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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY RAYMOND McCORD FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE LEGAL SERVICES AGENCY, NORTHERN IRELAND

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF JUSTICE

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McCord's Application [2016] NIQB 19

COLTON J

Background

[1] The genesis of this application concerns a dispute between the applicant, Mr Raymond McCord, and the Victims and Survivors Service, ("VSS"). Mr McCord applied for legal aid to seek judicial review of a decision by the VSS to suspend funding it had been providing to him for the purposes of him obtaining alternative medical treatment.

[2] On Friday 5 June 2015 the applicant's solicitor applied for emergency civil legal aid for the proposed judicial review proceedings against the VSS. Thereafter, the history was somewhat complicated but the important points for the purposes of this application are that on 9 June 2015 a detailed emergency application was submitted including an opinion from counsel and responses to queries raised after the 5 June request. On 10 June 2015 the applicant was informed that the application was refused on the grounds that he had not satisfied Regulation 43(1) of the Civil Legal Services (General) Regulations (Northern Ireland) 2015 which states that:

> "43.—(1) Subject to paragraph (2), an application for a certificate under this Part shall not be granted unless—

> (a) it is shown that there are reasonable grounds for taking, defending or being a party to the proceedings to which the application relates; …"

[3] Thus the application had been refused on the merits. The applicant sought to appeal this decision and the appeal was timetabled for an emergency hearing on 19 June 2015. On that date, prior to the appeal being heard, the applicant's solicitor expressly requested that the appeal proceed in the format of an oral hearing.

[4] On 19 June 2015 the applicant's solicitor was informed by the Legal Services Agency that the request for an oral hearing had been refused by the Civil Legal Services Appeal Panel. He was also informed that the appeal had been refused. On 24 June 2015 the applicant's solicitor received correspondence from Mr Damian McQuoid of the Legal Services Agency stating that the decision refusing the request for an oral hearing was made on the basis that:

> "The appellant has failed to satisfy Article 26(2) and Article 26(3) of the Civil Legal Aid Services (Appeal) Regulations (Northern Ireland) 2015".

The email also confirmed that the appeal was refused on the basis that the applicant had not shown an arguable case. Thereafter, the applicant initiated judicial review proceedings against the Civil Legal Services Appeal Panel, the Department of Justice and the Legal Services Agency Northern Ireland, challenging the decision to refuse the applicant legal aid and in particular the decision refusing him an oral hearing.

[5] Leave was granted on 8 October 2015. The substantive hearing took place on 3 February 2016. On the day prior to the hearing the applicant indicated that he no longer wished to pursue the application against the Civil Legal Services Appeal Panel in respect of the refusal of the applicant's request. In my view this approach was entirely proper and realistic.

[6] Mr Ronan Lavery QC appeared with Mr Michael Doherty BL on behalf of the applicant. Mr Tony McGleenan QC appeared with Mr Phillip Mateer BL on behalf of the Department of Justice and the Legal Services Agency Northern Ireland. I am obliged to counsel for their helpful and concise written and oral submissions which were of great assistance in focusing on the issues to be determined by the court.

[7] As a result the substantive hearing focused on the narrow issue of a challenge to Regulation 26 and Regulation 10(3) of the Civil Legal Services (Appeal) Regulations (Northern Ireland) 2015.

[8] The two grounds relied upon by the applicant were as follows:

(i) that Regulation 26 of the Civil Legal Services (Appeal) Regulations (Northern Ireland) 2015, which restricts the right of an appellant to have his

appeal proceed in the forum of an oral hearing, is procedurally unfair, unlawful, ultra vires and has no force or effect; and

(ii) that Regulation 10(3) of the Civil Legal Services (Appeal) Regulations (Northern Ireland) 2015, which restricts the right of an appellant to present fresh evidence in support of an appeal is procedurally unfair, unlawful, ultra vires, of no force or effect and constitutes the unlawful fettering of discretion.

