

Judicial review – legal aid – discharge of legal aid certificate – whether procedure followed fair – legality of the decision to discharge – whether reasons severable – dominant reason – fair trial – equality of aims – ECHR article 6

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

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY MICHAEL McKEVITT FOR
JUDICIAL REVIEW OF A DECISION BY THE NORTHERN IRELAND
LEGAL SERVICES COMMISSION ON 22 DECEMBER 2003**

GIRVAN J

[1] The applicant is the defendant in proceedings currently pending before the Queen's Bench Division under Writ 2001/No. 3918. Those proceedings are brought by and on behalf of the victims and dependants of persons killed and injured as a result of the bomb explosion which occurred in Omagh, County Tyrone on 15 August 1998. There are six defendants to those proceedings including the Real Irish Republican Army ("the RIRA") which is an unlawful organisation. The appellant, the third defendant in the proceedings, is sued on his own behalf as representing the RIRA and/or the Army Council and/or leaders and/or members of the RIRA.

[2] The applicant is currently imprisoned in Portlaoise prison in the Republic of Ireland serving a twenty year sentence as a consequence of his conviction in August 2003 before the Special Criminal Court in Dublin on charges of directing terrorism and being a member of the RIRA. These offences dated from August 1999 a year after the Omagh bomb. The applicant has appealed against his conviction. Mr O'Donoghue QC who appears on behalf of the applicant in this application informed the court that the appeal may come on for hearing in March or April 2005.

The history of the applicant's legal aid application

[3] The applicant applied for and was granted an emergency legal aid certificate on 12 August 2002. The certificate was limited in operation to taking all steps up to but excluding setting down and to include instructing Senior Counsel for advice and direction of proofs. The action has not yet been set down. The certificate is clearly expressed to be an emergency certificate to remain in force for a period of six months from 12 August 2002 or such longer period as the appropriate Committee may allow unless previously discharged or revoked or replaced by a civil aid certificate. Notwithstanding the passage of the six month period referred to in the Certificate Mr Lyttle QC on behalf of the Legal Services Commission accepted that it remained in force up until the point where it was discharged.

[4] The Legal Aid Department of the Law Society was informed in November 2002 of the fact that the applicant appeared to be enjoying disposable capital of £23,000. The Legal Aid Department informed the applicant's solicitors by letter of 15 November 2002 that the matter had been referred to the Legal Aid Committee to consider a discharge or revocation of the Certificate. At a meeting on 13 November 2002, at which the applicant was represented by counsel, the Legal Aid Committee concluded that it wished to obtain counsel's opinion on the issue of limits and for that purpose adjourned the item on the agenda for further consideration.

[5] At the time of his application for legal aid the applicant was in custody pending trial on charges of membership of the RIRA and directing terrorism. In his application for legal aid he stated that he had no involvement in or knowledge of the Omagh bombing or the events leading up to it. In response to correspondence from the Legal Aid Department dated 8 August 2002 the applicant's solicitors asserted that the applicant was "emphatically denying membership of the RIRA".

[6] On 7 August 2003 the applicant was convicted at the Special Criminal Court of offences relating to the direction of terrorism and membership of the Real IRA. On 8 August 2003 the Legal Aid Department advised the applicant's solicitors that by reason of that development no further active steps should be taken on foot of the Certificate pending clarification to the Department's satisfaction. The solicitor's attention was drawn to the provisions of Regulations 12(3)(b), 12(6) and 5(11) of the Legal Aid General Regulations (Northern Ireland) 1965. The applicant's solicitors indicated that the applicant was pursuing an appeal against his conviction.

[7] On 19 December 2003 the Committee, calling itself the Appeals Committee, considered the question whether the Legal Aid Certificate should be revoked or discharged. The applicant was represented at the meeting by Senior Counsel. According to the affidavit of Mr Broderick, Chairman of the

Committee, the Committee took the view that given the serious nature of the offence of directing terrorism which denoted a person playing a prominent role within the RIRA that it was highly improbable that the applicant had advanced to that position of influence without having been involved in the organisation for some time before August 1999. The Committee concluded that the applicant had been untruthful in denying his membership of the RIRA and that his conviction on balance added strength to the plaintiff's claim that he had an involvement in the Omagh blast.

