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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**08/03/2021**

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 MERVYN MOON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE LEGAL SERVICES AGENCY FOR NORTHERN IRELAND DATED 5 MAY 2020, 10 MAY 2020 AND 28 MAY 2020

AND IN THE MATTER OF AN ONGOING DECISION OF THE LEGAL SERVICES AGENCY FOR NORTHERN IRELAND

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David McKeown (instructed by GR Ingram & Co, Solicitors) for the Applicant
Laura McMahon (instructed by Departmental Solicitor's Office) for the Proposed Respondent

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COLTON J

Introduction

[1] The applicant was the subject matter of a sentence of life imprisonment imposed on 16 September 2008 after he pleaded guilty to the offence of murder.

[2] This case concerns decisions made by the Legal Services Agency in relation to remuneration of his solicitor in respect of a Parole Commissioners' hearing on 11 June 2020.

[3] The relevant chronology leading to this dispute is as follows:

- In December 2019 the applicant instructed Kevin McCamley of GR Ingram, Solicitors, to act on his behalf in respect of proceedings before the Parole Commissioners for Northern Ireland.

- On 9 April 2020 the applicant's solicitor received the dossier of papers to be considered by the Parole Commissioners in respect of a decision as to whether the applicant should be released on licence.

- On 20 April 2020 the applicant applied for legal aid in respect of the proceedings.

- On 30 April 2020 legal aid authority was granted on what are referred to as "the standard terms."

- Throughout April and May additional documentation was added to the dossier.

- On 2 May 2020 the applicant's solicitor reads as much of the dossier as possible within 8 hours.

- On 4 May 2020 the solicitor applied for additional hours for preparation, namely 60 hours for reading and preparation, 5 hours for consultation with counsel, 4 hours consultation with the applicant and 5 hours to appear at the hearing.

- On 5 May 2020 the Legal Services Agency grants the solicitor 13 hours for reading and preparation, less the 8 hours previously awarded, as well as the hours claimed for consultation. It appears that no authority was granted for appearance at the hearing.

- On the same date the applicant's solicitor seeks written guidance as to how additional hours for reading and preparation are calculated. On the same date the proposed respondent replied as follows:

> *"This has been settled practice within the Agency for some time – there is no specific statutory provision for same."*

- On 7 May 2020 the solicitor appeals the determination.

- On 10 May 2020 the appeal is rejected.

- On 11 May 2020 a pre-action protocol letter is issued to the proposed respondent. On 28 May 2020 the proposed respondent confirms the original decision save that an additional 5 hours is allowed for appearing at the hearing.

- The panel hearing took place on 11 June 2020. The applicant was represented by his solicitor and counsel.

- Following the hearing a decision was issued on 15 June that the applicant was not to be released.

- This decision is the subject matter of ongoing judicial review proceedings. The court is aware that at a subsequent hearing the parole commissioners have determined that the applicant be released from prison on licence.

- These proceedings were issued on 28 August 2020.

[4] Before the matter was heard by the court the then Senior Judicial Review Judge sought clarification as to the potential role of the Taxing Master in this type of application and whether there was a potential alternative means of redress.

[5] It has now been clarified and agreed that the Taxing Master has no role in the matter.

Grounds of Challenge

[6] The challenge relates to two issues. The first relates to the total amount of hours which were allowed for reading in this case. It is submitted on behalf of the applicant that the decision of the Legal Services Agency ('LSA') is unreasonable in the Wednesbury sense, procedurally unfair and irrational. It is submitted that to conclude that a complicated dossier including 1,207 pages can be read, analysed and properly considered within 13 hours is irrational. It is submitted that this decision does not accord with the statutory underpinning of the Civil Legal Services (Remuneration) Order (Northern Ireland) 2015 ('the 2015 Order') and in particular Article 47 of the Access to Justice (Northern Ireland) Order 2003 which provides:

> *"47.—(1) When making any remuneration order the Lord Chancellor shall have regard, among the matters which are relevant, to—*
>
> *(a) the time and skill which the provision of services of the description to which the order relates requires;*
>
> *(b) the number and general level of competence of persons providing those services;*
>
> *(c) the cost to public funds of any provision made by the regulations; and*
>
> *(d) the need to secure value for money."*

[7] In short, the applicant contends that no right minded decision maker could conclude that 13 hours was sufficient for the task of reading the relevant papers.