[9] At the outset of the hearing the applicant sought to introduce a second affidavit from his instructing solicitor which set out the chronology of the dispute with the Legal Services Agency but also introduced new and extraneous material in relation to his application for legal aid to support this challenge. Mr McGleenan QC strongly opposed the introduction of this material. He had not seen it until the morning of the hearing and was not in a position to take any instructions in relation to the factual contents of the affidavit. He submitted that it was procedurally unfair to attempt to introduce this material on the morning of the hearing and argued that it should not be considered by the court.

[10] I ordered that the affidavit should not be introduced. I took the view that it was procedurally unfair to the respondent. In any event the new material would not have impacted on my decision, given that the application resolved into an abstract challenge to the regulations themselves.

The Statutory Framework

[11] The parent legislation relating to the impugned regulations is the Access to Justice (Northern Ireland) Order 2003.

[12] Article 3 provides as follows:

> "3. **Exercise of functions of the Department under this part**
>
> The Department shall exercise its functions under this part for the purpose of –
>
> (a) securing (within the resources made available, and priorities set, in accordance with this part) that individuals have access to civil legal services that effectively meet their needs, and promoting the availability to individuals of such services;
>
> …"

Article 20A deals specifically with appeal panels and the relevant part in relation to this case is as follows:

"20A **Appeal Panels**

(i) The Department must by regulations make provisions for –

(a) The constitution and procedure of appeal panels;

…

(ii) The regulations may in particular –

(a) provide for an appeal panel;

…

(f) provide for the decision on an appeal to be taken without hearing any oral representations,

…

(k) contain such other provision as appears to the Department necessary or expedient for the efficient and effective working of the appeal panels."

[13] The regulations about which the applicant complains are contained in the Civil Legal Services (Appeals) Regulations (Northern Ireland) 2015. The pre-amble specifically records that:

> "The Department of Justice makes the following regulations in exercise of the powers conferred by Article 20A of the Access to Justice (Northern Ireland) Order 2003(a)."

Regulation 10 provides:

> "Making of Appeals and Applications
>
> 10.—(1) …
>
> (2) In respect of an appeal, subject to paragraph (3), the appellant's written representations must fully address

the reasons given by the Director for the decision which is the subject of the appeal.

(3) In any appeal brought under these Regulations, an appellant may not introduce or rely on any documentary material which the appellant did not provide to the Director at the time when the relevant decision was made, unless the Director is satisfied that the appellant could not with reasonable diligence have obtained that material prior to bringing the appeal."

[14] Regulation 26 provides as follows:

"Determination without oral hearing

"26.—(1) An appeal panel shall take its decision on an appeal without hearing oral representations, except as provided for in paragraphs (2) and (3).

(2) The presiding member shall direct an oral hearing if, and only if, he considers it necessary to receive oral representations in accordance with paragraph (3).

(3) Before allowing an oral hearing of an appeal under paragraph (2), the presiding member must be satisfied that the case which is the subject-matter of the appeal—

(a) would establish or uphold and develop new and important legal principles;

(b) would have an unprecedented impact in its consequences for the appellant and be of direct benefit to society at large; or

(c) is, in terms of its complexity and expected duration, distinct from other cases."

History leading to the passing of the regulations

[15] The genesis of the regulations was the report of the 2011 Access to Justice Review dealing specifically with the issue of civil legal aid appeals under the Legal Aid Advice and Assistance (Northern Ireland) Order 1981. It commented as follows:

"5.159 Decision on the merits of whether to grant legal aid and on certification for Senior Counsel are subject to Appeal to Panels of Solicitors and Barristers in

arrangements that go back to pre-2003 days when the administration of Legal Aid was the responsibility of a Department of the Law Society. The Panels meet on a regular basis and often hear representations from the legal representative in person. In 2010/11 there were approximately 1,000; and the administration of the appeals panels cost £128,193.00, in addition to the cost of 8 staff serving the panels.

