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Judgment: approved by the Court for handing down | *Delivered:* **06/03/2015**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Peifer's (James Robert) Application [2015] NIQB 18

IN THE MATTER OF AN APPLICATION BY JAMES ROBERT PEIFER FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] The applicant is James Robert Peifer who is a personal litigant. He wishes to challenge three decisions of the Office of the Industrial Tribunals and the Fair Employment Tribunal made on 28 October 2014, 27 August 2014 and 24 September 2014 refusing his requests for a written transcript of a hearing on each of these dates.

[2] The hearings on the said dates relate to the following:

(i) The final substantive hearing of Case Reference Number IT 1616/05 on 25 February 2013 *(Peifer v BELB and St Louises Comprehensive College* - "the St Louise's case").
(ii) The "alleged final substantive hearing" for case reference IT 1615/05 on 2 September 2013 *(Peifer v SELB and Drumglass High School* - "the Drumglass case").
(iii) The remedy hearing for the Drumglass case on 18 August 2014

Grounds of Challenge

[3] In broad outline the grounds upon which the Applicant challenges the said decisions are that:

(i) He is entitled to obtain the requested transcripts in order to pursue his appeals to the Court of Appeal. The failure to provide the transcripts

also breaches the Applicant's right to public records contrary to the Freedom of Information Act 2000.

(ii) The refusals amount to victimisation as the Applicant's requests satisfy the conditions of the Tribunal Practice Direction dealing with the provision of transcripts. The relevant Chairmen have offered no reasons, or trivial reasons, for their refusals.

(iii) The decisions on whether or not to provide the transcripts should not have been made by the same Chairmen whose decisions are under challenge on appeal in circumstances in which "the Practice Direction does not state that a Chairman, whose decision or conduct is being challenged as deliberately perverse, should be the same Chairman who judges whether the public record of such related proceedings should be made available".

Practice Direction

[4] Transcripts of hearings are considered against the criteria set out in the Practice Direction dated 7 May 2012. The Practice Direction states:

> "Transcripts of Proceedings
>
> When a transcript may be provided
>
> 1. The Chairman may direct that a transcript of a Hearing at Killymeal House be supplied if satisfied that:-
>
> (a) a recording of the relevant proceedings is in existence.
>
> (b) the party making the application;
>
> (i) has lodged an appeal to the Court of Appeal or has lodged an application for judicial review to the High Court; or
>
> (ii) is a Respondent to such an appeal or judicial review application; and
>
> (c) the transcript is necessary for the purpose of challenging or defending the decision in the Court of Appeal or High Court.
>
> Any transcript of proceedings directed to be supplied will be restricted to that part of the

proceedings necessary for the purposes of such challenge.

How to apply

2. The party making the application must apply in writing to the Secretary to the Tribunals and must provide all of the following information:-

(i) full details of the case, including names of the parties, dates and times of hearings and presiding Chairmen; and

(ii) detailed reasons for making the application: in other words why is the transcript necessary for the purpose of challenging or defending the decision in the Court of Appeal or High Court.

Fee for Transcript

If a request is granted there will be a fee. The fee will be the full actual cost of the transcript charged by Lawscript NI plus a nominal £25 administration fee."

Discussion

[5] I accept the Respondent's submission that there is no automatic entitlement to obtain transcripts and that the Practice Direction sets out a reasonable policy as to the circumstances in which transcripts should be provided.

[6] The Applicant's reliance on the Freedom of Information Act 2000 ("the 2000 Act") is misconceived since it is clear that the information requested is absolutely exempt from disclosure under section 32 of the 2000 Act.

[7] Section 32 provides:

Court records, etc.

32. -(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in-

(a) any document filed with, or otherwise placed in the custody of, a Court for the purposes of proceedings in a particular cause or matter;

(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter; or

(c) any document created by –

(i) a Court, or

(ii) a member of the administrative staff of a Court, for the purposes of proceedings in a particular cause or matter.

(2) Information held by a public authority is exempt information if it is held only by virtue of being contained in -

(a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration; or

(b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of this section.

(4) In this section -

(a) "Court" includes any Tribunal or body exercising the judicial power of the State;

(b) "proceedings in a particular cause or matter" includes any investigation under Part 1 of the Coroners and Justice Act 2009, any inquest under the Coroners Act (Northern Ireland) 1959 and any post-mortem examination;

(c) "inquiry" means any inquiry or hearing held under any provision contained in, or made under, an enactment; and

(d) "arbitration" means any arbitration to which Part I of the Arbitration Act 1996 applies.

[8] Section 2 of the Act confirms that section 32 confers absolute exemption from disclosure:

> *Effect of the exemptions in Part II.*
>
> 2. - (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either -
>
> (a) the provision confers absolute exemption; or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.
>
> (2)In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that -
>
> (a) the information is exempt information by virtue of a provision conferring absolute exemption; or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
>
> (3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption-
>
> (a) section 21;
> (b) section 23;
> (c) section 32;
> (d) …

[9] That digital recordings and official transcripts are exempt under section 32 of the Act is further confirmed under the ICO guidance note dated 10 February 2009. The same guidance also confirms the fact that rules of Court make provision for obtaining a transcript for a fee. In the case of Tribunals the policy in respect of transcripts is set out in the Practice Direction quoted above.