[8] The second issue is related to the first issue. It is submitted that the alleged ongoing failure by the Department to issue guidance to assessors has resulted in the "*settled policy*" that is challenged in this case. It is argued that Article 5 of the 2015 Order clearly envisages that directions and guidance would likely be provided in cases such as this. Article 5 states:

> *"5.-(1) Subject to paragraph (2) the remuneration payable to representatives in respect of work done providing civil legal services to which the order applies shall be determined by the Department in accordance with this order and having regard to such direction and guidance as may be issued by the Department."*

Consideration of the issues

[9] The proposed respondent opposed the grant of leave on three grounds:

(i) The applicant has no standing to bring these proceedings as he is not the proper applicant;

(ii) The grant of hours is reasonable in all the circumstances and such a decision requires a fact based analysis of their application for which funding is sought; and

(iii) Delay.

Standing

[10] I turn firstly to the issue of standing. It is clear from the above chronology that the applicant's LSA grant has been considered, awarded and exhausted in that the hours allocated have been utilised. The parole hearing has been completed. In his affidavit the applicant has expressly averred that "*I was happy with my legal representative's in-depth knowledge of all the documentation that was before the PCNI*." Thus, it seems to me from the applicant's perspective this matter is purely academic. He has received adequate legal representation with which he is satisfied. There is no suggestion that he faces any demand for payment by his solicitor.

[11] In relation to whether the matter is academic as between the parties I, of course, bear in mind the judgment of Lord Slynn in **R v Secretary of State for the Home Department ex p Salem** [1999] 1 AC 450 and in particular his comments at 456-457:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public

> interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where 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."

[12] That the only potential applicant in this case should be the applicant's solicitor is clear from case law. Previous challenges to LSA rates and remuneration payable have properly been taken in the name of the solicitors, see for example **Re John Finucane** [2011] NIQB 86, [2012] NICA 12 where a challenge to remuneration and the determination of costs payable for the solicitor was properly taken by the solicitor without adverse comment by the Court of Appeal.

[13] Very similar issues to those raised in **Finucane** were raised in the case of **Re Conway and Hutchinson** [2011] NIQB 68. In that case the applicants were both defendants in the Crown Court facing serious charges. They were the beneficiaries of legal aid certificates under Rules introduced in 2011. The issue in the case was whether or not remuneration to their legal representatives should have been provided under the previous Rules – "The 2005 Rules." As matters transpired the legal representatives did represent the defendants under the 2011 Rules but sought judicial review of the decision in any event.

[14] In his judgment Treacy J expressly considered the question of standing. Treacy J concluded that the applicants did not have "sufficient standing" within the meaning of section 18(4) of the Judicature (Northern Ireland) Act 1978 or Order 53(5) of the Rules of the Supreme Court. Having considered the facts of the case he concluded that it was the applicant's legal representatives who had the true interest in the issues raised by the proceedings *i.e.* the rates of remuneration. He concluded that the principal, if not the only, parties directly affected by the impugned decision were the legal representatives. The applicants' interests had been satisfied by the grant to them of a criminal legal aid certificate authorising a solicitor and two counsel. His conclusion was set out at paragraph 23:

> *"[23] In my view, the applicants have no legitimate justiciable interest, in the circumstances of this case, in ensuring their legal representatives secure a particular level of payment from the public purse."*

[15] In this case, like **Conway and Hutchinson**, the only party directly affected by the impugned decision is the applicant's solicitor. The applicant has in fact received adequate and proper representation at his hearing. However, unlike **Conway and Hutchinson** the issue raised in that case was the subject matter of a properly formulated judicial review – that of the **John Finucane** case to which I have referred. Thus, any issue of public importance that arose could be determined in the **Finucane** case. That consideration is absent here.

[16] In his judgment Mr Justice Treacy analyses the decision in **R v Legal Aid Board, ex parte Bateman** [1992] 1 WLR 7111. In that case the applicant was a legally aided plaintiff in proceedings which resulted in a consent order providing for the applicant's costs to be paid by the defendants and to be taxed in default of agreement. The applicant's solicitors were dissatisfied with the taxation and obtained a review pursuant to the relevant Legal Aid Regulations. They remained dissatisfied and sought authority from the Legal Aid Board under the relevant regulation to apply to a judge for further review. On the Board's refusal to grant authority the applicant sought to challenge the Board's decision by way of judicial review notwithstanding that she had no financial interest in the taxation proceedings. Dismissing the application the court held that the applicant's feelings of gratitude and sympathy for her solicitors did not afford sufficient justification, either in her own interest or in the public interest, for taking judicial review proceedings on their behalf.