[8] Mr O'Donoghue QC at the meeting advised the Committee that the probable cost of defending the action would be £1million and that there would be further substantial costs in relation to interlocutory applications. Mr Broderick's affidavit states:

"This assertion brought into focus the reasonableness of committing substantial funds in defending the plaintiff's actions given the absence of any prospect of the applicant being able to meet any judgment that might be obtained against him."

The overall value of the plaintiff's claim was in counsel's assessment between £10million and £20million.

[9] Liam Campbell, the fifth defendant in the action sued in his own capacity and/or as representative of the RIRA and/or the Army Council and/or the leaders and members of that organisation had assets which were the subject of a confiscation order. The Committee considered that as he had assets there existed a prospect of the applicant being able to have those assets or other assets available to defend the claims brought by the plaintiff. The Committee considered that it could take into account Regulation 5(11) of the 1965 Regulations as a guidelines to determining whether it was appropriate to discharge or revoke the applicant's Emergency Certificate. In paragraphs 13 and 14 of his affidavit Mr Broderick stated:

"13. Following completion of the Applicant's submissions the Committee continued with its own deliberations. The Committee took account of all relevant material. On the issue of the Applicant's failure to disclose the activities the subject of his convictions the Committee regarded as a breach of the Applicant's obligations to the Respondent and a factor making it all the more difficult to resist the plaintiff's claims concerning his involvement in the Omagh bombing. The Committee decided that to spend the significant funds described by Mr O'Donoghue in defending the claim was

inappropriate in the light of the Applicant's impecunious financial position. Furthermore it concluded that there was the prospect of the Applicant being able to secure or call upon funds from others to meet his defence.

14. In overall consideration of the matter the Committee discussed the importance of Article 6 of the European Human Rights Convention and of the need to ensure that any decision was complied with its provisions. The Committee concluded that if the applicant's certificate was discharged/revoked that that would not prevent his participation in the trial albeit it could affect that participation given the anticipated complexity of the proceedings and the hearing. The gravity of the allegations against the applicant was also taken into account. However, the Committee concluded that the trial judge would be able to and could ensure that the applicant enjoyed the protection of his rights as provided by Article 6."

He went on in paragraph 15 to point out that the Committee's discussion revealed a difference of opinion amongst its members although the majority were in favour of the discharge of the certificate. The majority view of the Committee was that the first two factors were of greater weight than the guidance of Regulation 5(11) of the 1965 Regulations. Some consideration was given to revocation. However on balancing all matters the lesser course of discharge was chosen.

The funding of the plaintiffs in the action

[10] Purporting to exercise powers under Article 12(8)(a) of the Access to Justice (Northern Ireland) Order 2003 the Lord Chancellor directed the Commission to make payment towards the plaintiff's costs. The Lord Chancellor directed the Commission to administer a sum not exceeding £804,322.51 plus VAT. When the expenditure came within £100,000 of the sum of £742,702 the Commission should notify the plaintiff's solicitors and the Court Service and a case for additional funding could be made out. Under the terms of the direction, to the extent that the full amount of the costs and damages awarded were not recovered from the defendants, provision was made for the recoupment of costs incurred by the Commission in funding the action for monies recovered as a result of the action. In keeping with the formula set out in paragraph 8 of the direction. In effect, each plaintiff would be entitled to retain a minimum of £2,500 and there would be a recoupment levy of 17.5% applied to all monies recovered in excess of the first £2,500 from each plaintiff.

Letter of reasoning

[11] The applicant was advised by letter of 22 December 2003 that the Certificate had been discharged. The letter stated that it had so decided having regard to Regulation 12(3)(b) of the Regulations and it set out the wording of the Regulations. The solicitors asked for the reasons for the decision and the Commission 16 January 2004 stated the Committee would be asked for its response. After a lengthy delay the Commission's Chief Executive in a letter of 21 May 2004 stated the reasons as follows:

- (i) Mr McKevitt's conviction for directing terrorism is not consistent with his statement of the Legal Aid Department;
- (ii) there was no prospect of the defendant ever being able to meet any judgment which may be made against him, given the expected level of damages the plaintiffs were likely to be awarded if successful. The Committee considered that defending proceedings was therefore futile, as Mr McKevitt was effectively a man of straw and it was unreasonable to spend substantial public funds in defending such a case in these particular circumstances; and
- (iii) under Regulation 5(11) the Committee is bound to take account of the existence of others who were in a position to defray the costs of the proposed litigation.

