

Neutral Citation No. [2015] NIQB 105

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

Delivered: 17/12/2015

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Morgan's (Barry) Application [2015] NIQB 105

IN THE MATTER OF AN APPLICATION BY BARRY MORGAN
FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND
LEGAL SERVICES COMMISSION AND THE FAILURE OF THE DEPARTMENT
OF JUSTICE TO MAKE PROVISION FOR THE REPRESENTATION OF
DEFENDANTS IN APPLICATIONS FOR LEAVE TO PRESENT A VOLUNTARY
BILL OF INDICTMENT

Before: Morgan LCJ, Weatherup LJ and Weir LJ

MORGAN LCJ (delivering the judgment of the court)

[1] The applicant claims that the Department of Justice (the Department) has failed to make provision for the payment of fees in cases where a Defendant in criminal proceedings faces an application for leave to present a Voluntary Bill of Indictment. The Department argues that a fee is payable for such an application on foot of Article 29 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (the 1981 Order) and the Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 (the 2005 Rules). It is accepted, however, that the 2005 Rules do not make any provision for exceptionality and that they should do so. The Department intends to consult and come forward with exceptionality proposals but no such exercise was in place at the time of this hearing.

Background

[2] On 20 December 2005 various offences were committed in Dunmurry (the 2005 offences) as a result of which several individuals were arrested, charged and convicted. They have all now served their sentences. The applicant was living in the Antrim Road area of Belfast between 2005 and 2009. In February 2009 he was notified by his solicitors that police wanted to speak to him in relation to the 2005 offences. He attended for interview on 12 February 2009 and was subsequently charged with conspiracy to rob in respect of that incident. On 25 August 2009 the PPS withdrew the charges in respect of the 2005 offences at Lisburn Magistrates' Court.

[3] On 31 October 2011 offences were committed in the County Court Division of Ards as a result of which the applicant was charged with conspiracy to rob and kidnapping (the 2011 offences). The applicant denies involvement in any of those offences. After being charged with the 2011 offences he was again interviewed on 29 February 2012 in respect of the 2005 offences.

[4] In April 2013 the applicant received PE papers from the PPS which notified him of an intention to hold a preliminary inquiry on 16 May 2013 at Downpatrick Magistrates' Court in relation to both the 2005 and 2011 offences. There were various issues about jurisdiction but on 11 April 2014 the applicant was returned for trial at Downpatrick Crown Court on charges of conspiracy to rob and possession of firearms and ammunition with intent to commit an indictable offence in respect of the 2005 incident and charges of conspiracy to rob, two charges of kidnapping and one of possession of firearms with intent to commit an indictable offence in respect of the 2011 incident.

[5] A Bill of Indictment reflecting those charges was duly drawn up and on 5 September 2014 the court heard inter alia a No Bill application in respect of the 2005 offences. On 18 September 2014 His Honour Judge Grant directed a No Bill on those charges. That disposed of those counts on the indictment. The trial of the remaining counts was fixed for 2 February 2015. On 28 January 2015 the Crown placed before the Crown Court at Downpatrick an application for leave to present a Voluntary Bill of Indictment in respect of both the 2005 and 2011 offences.

[6] On 28 and 29 January 2015 the applicant's solicitors sent pre-action protocol letters to the Department and the Northern Ireland Legal Services Commission (the Commission) contending that the 2005 Rules did not make provision for legal aid for the applicant to be represented in the application for leave to present the Voluntary Bill and consequently neither counsel nor solicitors were in a position to accept instructions from him in relation to that application. Pending the determination of these proceedings that application remains adjourned.

Correspondence

[7] Subsequent to the pre-action protocol letters the applicant's solicitor spoke to a representative of the Commission on 30 January 2015. She indicated that it was the

view of both the Department and the Commission that the costs of contesting the application for the Voluntary Bill would be covered under the original certificate which had issued on 11 April 2014 subsequent to the applicant's return on the original charges. It was accepted that there was no specific provision for a fee in relation to such an application but it was argued that this could be claimed as an application fee under the 2005 Rules.

[8] The Commission reiterated its position in a letter dated 18 February 2015. It noted the argument of the applicant's solicitor that the application for the Voluntary Bill constituted fresh proceedings by the PPS the object of which was to abort the original proceedings since these no longer included the 2005 charges. The Commission indicated that the position was that the existing criminal legal aid certificate covered the proceedings which should be remunerated as an application fee in accordance with the 2005 Rules. That constituted fair remuneration.