5.160 Steps were taken to ensure that no panel member deals with a case where he or she has a personal interest and we are clear that they carried out their task with objectivity and integrity over the years; indeed a significant proportion of appeals are rejected. Nevertheless, we do think it questionable whether panels consisting entirely of practising private sector lawyers should be taking decisions on these matters. Moreover, there have been concerns about delay while cases await appeal and about the lack of reasons given in decision making both at first instance and on Appeal. We see a need for a more streamlined and efficient system for reviewing decisions and ensuring that a better service is provided to the Legal Aid Applicant through improved timeliness of decision making and greater transparency. The Commission has been working with Panels to speed up the process, for example, by putting appeals through a single Panel Member to enable those that were clearly going to be allowed to be determined without going through a full panel meeting. There are also moves in the direction of giving reasons for decisions.

5.161 We have looked at the appeal arrangements in other jurisdictions. In Scotland appeals are limited to an internal review of decisions at the request of Applicants; if dissatisfied with the outcome of the internal Review, they can apply to a Sheriff for a decision on whether they should be legally aided to apply for Judicial Review (an option rarely taken up). In England and Wales appeals against decisions of the Commission are considered, usually on paper, by an independent funding adjudicator (a lawyer, sometimes retired, and often not a legal aid practitioner), while in Dublin appeals are dealt with by a Committee of the Board, consisting of legal and lay members.

> We endorse the proposed funding code procedure whereby the solicitor and client will be notified of a refusal of legal aid together with a brief statement of the reasons and the process whereby representatives can be made to the Commission to have the decision reviewed. Such a Review would be carried out by a senior member of staff who had not been involved in the original decision. If following review, the original decision is affirmed (with reasons) there should be the opportunity to mount an Appeal to a Panel that might consist of a senior member of staff and a legally qualified independent member, who would be drawn from the Board of the Commission. We envisage such appeals being processed on paper rather than at hearings. In the event that the Appeal raises issue of policy or particular difficulty, it could be referred to an Appeals Panel of the Board. Throughout this process we envisage an approach based on transparency and reasons being given for decisions to better inform Applicants and their solicitors (which should in itself reduce the number of appeals) and to ensure that there is feedback to staff who take decisions at first instance. Given the scope for speeding up decision making and making savings and running costs we do not think that these changes need await implementation of other aspects of the reform programme; they should be pursued as a matter of priority."

[16] After the Review the Department of Justice proposed a consultation document on 27 February 2013 and in relation to appeals from a refusal by a panel it was proposed that:

> "3.8 … that appeals will be paper based and will be considered, without a hearing, by one member of the panel who has a recognised competence in the area of the appeal. There may however be times when the circumstances of the case require to be considered by two or more panel members. This would be at the request of the agency or a panel member. Only in exceptional cases will oral representations by the applicant or agency be required."

[17] There were a number of responses to the issue of appeals. The Attorney General responded by welcoming "the focus on reasoned decision making and the opportunity afforded to address the reasons for refusal before an appeal is lodged". He notes the proposal that appeals will normally be on paper and considered by one

person drawn from a panel. The Attorney was of the view that the quality and consistency of decision making at appeal level and consequently at initial stage would be best served by the appointment of an appropriately highly qualified and independent lawyer. The Bar Council responded by indicating that it did not agree that appeal hearings should automatically be on the papers as this provides no option to interrogate the reason for refusal or elaborate on the grounds for appeal. It was submitted that it was in the public interest that the panel should be able to request an oral hearing if the appellant considered same necessary.

[18] One MLA sought clarification on what is meant by "exceptional cases" with regard to oral submissions. The Association of Personal Injury Lawyers (APIL) felt that there should be a right to an oral hearing for appeals "if the case is complex or borderline".

[19] In its response the Law Society disagreed with the proposal to make the appeals process purely on written submissions in a blanket fashion. It suggested that there should be an "interest of justice" provision enabling oral representations to be made.