The letter made clear that the Committee made its decision without regard to the comments made in the press in relation the conviction of the accused and the fact that he had been granted legal aid.

The statutory context of the impugned decision

[12] The Commission established by the Access to Justice (Northern Ireland) Order 2003 took over as the successor of the Law Society of Northern Ireland in relation to the discharge of the statutory responsibilities in relation to legal aid with effect from 1 November 2003. For the purposes of the applicant's application for legal aid, the Emergency Legal Aid Certificate and the decision to discharge the Certificate civil legal aid was provided under the Legal Aid and Advice and Assistance (Northern Ireland) Order 1981 ("the 1981 Order"). During the transitional period before the 2003 Order is commenced in its entirety the Commission continues to provide civil legal aid under the provisions contained in the 1981 Order. The Legal Aid (General) Regulations (Northern Ireland) 1965 as amended govern the question of legal aid although made under the 1965 Act the Regulations remain in place under the late legislation. They set out the procedures to be adopted on applications

for civil aid certificates and emergency certificates, the revocation and discharge of certificates, appeals against refusals of legal aid, conduct of proceedings on behalf of assisted parties, the taxation and assessment of costs and other matters.

[13] The discharge and revocation of certificates by the Legal Aid Committee is dealt with in Regulation 12. Under Regulation 1(4) the Legal Aid Committee is not permitted to delegate its powers to discharge certificates under Regulation 12(3)(b). The Legal Aid Committee sits about three times a month primarily to consider appeals, but at such meetings also considered irrevocation and discharges of certificates. The Committee was regularly referred to by staff and practitioners as the Appeal Committee. It is the respondent's case that the relevant Committee that arrived at the impugned in this case was the properly constituted Legal Aid Committee. The applicant's Order 53 statement did question the legal status of the decision-making Committee though it did not set out in explicit terms any legal challenge to the decision on the ground that the wrong body had taken a decision. I am satisfied that the decision was made by the correctly constituted Committee. While it was somewhat loosely called the Appeals Committee this did not attract from its true identity.

[14] Regulation 12 sets out provisions relating to the suspension and discharge and revocation of certificates. Regulation 12(2) sets out the provisions the circumstances in which the Committee may discharge a certificate. Under Regulation 12(3)(b) a certificate shall be discharged if:

“As a result of any information coming to their knowledge they consider that the assisted person no longer has reasonable grounds for asserting or disputing the claim or to foretaking, defending or being a party to the proceedings, or that it is unreasonable in the particular circumstances for him to continue to receive legal aid (and for the purposes of providing information under this paragraph, any party may disclose to the Legal Aid Committee communications relating to the proceedings sent to or by the assisted persons solicitor, whether or not marked 'without prejudice'):

Provided that a certificate shall not be discharged under this sub-paragraph until notice has been served on the assisted person that the Legal Aid Committee may do so and that he may show cause why the certificate should not be discharged. “

Under Regulation 12(6) the Legal Aid Committee may revoke a certificate (inter alia) if the applicant knowingly makes an untrue statement in furnishing information. Different consequences flow from a discharge as compared to a revocation which has more draconian circumstances. In this case the Committee relied on Regulation 12(3)(b) to discharge the certificates. Once the Committee considers that it is unreasonable in the particular circumstances for the assisted party to continue to receive legal aid then it must accordingly discharge the Certificate.

[15] The Committee relied inter alia on the provisions of Regulation 5(11). It provides:

“When an application is made or on behalf of a person in connection with a cause or matter in which numerous persons had the same interest and, in accordance with the rules of court, one or more persons may sue or be sued, or may be authorised by a court to defend any such cause or matter on behalf of or for the benefit of all persons so interested the appropriate Committee shall refuse the application if they are satisfied:

- (a) that such refusal would not seriously prejudice the right of the applicant; or
- (b) that it would be a reasonable and proper for the other persons having the same interest in the matter as the applicant to defray so much of the costs as would be payable from the fund in respect of the proceedings if a certificate were issued.”

