and two other members appointed under Regulation 13 who have experience and/or knowledge of:

> "(a) The provision of services which the department can fund as civil legal services,
>
> (b) The work of the courts and tribunals, and

(c) The provision of expert services or testimony in cases which can be funded by way of civil legal services."

[36] In this case the applicant has met the financial criteria.

[37] In order to be granted legal aid an applicant must also establish the "merits criteria."

[38] In this case it is accepted that the applicant meets the merits criteria under Article 14(2)(A)(a) in that there are reasonable grounds for taking the proceedings.

[39] In terms of the test at (b) there are multiple factors that can be legitimately taken into account in determining whether the test is met. This is discussed in detail in the publication "Guidance on Civil Representation" published by the Legal Services Agency in June 2019. The guidance states at 6.1 that:

> "An application for Civil Representation may be refused if, in the particular circumstances of the case, it appears unreasonable that representation should be granted. This is a wide and general test under which the Agency can take into account all the factors which would influence a private client taking proceedings. Technically the Reasonableness Test is only a discretion ('may be refused') but in practice the Agency will always wish to consider the Reasonableness Test and will not wish to commit public funds to a case if it is unreasonable to do so."

[40] The parties could not point to any specific guidance on when and in what circumstances a legal aid certificate should include an entitlement to senior counsel.

[41] In his submissions Mr Henry pointed to the passages which deal with over-representation at 6.27 and 6.28 of the guidance. However, those passages deal with the question of situations in which other parties with a similar interest to the applicant are already involved in proceedings. That is not the case here.

[42] When one analyses the reasons set out in the refusal letter of 28 June 2021 it can be seen that the issues in play appear to be whether there was sufficient "factual or legal complexity to warrant a higher level of representation given the nature of the proceedings in the tier of court stated and the circumstances of the case as described in your application." This seems a reasonable yardstick for consideration of whether the certificate should cover senior counsel.

[43] It is clear that the Panel has a wide margin of appreciation/discretion when making the decision under challenge.

[44] Mr Henry relied particularly on decisions of Keegan J in the cases of *Re Hegarty* [2018] NIQB 108 and *Re Tate* [2019] NIQB 102. In *Hegarty* at paragraph [13] she said:

> "[13] The substance of the case then comes down to a broad irrationality challenge. In that regard I bear in mind a number of things. Primarily, the adjudication is by a panel made up of a body of lawyers. They must obviously consider materials and apply the facts to the case applying a statutory test bearing in mind the overriding objective to protect the fund. It is for the applicant to show some grounds for appeal. There is clearly a wide discretion imparted to a decision maker in this context; a principle which was rightly not under serious challenge in this case."

[45] In similar vein in *Tate* at paragraph [19] she says:

> "[19] I remind myself that this is a court of supervisory jurisdiction. It is not for me to concern myself with the merits of administrative decision making. The context of the case is also important. In the case of *Neil Hegarty* [2018] NIQB 108 I dealt with a judicial review against a decision of the Civil Legal Aid Services Appeal Panel. In that decision I made the following comments at paragraph 13." (see above) ...

[46] As was clear from the judgments of Keegan J the context of the matter under review is important. I have some concern that the respondent in this case focusses on Keegan J's reference to "the overriding objective to protect the fund" as a determining factor in considering the application.

[47] I do not understand that this is what Keegan J was saying. The reference to "the overriding objective" should not be elevated to the pre-eminent factor in a panel's consideration.

[48] In my view, the fundamental principle underlying the scheme is to provide access to justice for those who meet both the financial and the merits criteria. Of course, the panel in accordance with the 2003 Order "shall aim to obtain the best possible value for money." That is why there is both a financial test and a merits test. This principle is reflected in the Legal Services Agency framework document published in September 2021. Section 2 of the document sets out the Legal Services Agency's vision, mission and main activities. Included is the following:

> "2.2 The LSANI's vision is to be a responsive provider of high quality, digitally enabled, services which support individuals seeking justice.
>
> 2.3 The mission of the Agency is to facilitate access to justice by delivering timely and high quality decisions and payments which secure value for money."

[49] In the context of this application it seems to the court that there are a number of important contextual matters.

[50] The applicant had the benefit of senior counsel in the lower court.