The Statutory Background

[9] Section 2 of the Grand Jury (Abolition) Act (Northern Ireland) 1969 provides for the presentment of indictments.

"2. - (1) Subject to the succeeding provisions of this section, an indictment may, notwithstanding anything to the contrary in any enactment or rule of law, be presented to the Crown Court although not found by a grand jury.

(2) An indictment shall not be presented against a person charging him with an indictable offence unless either-

(a) he has been committed for trial for that offence; or...

(e) the indictment is presented with the leave of a Judge of the High Court, Court of Appeal or Crown Court granted upon application made to him in that behalf...

and, in the case of an indictment presented by virtue of paragraph (e),

(i) statements of the witnesses intended to be examined on behalf of the prosecution have been lodged, together with the indictment, in the office of the chief clerk; and

(ii) copies of such statements and of the indictment have been served on the person against whom the indictment is presented,

at least eight days before the opening of the court at which the indictment is presented.

(3) The Judge presiding at the Crown Court shall, in addition to any other powers exercisable by him, have power to order an entry of “No Bill” in the Crown book in respect of any indictment presented to that court after the commencement of this Act if he is satisfied that the depositions or, as the case may be, the statements mentioned in subsection (2)(i), do not disclose a case sufficient to justify putting upon trial for an indictable offence the person against whom the indictment is presented.”

[10] It is common case that as a result of the decision in R v Thompson and Hanson [2007] 1 WLR 1123 the prosecution cannot appeal against the entry of a No Bill in respect of a person who has been committed for trial. The Crown may, however, as in this case, apply to present an indictment with the leave of a judge of the Crown Court where a No Bill is entered in respect of the committal.

[11] Article 29 of the 1981 Order provides for free legal aid for anyone returned for trial for an indictable offence but, as amended by Article 29(5) of the said Order, extends the provision of legal aid in the Crown Court.

“29. - (1) Any person appearing or brought before a Crown Court ... shall be entitled to free legal aid and to have solicitor and counsel assigned to him in such manner as may be prescribed by rules made under Article 36, if a criminal aid certificate is granted in respect of him in accordance with the provisions of this Article.

(2) Subject to the provisions of this Article, a criminal aid certificate may be granted in respect of any person-

(a) ...

(b) by the judge of the court before which he appears or is brought, or

(c) ...

and such court or judge is in this Part referred to as “the certifying authority”.”

[12] The 2005 Rules were made in exercise of the powers conferred by Article 36 of the 1981 Order. Rule 3 provides that the 2005 Rules apply for the determination of costs which are payable in respect of work done under a criminal aid certificate

granted under Article 29 of the 1981 Order on or after 4 April 2005. Rule 2 provides definitions unless the context otherwise requires:

"Application Fee" has the meaning given by paragraphs 12 (2), 13 (3), 14 (2) and 16 of Schedule 1.

'Case' means proceedings in the Crown Court against one assisted person –

(a) on one or more counts of a single indictment..."

[13] Claims for costs or fees for work done under a criminal aid certificate must be submitted within 3 months subject to a provision for extension (Rules 7 and 10). The Commission shall allow fees for such work as has been reasonably undertaken and properly done (Rules 8 and 11). The fees so allowed are payable in accordance with Schedule 1 which applies to every case on indictment.

[14] Part 2 of Schedule 1 sets out the basic trial fees and refresher fees payable for contested cases and Part 3 deals with the standard fees payable for guilty pleas. Part 4 deals with fixed and time-based fees. Within Part 4 paragraph 12 deals with cases which are listed for mention only, paragraph 13 deals with various applications including the hearing of a No Bill application and paragraph 14 deals with confiscation hearings. In each case the application fee, if payable, is that fixed by paragraph 19 of Schedule 1. Paragraph 16 deals with fees

"payable to a representative for attending at the following hearings in a case on indictment, when not forming part of the main hearing or hearing for which a fee is provided elsewhere in this Schedule –

...

(a) bail and other applications"

That fee is also calculated by reference to paragraph 19 of Schedule 1.

[15] It is common case that the fees for which provision is made in paragraph 19 do not make any allowance for preparation time and that there is a need to recognise exceptionality if this is the provision which governs the payment of the relevant fee. It also follows from the position adopted by the Commission that if the application for leave to present the Voluntary Bill were successful the applicant would be entitled to fresh legal aid in respect of the hearing of the charges the subject of the indictment. The Commission accepts that the application fee is a stand alone fee.