[20] The Department responded to the representations during the consultation period and the current regulations 10 and 26 were published in draft terms for consultation. In response APIL agreed that the appeal system should be paper based but that there should be a filter in place to ensure that those appeals that require an oral hearing will get one. Again they referred to the suggested test of "complex or borderline". They submitted that there was a risk "that Regulation 26(3)(c) will be interpreted too strictly, which will lead to cases being denied an oral hearing when they require one". The Law Society felt that the criteria set out in the regulation were "overly restrictive". In particular it recommended that Regulation 26(3)(b) be amended with "an unprecedented impact in its consequences" replaced with "significant consequences". They also felt that the regulation should make provision for vulnerable applicants and in particular should provide for an additional criteria along the lines that "it would result in injustice to the appellant in the circumstances to deny an oral appeal". The Attorney in contrast to Law Society queried whether the provision which referred to the unprecedented impact in its consequences was sufficiently narrow to deliver the policy intention. He also indicated that he was interested in the policy reasons for limitation of the challenge options to judicial review for an applicant who receives a decision that legal aid is not required to protect his or her rights under ECHR or EU law. He also felt that the panel should have the opportunity to seek information from the other party to the dispute at appeal stage.

[21] The Examiner of Statutory Rules commented that "Regulation 26(3) seems to be a particularly high threshold (in a very early stage in the proceedings) for an oral hearing. He suggested there might be consideration pointing to an oral hearing in more mundane but perhaps potentially meritorious litigation. He further suggested

that it should it be left to the wider discretion of the presiding member to direct an oral hearing.

[22] The departmental response to this query clearly sets out the rationale behind the draft regulations. The Department responded as follows:

> "The policy is that appeals should be considered and decided through a written process, except where exceptional circumstances as set in Regulation 26(3) occur. In those scenarios (where new and important legal principles are at stake, where it would have an unprecedented impact; or where it is particularly complex) the presiding member has power to receive oral representations. We have tried to strike a balance between providing for an appeals route that can be managed effectively through written representations (in the vast majority of cases it should be possible to provide all material in this way) and allowing for oral representations in certain cases.
>
> I am content that we have struck the right balance and am confident that the majority of appeals can be presented effectively in writing."

[23] After the usual impact assessment screening the regulations were passed in the form set out above in this judgment.

The Challenge to the Regulations

[24] Mr Lavery's key point is that the regulations which are challenged must serve the purpose of the Article under which they were made. The regulations must be consistent with that purpose. He therefore argues that the regulations must ensure that individuals such as the applicant have access to civil legal services that effectively meet their needs.

Consideration of Regulation 26

[25] This applicant's case is that the restriction placed on the circumstances in which an appeal panel can grant an oral hearing on an appeal is not consistent with this purpose. In this regard of course it is important to note that Article 3 also provides that the purpose of securing access to civil legal aid services has to occur within the resources made available, and priorities set, in accordance with the statute. Regulation 26 refers to only 3 circumstances in which an oral hearing will be permitted. The applicant argues that confining oral hearings to the limited and defined circumstances set out is an irrational and therefore an unlawful fettering of the discretion of a Civil Legal Services Appeals Panel.

[26] In his submissions Mr Lavery pointed out many of the undoubted advantages of an oral hearing in a decision making process. It gives an applicant the best opportunity to address issues upon which an application is likely to be refused. The provision of full oral hearings may well discourage subsequent judicial reviews. These arguments were echoed in the various responses from the Bar Council, the Law Society and APIL to which I have already referred.