[51] Mr Henry correctly points out that this does not mean that the applicant should automatically have the benefit of senior counsel in an appeal. Nonetheless, the court considers it is a very important starting point. In my own personal experience of over 30 years practice at the Bar and seven years on the Bench I have not come across a case where a plaintiff/applicant had the benefit of senior counsel in the lower court but not in a higher court on appeal, in circumstances where the merits test has been met. Although not on all fours with this application the decision of the Supreme Court in *R(E) v JFS Governing Body* [2009] UKSC 1 is instructive. In that case the Legal Services Commission's refusal to fund an individual who had been successful in the Court of Appeal but who was now the respondent in an appeal to the Supreme Court was so unreasonable in the circumstances as to be unlawful. The Supreme Court was considering whether it was reasonable for the Legal Services Commission to insist that a party who had funding in the Court of Appeal could only obtain funding for the appeal to the Supreme Court if it sought a protective order for costs. Obviously, the context was very different. In his judgment on the issue of costs, with which the other members of the court agreed, Lord Hope said the following at para [22]:

> "It should be understood, as a principle of general application, that if the Legal Services Commission decide to fund a litigant whether by way of claim or a defence who is successful in his cause, that decision must ordinarily be seen to carry with it something close to an assurance that the Commission will continue to support him in any subsequent appeal by the unsuccessful party whilst he remains financially eligible. This will particularly be so where (a) the withdrawal of support would expose the publicly funded litigant to a substantial risk for future costs, (b) he retains a significant interest, quite apart from his interest in resisting any future costs liability, in maintaining his success in the litigation and (c) the issues raised on the appeal are of general public importance which it is in the public interest to resolve and

> his case on these issues is unlikely to be properly argued unless he continues to be funded by the Legal Services Commission. All three of these circumstances prevail in this case."

[52] Obviously, the context being considered by the Supreme Court was different from the context here. It could not be considered a precedent for this case but it does provide an insight from the highest court as to the approach to be adopted in considering legal aid funding on appeal to the higher courts.

[53] In this regard, as recognised by the panel, the tier of court is important. This case will be heard by the Court of Appeal, the highest court in this jurisdiction. In my view, this is a strong factor supporting representation by senior counsel.

[54] In those circumstances one looks for cogent reasons for the limitation that has been imposed in respect of the appeal. The panel relies on the fact that this appeal will not be a re-run of the original case. Not all issues that were before the lower court will be considered by the higher court.

[55] This is certainly a valid matter to be taken into account.

[56] However, it seems to me that the matter to be considered by the Court of Appeal could properly be characterised as a complex and important matter.

[57] The issues raised before the Court of Appeal can be seen from the grounds contained in the applicant's skeleton argument. There are three grounds in total. The most significant, in my view, is ground 1.

[58] Ground 1 turns on the judgment of McCloskey J in *JM4* [2019] NIQB 16 in which he set out the governing principles to be applied when considering whether or not a matter constituted a "fresh claim" within the framework of and giving effect to paragraph 353 of the Immigration Rules. Having set out the principles the court went on to consider whether or not the wording of the decision-maker under challenge constituted a misdirection in law. This issue was also considered by the Court of Appeal in *Re Chudron's Application* [2019] NICA 9. In *Chudron* the applicant was again challenging similar wording by the Home Office as was used in *JM4,* although the court did not actively consider the issue as to whether the wording, of itself, constitutes a misdirection in law.

[59] The applicant contends that in these circumstances the Court of Appeal should expressly deal with this issue. The issue is one of considerable importance to both the applicant, to the Home Office and to asylum seekers generally.

[60] Grounds 2 and 3 relate to the threshold test in relation to the raising of a prima facie case under Article 3 ECHR. In particular the applicant relies upon the decision in *AM (Zimbabwe v Home Office)* [2020] WLR 1152 and to the test as applied

by Lord Wilson in his judgment. The previously applied test was that set out in *N v SSHD* [2005] UKHL 31. The effect of the Supreme Court judgment in *AM* was to adjust the threshold to take account of more recent jurisprudence from the European Court of Human Rights. The difficulty the applicant faces on these points in the appeal is the relative paucity of medical evidence, as appears from the judgment of the LTJ. The applicant contends that the court ought to have remitted the case back to the Home Office because of the change in the law but it seems to the court on a prima facie basis that he will have some difficulty in establishing that the medical evidence meets the threshold as set out in *AM* in any event. In short it seems to the court that grounds 2 and 3 may not involve the same degree of complexity, notwithstanding that the merits test has been met.

[61] Having considered the judgment of the LTJ and the issues raised in the grounds of appeal I consider that this is a matter of some importance and complexity. Bearing in mind the tier of court involved I have come to the conclusion that this is one of those very rare occasions when the applicant can establish the high threshold of Wednesbury unreasonableness or irrationality. I do so conscious of the need for judicial restraint in interfering with administrative decisions and the demanding test for justifying such interference. However, in my view, the context of this application, the fact that the applicant meets the merits test for appeal, the complexity of the issues raised in the appeal and the tier of court involved all point irresistibly to the conclusion that the applicant should be granted the same level of representation in the Court of Appeal as he was in the High Court, that is to include senior counsel.

[62] I therefore grant an order of certiorari quashing the decision of the respondent to refuse legal aid for senior counsel in respect of his appeal to the Court of Appeal.

[63] The court declares that the decision is unlawful, and of no force or effect. The court directs that a differently constituted panel should reconsider the appeal against the refusal of funding for senior counsel in the applicant's appeal to the Court of Appeal.