Consideration

[16] The Commission submitted that the fee in this case was payable pursuant to paragraph 16 of Schedule 1. The appellant submitted that the fee under paragraph 16 was only payable to a representative attending a hearing in a case on indictment. In

order to determine whether this was such a hearing it was necessary to return to the definition of "case" in paragraph 2 of Schedule 1 as set out at paragraph 12 above. In the subject hearing there was no indictment. The application was for leave to present an indictment. Accordingly this was not a hearing in a case on indictment.

[17] Secondly, paragraph 1 (1) of Schedule 1 provides that the Schedule applies to every case on indictment. For the same reason this was not a case on indictment and the Schedule did not make provision for payment in respect of this application for leave to present a Voluntary Bill. Thirdly, paragraphs 12, 13 and 14 of Schedule 1 provided for various types of application and the circumstances in which payment should be made. Paragraph 16 similarly dealt with various ancillary applications in relation to cases on indictment. The applications to which reference is made in paragraph 16 (1) (c) ought to be construed so as to be *eiusdem generis* with bail applications or with applications ancillary to cases on indictment.

[18] Fourthly, it is apparent that no specific consideration was given to the payment of the costs of a defendant resisting an application for leave to present a Voluntary Bill. That is apparent first, because although there is specific provision for a range of different applications, no such provision was made for this application. Further, in answer to the pre-action correspondence and when the applicant applied for leave the case was made on behalf of the Department and the Commission that the original certificate covered the application. It was now conceded that this submission was wrong. The applicant understandably submitted that this was clear evidence that the Commission and the Department had not given any consideration to the payment of fees for such applications when drafting the Rules.

[19] In order to determine the proper interpretation of the provisions it is necessary to start by identifying the object of the legislation and the mischief to which it was directed. The object of the legislative scheme is plain from Article 29 of the 1981 Order. Legal aid shall be provided for those returned for trial for an indictable offence and for those appearing before the Crown Court. There is no dispute that the applicant is a person appearing before the Crown Court and that he therefore, falls within the object of the primary legislation.

[20] Article 36 of the 1981 Order provides the mechanism whereby payment is to be achieved:

"36. - (1) In any case where a criminal aid certificate has been granted in respect of any person, the expenses properly incurred in pursuance of that certificate including the fees of a solicitor and, where counsel has been assigned, of counsel, shall be defrayed out of moneys provided by the Assembly, subject nevertheless to any rules made under this Article.."

The article goes on to make provision for vouching and governance matters.

[21] The Rules made under Article 36 in order to implement Article 29 of the 1981 Order make it plain in Rule 3 that they apply for the determination of costs which are payable in respect of work done under a criminal aid certificate granted under Article 29. This applicant is perfectly entitled to apply for a criminal aid certificate by reason of appearing before the Crown Court resisting the application for leave to present a Voluntary Bill. He, therefore, falls within the object of the legislation. That presents the context, therefore, in which it is necessary to interpret "case" in paragraph 2 of the 2005 Rules, the reference to "Case on Indictment" in Paragraph 16 of Schedule 1 and a reference to "other applications" in paragraph 16 (1) (c).

[22] In our view that context strongly supports the conclusion that the 2005 Rules should be interpreted so as to ensure that those who are entitled to a legal aid certificate pursuant to Article 29 of the 2001 Order are remunerated under those Rules. We consider that this can be achieved by interpreting "indictment" in Rule 2 and paragraph 16 of Schedule 1 as including "proposed indictment". We similarly conclude that it would be contrary to the context of the legislative scheme to interpret "other applications" narrowly and we consider that it should catch any applications for which provision has not otherwise been made. We accept that those who drafted the 2005 Rules do not appear to have contemplated provision for this type of application but we do not consider that this diminishes in any way the force of the interpretive obligation under the legislative scheme.

[23] At the hearing counsel for the respondents accepted that the Rules were deficient in failing to provide for exceptional circumstances including the absence of any provision for preparation time. The Department proposes to engage in a consultative exercise with a view to correcting that deficit but in light of the fact that no steps were taken to deal with this issue until very late in the day we consider it appropriate to declare that in that regard the 2005 Rules are incompatible with the applicant's rights under Article 6 of the European Convention on Human Rights.