[27] The applicant in particular relies on the decision of Treacy J in the case of Blast 106, Re Judicial Review [2014] NIQB 95. That case involved a challenge to decisions by OFCOM determining that the applicant was in breach of its licence and that it did not have the power to extend the licence under the relevant provisions of the Broadcasting Act 1990. Part of the challenge related to the failure by OFCOM to grant an oral hearing to the applicant. The judgment makes it clear that the relevant decision maker made the case that he was not even aware that a request for an oral hearing had been made. It appears that there was no correspondence at all on behalf of OFCOM in relation to the request. The court took the view that there was no "conscientious engagement" by OFCOM in respect of the request which was either ignored or overlooked. Unsurprisingly, he took the view that this was unfair. He also relied upon the fact that OFCOM's usual procedure in relation to statutory sanctions under a different section of the Broadcasting Act did allow for oral representations before a final decision was taken. Indeed, it was conceded on behalf of OFCOM in the course of the proceedings that "having regard to OFCOM's usual practice in relation to decisions as to statutory sanctions under Section 110 of the Broadcasting Act 1990 we can see that it is arguable that by analogy there should have been a similar opportunity to make representations before the VLC before a final decision was taken on your client's application for an extension of its licence".

[28] Having considered the decision in Blast 106 I do not consider that it assists the applicant in this case. The factual situation is very different. The applicant has not pursued a challenge to the decision itself in this case but rather challenges the regulations. Whilst it is not therefore material to my decision I note that in any event the presiding member of the appeals panel did make his decision in the context of the provisions of Regulation 26 which were specifically drawn to his attention when the request for an oral hearing was made.

[29] The key issues remain. Is Regulation 26 ultra vires, irrational and therefore unlawful?

[30] In terms of the ultra vires argument it seems to me that Regulation 26 is plainly intra vires as is evident from the terms of Article 20A(2)(f) of the 2003 Order. The enabling statute could not be clearer. It enables the Department to make regulations which "provide for the decision on appeal to be taken without hearing any oral representations, except in such cases as may be prescribed". That is exactly what Regulation 26 does.

[31] Does the rationality challenge stand up to scrutiny? For context it is worth bearing in mind the general legal principles concerning oral hearings. These are well set out in Professor Gordon Anthony's publication "Judicial Review in Northern Ireland" in his discussion on "The nature of the hearing and evidence" as follows:

> "The nature of the hearing that is required by the Common Law in any case will depend on the context that is set by the individual's right, interest or expectation and by the corresponding nature of the decision to be taken. At its highest, the full protection of the individual would require that there is an oral hearing, at which the individual is both present and able fully to participate in (although it is also open to an individual to decline the offer of a hearing). However, there is at the same time no fixed requirement for an oral hearing in all cases and it may be that written submissions will suffice where, for instance, an individual is making an application for the first time for a licence for economic activity."

[32] He goes on to give examples why the common law may impose an obligation to grant an oral hearing in what he describes as very different circumstances where a prisoner who has been released early from prison on licence resists recall to prison for an alleged breach of the terms of the licence.

[33] It is clear therefore that there is no absolute right to an oral hearing at common law. I do not consider that procedural fairness requires an absolute right to make oral submissions in the context of an appeal against the refusal of legal aid. Mr Lavery may well be right in his submission that such a right would be desirable and clearly this was the view taken by a number of those who responded to the consultation which led to the regulations. However, the fact that the Department came to a different view does not make its decision unlawful or irrational. Regulation 26 is consistent with the recommendations contained in the 2011 Access to Justice Review with a clear focus and emphasis on appeals being processed on paper rather than at hearings. The regulations were intended to promote and encourage better quality applications at first instance to enable legal aid to be granted without recourse to an appeal. Notwithstanding the emphasis on written submissions the regulations do nevertheless provide for hearing of oral submissions in certain cases in accordance with paragraph 3 of Regulation 26. There is nothing irrational with the criteria set out in paragraph 3 and indeed they reflect merits tests commonly applied by decision makers such as complexity of issues, importance of issues both to individuals and to the public.