The grounds of the applicant’s challenge

[16] The applicant contended that the Committee decision was ultra vires and unlawful because the Committee was not legally empowered to discharge the Certificate. For the reasons indicated I am satisfied the decision was made by the correctly constituted Committee.

[17] It was argued that the reasons given for the decision were bad in law. Mr O’Donoghue QC argued that the Committee’s first reason (namely that the applicant’s conviction was not consistent with his statement to the Legal Aid Department) was fallacious because the applicant had consistently asserted his innocence and was appealing his conviction. It was argued that while a conviction may potentially be relevant to the submission of the applicant that he was not involved in any way with the Omagh bomb the

conviction per se was not inconsistent with any statement may by the applicant to the Legal Aid Department. However, as Mr Lyttle QC pointed out on behalf of the respondent, this approach to the question of consistency was flawed in that it focused on the question whether the applicant was pursuing a consistent course (which was not relevant) rather than on the question of whether his conviction and his assertion of innocence could stand together. It is in that latter sense that the first reason of the Committee must be viewed.

[18] The fact that a court of competent jurisdiction has found the defendant guilty of the offences is a very material consideration for the Committee in approaching the question whether the certificate should be discharged. Although that conviction is subject to an appeal and might be quashed in the meantime it is a valid and binding decision which establishes that he was directing terrorism and a member of the RIRA. The conviction is material to many issues in the case even though it relates to a period posting dating the Omagh bomb. It is relevant to the question of the credibility of the applicant and in the context of the legal aid application to his conduct. An application for legal aid is one which demands utmost good faith on the part of the applicant (see Re Legal Aid Board ex parte Parsons [1999] 3 All ER 347). The Committee considered that the conviction pointed to a breach of the obligations owed by the applicant to the Legal Aid Department and a factor making it all the more difficult to resist the plaintiff's claims concerning his involvement in the Omagh bomb. This was clearly a tenable approach on the part of the legal aid authorities. Mr Lyttle QC accepted that if subsequently it should emerge that the appeal was successful it would be open to the applicant to bring a fresh application for legal aid and the discharge of the certificate in this instance would not in itself preclude him seeking and being granted legal aid.

[19] The second reason, described in the applicant's submission as the "man of straw" argument, was criticised by Mr O'Donoghue QC on the grounds that this was not information "coming to the knowledge" of the Committee as required by Regulation 12(3)(b). Impecuniosity should be an irrelevant consideration and is an illogical consideration since the whole basis of a legal aid application is that the person seeking legal aid is short of funds. He argued there was no material change of circumstances either regarding the proceedings or the financial circumstances of the applicant. The legal aid authority had failed to take account of the true nature of the proceedings which were to establish the defendant's guilty involvement in the Omagh bomb.

[20] Mr Lyttle QC stressed that the second reason given had to be viewed in conjunction with the first ground of the decision. Having regard to his conviction (and the effect it had on his defence) the spending of upwards of

£1 million in the defence of the claim was inappropriate in the light of the applicant's impecunious financial provision.

[21] In Re John Mitchell McLaughlin (unreported) MacDermott LJ pointed out that the discretionary powers of the Legal Aid Committee are intentionally couched in broad terms. Funding claims involved public money and it seems apparent that Parliament was not prepared to finance every reasonable claim and so it gave the Committee power to refuse legal aid if it thought it reasonable in the circumstances so to do. The court should be slow to condemn as unreasonable its decision arrived at after a careful thought. While those words were spoken in the context of a decision challenged on Wednesday irrationality grounds they are appropriate also in relation to the approach a Committee is entitled to take in deciding what it considers to be relevant considerations and the weight to be attached to them. In the context of this case the conduct of the applicant in relation to his conviction, the potential cost to the legal aid funds of defending the case and the fact that he had no funds to meet a judgment (and thus had no significant proprietary interest at stake) were all matters the Committee were entitled to take into account in arriving at its decision.