[17] In my view the circumstances of this case are different from circumstances in which an application is brought in the name of a client who is unable to obtain representation because of an alleged unlawful decision in relation to remuneration levels. Thus, in the case of **R v Brownlee** [2015] NICA 58 a judicial review challenge was permitted since the applicant could not actually obtain representation.

[18] In this case, had an application been brought prior to the Parole Commissioners' hearing on 21 June 2020 the applicant would have enjoyed the necessary standing in the event that the decision of the LSA meant he was not in a position to obtain adequate or proper legal representation.

[19] In the case of **Re D's Application** [2003] NI 295 the Court of Appeal listed four "*generally valid*" propositions about the proper approach to standing. Delivering the judgment of the Court of Appeal Carswell LCJ stated:

> "*[15] There has been much discussion of the topic of standing in textbooks and legal periodicals and examples abound in the reported cases, yet it is difficult to pin down any authoritative statement of the principles to be applied by a court in determining the question. It appears to be incontestable that the courts have tended in recent years to take a more liberal attitude to matters of standing. We would tentatively suggest that the following propositions may now be generally valid:*
>
> *(a) Standing is a relative concept, to be deployed according to the potency of the public interest content of the case.*
>
> *(b) Accordingly, the greater the amount of public importance that is involved in the issue brought before*

the court, the more ready it may be to hold that the applicant has the necessary standing.

(c) The modern cases show that the focus of the courts is more upon the existence of a default or abuse on the part of a public authority than the involvement of a personal right or interest on the part of the applicant.

(d) The absence of another responsible challenger is frequently a significant factor, so that a matter of public interest or concern is not left unexamined."

[20] Applying the appropriate legal principles to the particular facts of this case it seems to me that the applicant has no personal interest in the proceedings. Mr McKeown suggested that since the applicant was still on licence there was a potential in the future that he might be recalled in which case he would require legal representation. That, in my view, is insufficient to create an interest in these proceedings. Whether or not he will ever be recalled is entirely speculative and in the event that he is then any application for legal aid will need to be looked at in the circumstances of that scenario.

[21] Bearing in mind the principles in **Salem** and **Re D's Application** is there sufficient public interest to justify the court considering this matter by way of judicial review?

[22] Looking at the points raised by the applicant I am not persuaded that this is the case. The assessment of the appropriate hours for reading papers, consultation and appearance seems to me to be primarily and invariably a fact sensitive issue. There is no discrete point of statutory construction arising. In contrast to the very public dispute about the 2011 Rules under consideration in **Finucane** there is nothing before me which suggests this issue has a wider relevance or that there are a large number of similar cases so that this issue will need to be resolved in the near future. When I look at the nature of the illegality alleged here it relates to an assessment by the proposed respondent in a particular factual context.

[23] The only issue that might support an argument that this matter was of sufficient public importance to merit further examination relates to the argument about the Department's power to provide directions and guidance. The obvious point here is that this obligation rests on the Department and not on the proposed respondent, the LSA. Therefore, in addition to issues about the standing of the applicant, insofar as a substantial element of the applicant's claim is concerned, the wrong proposed respondent has been identified.

[24] I also consider that the issue of standing is impacted to an extent by the question of delay. The proposed respondent argues that the last relevant decision was made by the LSA on 10 May 2020, although it seems to me it is arguable that in

fact the last relevant decision was made on 28 May 2020. Judicial review proceedings were not lodged until 28 August 2020, some 3 months post that decision. This delay has been explained in the supporting affidavit filed by the applicant's solicitor. On 29 May 2020 after taking his client's instructions the applicant's solicitor applied for legal aid. The application was refused and it was necessary to go through the appeals process. Legal aid was granted on 10 July 2020 by which stage the Parole Commissioners hearing had taken place. Thus, these proceedings were delayed pending an application for legal aid to bring proceedings against the LSA in circumstances where the key date for the applicant was the Parole Commissioners' hearing on 11 June 2020.

[25] Whilst I consider there is some merit in the proposed respondent's submissions on the issue of delay I would not refuse leave on that ground. However, as explained above it provides relevant context for the consideration on the issue of standing.

[26] Accordingly, leave is refused on the grounds that the applicant does not have sufficient standing and that from his perspective the matter is academic.

[27] It is a matter for the applicant's solicitors whether they wish to pursue the matter by way of proceedings against this respondent, or indeed, any other respondent.