[34] In terms of any argument based on an unlawful fettering of discretion I agree with Mr McGleenan's submission that this is misconceived in the circumstances of this case. This is not a case where a panel has set procedures for itself rather the

legislation itself has defined the limits of the discretion following on from clear policy decisions. Thus the panel has not applied a policy fettering the statutory power. Rather it has explicitly applied the statutory test without reference to or application of any additional policy.

[35] Further, I note it is clear that as a matter of practice the panel is exercising its powers under Regulation 26. As of 26 November 2015 the Appeals Panel had determined 231 cases under the new Regulations. A request for an oral hearing was made in 35 cases. Of those 35 requests 27 were granted and 8 refused. Clearly therefore the Panel is applying the criteria without any apparent difficulty.

[36] I have therefore come to the conclusion that Regulation 26 is not ultra vires, irrational or procedurally unfair.

Consideration of Regulation 10

[37] The applicant argues that the restriction on the introduction of documentary material in an appeal is irrational and fetters the ability of the panel to conduct a fair and proper hearing. Of course this issue did not arise in the particular circumstances of Mr McCord's application and so the court is considering this issue in the abstract sense. Under the regulation an applicant will be unable to provide any further documentary material to the Civil Legal Services Appeals Panel in the context of an appeal without first submitting same to the Director of the Legal Services Agency. It is argued that this fetters the ability of the panel to conduct a fair and proper hearing and serves no rational purpose. Furthermore, it is argued that the independence of the Civil Legal Services Appeals Panel is undermined by the requirement of the consent of the Director to consider additional documentation.

[38] As is the case with Regulation 26, Regulation 10 is clearly intra vires a power of the Department to make regulations under Article 20A of the 2003 Order, in particular having regard to the wide discretion afforded it under Article 20(A)(2)(g)-(k).

[39] The rationale behind this particular regulation flows from the policy intention to promote and encourage better quality applications at first instance. It places an onus on an applicant or its legal representatives to produce all relevant and necessary information including documentary material relied upon to the decision maker at first instance. The objective is to increase the quality of applications made, and to assist in the granting of legal aid at an earlier stage in appropriate cases, streamline the system and reduce delay. The obligation is to provide all material <u>available</u> at the time the application is made and does not preclude documentary material that post-dates the application. Indeed, correspondence from the Department exhibited to the affidavits in this case confirms that the Agency has only excluded material on one occasion and that was without objection. Of course even if the original application does not comply with the requirement to provide relevant documentary evidence at an early stage this does not preclude an applicant from

obtaining legal aid if a fresh and properly constituted application is made including the material erroneously omitted in the first place. The regulation clearly provides for the admission of material which could not with reasonable diligence have been obtained prior to bringing the appeal.

[40] As is the situation with Regulation 26, Regulation 10(3) does not constitute a fettering of the Appeals Panel's discretion as it enjoys no discretion in the determination of appeals other than that afforded it by the Appeal Regulations.

[41] Accordingly, as is the case with Regulation 26 I have come to the conclusion that the impugned regulation is neither ultra vires, irrational or procedurally unfair.

Article 6 Considerations

[42] In my view there can be no doubt that the statute itself is entirely compatible with Article 6 and indeed probably goes beyond what is required. There can be no issue about a statute which purports to ensure that individuals have access to civil legal services that effectively meet their needs. I bear in mind that any decision in relation to the granting of civil legal aid may have an impact on an applicant's access to justice if a decision is refused. However, I do not consider that there is any breach of Article 6 in devising a scheme that provides for civil legal aid which is subject to a reasonable merits and means test.

Conclusion

[43] The regulations complained of are entirely consistent with the policy promoted by the Department. In respect of an application for civil legal aid they provide for an original decision, a review and access to an appeal. They were the subject of extensive consultation, impact assessment, consideration by the Justice Committee and debate in the full assembly. Whilst a case can be made that they could be improved as I have set out in my judgement I do not consider that they are ultra vires, irrational or procedurally unfair so as to render them unlawful. Accordingly, I refuse the application for judicial review.