

Neutral Citation No: [2019] NIQB 111

Ref: KEE11139

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 20/12/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY JANE McCracken
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION BY THE
LEGAL SERVICES AGENCY FOR NORTHERN IRELAND**

KEEGAN J

Introduction

[1] In this case the applicant challenged a decision of the Legal Services Agency ("LSA") of 20 February 2019. This was a decision whereby the LSA refused a financial extension under the Green Form "scheme" for a medical expert report in order to advise and assist the applicant. The response from LSA stated that "the Advice and Assistance Scheme does not fund the cost of any reports in medical negligence cases."

[2] The context of the case may be briefly stated. The applicant wished to bring a claim against a health trust in relation to an alleged misdiagnosis of an ankle fracture. She, through her solicitor, sought an expert medical report. Various costings were obtained which resulted in the final request for £350. Having being refused the financial extension the applicant sent pre-action correspondence to the LSA. The response from the LSA of 10 April 2019 is important and sets out that on receipt of the request the Agency advised that the matter was not a case for which it was considered appropriate for an extension to be granted pursuant to Part 3 of the Civil Legal Services (General) Regulations (Northern Ireland) 2015 ("the 2015 Regulations"). This is commonly known as "the Green Form scheme."

[3] Regulation 32 reads as follows:

“32(1) Subject to paragraph (2), where it appears to the supplier that the cost of giving advice and assistance is likely to exceed £88.00, the supplier shall apply to the Director for an extension and shall furnish such information to enable the Director to consider and determine the application:

(3) The Director shall approve an extension under paragraph (1) if satisfied that-

- (a) it is reasonable for the advice and assistance to be given; and
- (b) the estimated amount of the costs to be incurred in giving advice and assistance is fair and reasonable.”

[4] Regulation 43 of Part 5 of the 2015 Regulations involves determinations of applications for certificates and reads as follows:

“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 proceedings to which the application relates; and

(b) The applicant has signed an undertaking to pay any required contribution.

(2) An application for a certificate under this Part may be refused if, in the circumstances of the case, it appears to the Director -

(a) to be unreasonable that a certificate should be granted;

(b) to be more appropriate that an application for a certificate should be made under Part 4; or

(c) that only a trivial advantage would be gained by the applicant in taking, defending or being a party to the proceedings to which the application relates, or, owing to the simple nature of the proceedings, a supplier would not ordinarily be employed.”

[5] The pre-action protocol response states:

“The Advice and Assistance Scheme is not intended to cover the instruction of a medical expert in medical negligence cases. The Scheme operates to enable up to two hours advice and assistance, which may be extended together with the costs of obtaining GP and hospital notes and records. This allows for consideration of this documentation by the applicant’s legal representative prior to making an application for civil legal services.

In clinical negligence cases it is considered that the obtaining of an initial medical expert report should be by way of representation (higher courts) under Part 5 of the Regulations as this allows the Agency the appropriate level of scrutiny under which the requests for such an authority can be considered and this is the usual practice of the Agency in such cases. This is considered reasonable because of the unusually high costs associated with medical negligence reports. It is noted that the report requested for this applicant will cost £350. There is no breakdown as to how much time will be required to prepare the report.

You will be aware that the Agency will consider an application under Part 5 of the Regulations which can allow the obtaining of the assisted person’s medical records, including, if necessary, an application for pre-action disclosure, enforcement thereof and considering such records in detail.”

[6] The substance of this pre-action protocol response also directed the applicant to an effective alternative remedy and maintained that “there is no prejudice to the applicant making an application for civil legal services in this case.” That effective alternative remedy was to apply for a limited representation higher certificate to obtain an independent medical report. The pre-action response pointed out that the remedy had been available since around November 2018 when the solicitor obtained the client’s notes.

[7] Notwithstanding this pre-action response the applicant lodged judicial review proceedings on 17 May 2019. These proceedings came before McCloskey J on 24 May 2019 and on that date he issued case management directions which stated at paragraph 5 that “the court would urge consensual resolution if at all possible. The case will be listed for preliminary consideration only on 26 June 2019.”

[8] On 26 June 2019 McCloskey J stayed the proceedings until further order of the court. He requested that the applicant file an updated report on or before the close of business on the Thursday 12 September.