[22] The third reason advanced was that the Committee was bound to take account of the existence of others who were in a position to defray the costs of the litigation. Under Order 15 rule 11 where numerous persons have the same interests in any proceedings the proceedings may be begun unless the court otherwise ordered continued by or against any one or more of them as representing all except one or more of them. The rule is prima facie applicable to actions to establish a right against a fund rather than actions to enforce personal liability. The Court of Appeal in refusing to make the Chairman, Secretary and Vice Chairman of an unincorporated association representatives of the Association in an action for libel in the Association's magazine expressed a doubt whether the rule should ever be applied to actions in tort (see Mercantile Marine Association v Toms [1916] 2 KB 243). It has been held however that in an action against a member's club that in an appropriate case the court will make such an order in an action for tort provided that the members whose names appear on the writ are person who can fairly be taken to represent the body of club members and that they and all of the other club members have a common interest in resisting the claim. (See generally Clerk and Lindsell on Tort 16th Edition at page 176). Difficult questions arise as to how applicable the principle stated in the members' club cases apply to an unlawful organisation whose funds may consist largely of illegally acquired money. Moreover, as here, there is an issue as to whether the applicant was a member of the unlawful organisation and thus tortiously liable for the actions of the members of the RIRA in relation to the Omagh bomb. He has or potentially has a different interest to protect in relation to his own personal positions as compared to the other alleged tortfeasors. There will be an issue as to whether, even if the organisation's funds are

available to meet the damages claimed of the plaintiffs, the plaintiffs can prove a case against him and his personal assets. While I accept that the Committee would be entitled to take account of Regulation 5(11) in an appropriate case where it is considering a discharge of a certificate (it clearly has such a power when a certificate is being granted) in the circumstances of this case I conclude that the Committee could not rely on Regulation 5(11) to justify the discharge of the Certificate. Its conclusion that Campbell had available assets which might assist in the defence of the applicant's case cannot be justified. Campbell and the applicant have potentially different interests to protect. In any event a confiscation order seems to have been made in relation to Campbell's assets and it would be highly unlikely that Campbell would be permitted to have resort to those assets to defend the current proceedings. Furthermore Campbell does not appear to have indicated any intention to defend the proceedings.

[23] Mr O'Donoghue QC contended that the process by which the decision was reached and the reasons advanced for the decision were tainted by a procedural unfairness and impropriety. He complained that the Committee have failed to articulate the precise basis in which the Committee was minded to discharge the certificate; the applicant's legal representatives were not invited to address the issue relating to Regulation 5(11) that formed the basis of the Committee's third reason for discharge; there was a long delay in providing reasons; the Committee wrongly sought legal advice; there was no clear indication of the legal basis in which the majority vote was taken and of the weight given by the Committee to the three reasons advanced in respect of the decision. I am satisfied from what Mr Lyttle QC told the court that the legal advice did not relate to the merits of the decision. I have ruled that the third ground was the reason which was bad in law for the decision. It is apparent from the affidavit that it was not a dominant ground for the decision. I am also satisfied that the applicant's counsel had a reasonable opportunity to articulate the applicant's case against the discharge of the certificate. Detailed reasons were given albeit belatedly. One must bear in mind the observations of Carswell LJ in Re Neil Oliver:

"In considering this issue I start from the position that the legislation governing legal aid in Northern Ireland does not require the Legal Aid Committee to give reasons for its decisions. That is not in my view conclusive, but it points towards a conclusion that in the ordinary way one would not expect it to be obligatory for the Committee to furnish reasons for its decisions. It seems to me that it will depend on the nature of the issues before the Committee whether reasons will ever be required. In the present case to which I shall limit my ruling the grounds on which the applicant relied in his appeal to the Committee

appear with sufficient clarity from the documents which he submitted. When the Committee dismissed his appeal, it was rejecting his submission on each of those grounds. The applicant and the court are quite well able without receiving more details to examine each submission and to decide if the Committee has applied the law correctly or fallen into error in rejecting it.”

The applicant has failed to satisfy me that the decision should be quashed on the grounds of procedural irregularity.

[24] The applicant contended that the Committee failed to properly take into account the effect of the decision on the applicant’s right to a fair trial under Article 6 of the Convention with particular reference to Perotti v Collyer-Bristow [2004] 2 AER 189; the issue of equality of arms having regard to the provision of substantial public funds for the plaintiffs; the fact that the applicant will be unable as a prisoner sentenced in the Republic of Ireland to attend the trial and conduct his defence; the fact that the applicant was appealing his conviction; and the true nature of the proceedings (being intended to establish the guilt of the applicant in the Omagh bomb atrocity).

[25] In his affidavit Mr Broderick indicated that the Committee did consider the importance of Article 6. It concluded that the trial judge would be able to ensure that the applicant enjoyed the protection of the rights provided for by Article 6.

[26] In Perotti v Collyer-Bristow [2004] 2 AER 189 the Court of Appeal in England held that the decision whether or not to fund legal services in civil proceedings was a matter for the discretion of the Legal Services Commission, although if the court were to indicate that legal representation was necessary in order to ensure a fair hearing, it would be likely that the public funding would be made available, if the applicant qualified on financial grounds. The obligation on the state to provide legal aid in civil cases arose under Article 6(1) of the Convention if the fact of presenting his own case could be said to prevent a claimant from having effective access to the courts. The test was whether a court was put in such a position that it could not do justice in the case because it had no confidence in its ability to grasp the facts and principles of the matter in which it had to decide. In such a case a litigant in person would be deprived of effective access because although he could present his case he could not do so in a way which would enable the court to fulfil its paramount function of reaching a just decision. What is clear from that decision is that the trial judge has a vital role to play in ensuring that the defendant gets a fair trial and if he considers that it is in the interests of a fair trial that the defendant receive legal aid he can give a ruling to that effect. Mr Lyttle QC made clear that if the trial judge in this

case where to so indicate the Commission would be bound to consider an application for legal aid in the light of the court's views. Mr O'Donoghue pointed to a raft of matters which he argued indicated that his client could not get a fair trial without being legally represented. He indicated that his client is in prison in the Republic of Ireland and could not attend the trial. This is a point which may or may not lead the trial judge to conclude that it would be impossible for the defendant to conduct his defence in person. It may lead to the conclusion that a fair trial is impossible at all in such circumstances. It is clear that if the defendant's appeal is unsuccessful his participation in the trial would involve complex arguments between the United Kingdom and the Irish Government and prison authorities to ensure a fair opportunity to participate but those are matters that the trial judge can deal with and the Legal Aid Committee's conclusion that the trial judge can protect the applicant's rights to a fair trial is soundly based in law.

[27] In relation to the fact that there is a pending appeal Mr Lyttle QC indicated that it would be difficult to see how or why a trial court should press on with the trial in the current circumstances pending the outcome of the appeal which could be very material to the issues in the trial. If the appeal is dismissed it would establish conclusively some issues material in the present case. If it is successful then again it may raise material issues. Counsel indicated that it would be most unusual in a domestic law case for a civil court to proceed with a civil action when a criminal trial and appeal is pending in relation to criminal proceedings that touch on the issues in the civil action. As noted the Committee indicated that it would reconsider the question of legal aid in the event of a successful outcome of the appeal. Those matters would no doubt be matters which the trial judge would be bound to take into account in fulfilling his duties in relation to the conduct of the trial.

[28] There is nothing to suggest that the Committee left out of account relevant considerations. In relation to the irrelevant considerations I have concluded that the Committee was wrong to take account of the existence of other parties funds to defend the applicant's case. To the extent that the Committee took account of an irrelevant consideration the question arises whether the decision should be quashed on that ground. Counsel referred me to the statement of principle in the Smith, Wolff and Jowell at paragraph 9054 that:

"If good and bad reasons for a decision are given, the decision should stand provided that the reasons are independent and severable or the dominant reason is lawful."

Mr Broderick in his affidavit in paragraph 15 stated that the majority of the Committee were in favour of discharges of the certificate and that the majority view of the Committee was that the first two factors were of greater

weight than the guidance given by Regulation 5(11) of the 1965 regulations. I am satisfied that the dominant reasons for the decision in the present case were good in law and in the circumstances I dismiss the application for judicial review.