[9] As appears from the affidavit evidence of the applicant's solicitor, Ms Wells, an application under Part 5 of the 2015 Regulations was made on 8 July 2019. A limited Legal Aid Certificate was granted on 3 October 2019 which allowed for the obtaining of an independent medical report and thereafter where necessary, preparation of papers for counsel and obtaining counsel's opinion. Ms Wells in her affidavit evidence points out that there was a considerable delay in the obtaining of this certification and I agree with that. Ms Wells contends that the 3 month delay in obtaining authority was unsatisfactory and that if it had been done under the Green Form Scheme authority would have been obtained in a much quicker way. In reply to this Mr Sands frankly pointed out that the problem in this case was that the LSA moved to a new on-line Legal Aid Management System ("LAMS") which caused some delays over the summer period.

[10] In any event the applicant has secured funding for the report under Part 5 of the 2015 Regulations and she accepts that this case is now resolved as far as she is concerned. The question is whether the case should proceed any further.

[11] In his argument Mr Corkey contends that I should hear this case in accordance with the principles laid out in the House of Lords case of *R v Secretary of State for the Home Department, ex parte Salem* [1992] 2 All ER 42. I considered this case in *Re Wright's Application* [2017] NIQB 29 where I stated at paragraph 16:

"The guiding principle is whether or not a case raises a point of general public interest. This will depend upon the facts of each case. The identified categories in *Salem* in relation to statutory construction and such like are by way of example and do not form an inflexible code. So in my view the court must look at the facts of each case to decide on an overall appraisal whether or not a case should proceed in the public interest taking into account that an appropriate measure of caution should be applied."

[12] Mr Sands on behalf of the LSA, contends that no public interest point emerges. He argues that there is no denial of access to the court and that the core complaint is one of administrative delay. Whilst obviously regrettable Mr Sands contends that that is not a matter which should trouble the judicial review court. He also makes the point that there is no evidence before the court that a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future. Indeed, Mr Sands states that there is no evidence that this issue has ever arisen in the past. He contends that there was clearly a consensual resolution available in this case raised in pre-action correspondence by

way of an alternative remedy and given that the matter has resolved there is no purpose in continuing with a case which would be an unnecessary use of court time and of public funds.

[13] Against that Mr Corkey maintains that the LSA's position of excluding medical negligence reports from the Civil Legal Services General Regulations (Northern Ireland) 2015 Part 3 is unlawful. He also maintains that by requiring an application to proceed under Part 5 a higher burden is placed upon an applicant given the requirement in Regulation 43 of Part 5 that a certificate 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.

[14] Mr Corkey contends that this issue is likely to arise in many other cases and so it would be in the public interest to determine the application. In his argument Mr Corkey also makes the point that the application has taken a long period of time to adjudicate upon, namely 87 days which was outwith the court's expectations and that has caused a particular issue in this case.

Conclusion

[15] The point at issue in this case is now academic but in certain circumstances the court may nonetheless proceed. This is a fact sensitive exercise. I have considered all of the papers in this case and the helpful legal arguments made by Mr Corkey. Overall, I am not persuaded to list this case for further adjudication for the following reasons:

- (i) It seems to me that under the regulatory structure the LSA are entitled to return to the purpose of Part 3 of the Civil Legal Services General Regulations (Northern Ireland) 2015 that is advice and assistance commonly referred to as the Green Form Scheme. The regulations themselves point out the limited nature of that funding provision.
- (ii) In my view it is appropriate for the LSA to formulate its own policy in relation to medical negligence cases which as the pre-action correspondence clearly stated are liable to be more complicated and costly and therefore justifiably require the greater scrutiny contained within Part 5 of the Regulations.
- (iii) Whilst this case involved a relatively modest cost, the court can see that this is related to the subject matter and many medical negligence cases are highly complex requiring very specialist medical reports, sometimes from practitioners outside the jurisdiction at considerable cost.
- (iv) There has been no evidence put before the court that this regime causes prejudice to applicants or restricts access to justice in any way.

- (v) I do accept that there has been delay in this case which should be monitored but it seems to me that this may have been occasioned due to the cross-over of the LAMS system and I trust that this will be kept under review.
- (vi) I am not informed that there is a cohort of cases that are reliant on a ruling in relation to this issue.
- (vii) Finally, even if there were merit in Mr Corkey's well framed points, this issue would be best dealt with by a process of consultation in the first instance. The Clinical Negligence Practitioners Group is an ideal vehicle to take up the baton as it can look at matters of practice and procedure in a collaborative way with all interested parties including the LSA. I encourage practice issues to be raised in that type of forum in the first instance.

[16] Accordingly, on an overall appraisal, and applying the appropriate level of caution, I have not been persuaded that there is a point of general public interest that I should determine. I do not intend to proceed any further with this case, the applicant having achieved the result she sought. This application will be dismissed.