[10] I accept the Respondent's submission that the Applicant's requests for transcripts were dealt with fairly and on their own merits and that the decisions were taken on the same principles and in the same way that any similar applications

would have been taken i.e. against the background of the relevant policy as set out in the Practice Direction.

[11] It is impossible to gainsay the Respondent's submission that in each instance the Applicant failed to establish that a transcript was necessary for the purpose of challenging the impugned decisions in the Court of Appeal. There is insurmountable force in their related submission that each impugned decision was not only reasonable but, having regard to the content of the relevant requests and the apparent reasons for the requests, inevitable.

[12] I note that in his affidavit the Applicant avers that since 2007 he has made his own digital recordings of hearings including the hearings in respect of which he seeks transcripts.

The first refusal challenged

[13] The Respondent sets out its reasons for the refusal of this request in correspondence dated 31 July 2013 which records:

> "However, having considered the terms of the Notice of Appeal, as amended, in light of your application for a transcript of the proceedings and/or a copy of the digital recording of the proceedings relating, in particular, to the acceptance of the statistical evidence by the Respondent's representative, the Chairman is not satisfied, having regard to the terms of the overriding objective, that you have shown such a transcript or digital recording is necessary for the purpose of your challenging the Tribunal's decision in the Court of Appeal. In doing so the Chairman has taken into account that the Tribunal has set out, in Paragraph 2 of the decision, its detailed findings of fact on the matters, the subject-matter of your appeal, and in particular, those set out in Paragraphs 6 and 7 thereof. In particular, in paragraph 2.17 of the decision, the Tribunal expressly referred to the acceptance by the Respondent's representative of the statistical evidence produced by you. In such circumstances the Chairman cannot see any basis upon which to access to a transcript and or digital recording of the proceedings could assist your challenge to the Tribunal's decision."

That decision was not challenged but the application for a transcript was subsequently renewed the next year at which time the Respondent in refusing the application confirmed inter alia:

> "Secondly, having reconsidered your application, and after taking into account the grounds of appeal in this matter, as set out in your Notice of Appeal, he can see no grounds to alter his decision, as set out in the letter of 31 July 2013. He is not satisfied that your letter of 22 September 2014 has set out any new grounds for the application, which had not previously been considered by him. Therefore, he is not satisfied you have shown a written transcript, as requested by you, is necessary for the purpose of your challenge of the decision of the Tribunal in the Court of Appeal or that it could assist you in any relevant way in your said challenge. In particular, in paragraph 2.17 of the Tribunal's decision, as previously stated in the letter of 31 July 2013, the Tribunal has expressly referred in some detail, to the acceptance by the Respondent's representative of the statistical evidence produced by you; the acceptance of which is, in essence, the subject-matter of your said application for a written transcript."

This decision sets out clearly, by reference to the Practice Direction, that the issue is necessity which has not been established. This decision is in my judgement unimpeachable and no arguable public law ground to challenge it has been established.

The second and third refusals challenged

[14] The Respondent considered these requests together. With respect to the "alleged" substantive hearing the Respondent submitted that the first semblance of an indication as to why a transcript of same was sought appears in a letter of 31 August 2014 in which the Applicant states:

> "… I believe no substantive hearing of the case was ever conducted. For this reason, and many others I lodged a 21 Oct 13 appeal … I now seek confirmation from the Tribunal. Does the Tribunal possess an official digital record of the alleged 2 Sep 13 hearing? If so, I again request that the Tribunal make this readily available …"

[15] The Respondent referred to an e-mail of 17 August 2014 in which the Applicant again asserted that a relevant ground of appeal is that "no hearing had taken place" and suggested that the Applicant wished to make the case on appeal that there was no substantive hearing of his claim in that instance. The Respondent submitted that such a transcript is unnecessary because the Respondent replied long ago, on 27 August 2014 confirming that there had been no substantive hearing and explaining why (on the basis of an admission of liability). As stated in that

correspondence "*In those circumstances a transcript is not considered relevant, in light of the decision issued on 9 September 2014*". As the Respondent observed "the transcript is not relevant never mind necessary". No arguable public law ground has been established to impugn this decision. That refusal is rational and unimpeachable. That the Practice Direction was considered relevant and taken into account is evident from the fact that a copy was in fact provided to the Applicant for his consideration in this regard in relation to this request by letter dated 13 August 2014.

[16] The Applicant advanced no coherent argument to the tribunal as to why a transcript was necessary to advance any of the grounds of appeal relied upon. That remained the case before this court.

[17] Furthermore, the Applicant has failed to make any reasonable case that it is necessary for the purposes of any appeal that he obtains any transcript from the Respondent, additional to the transcripts and recordings he already has.

[18] Finally, the Applicant submitted that decisions on whether or not to provide the transcripts should not have been made by the same Chairmen whose decisions are under challenge on appeal in circumstances in which "the Practice Direction does not state that a Chairman, whose decision or conduct is being challenged as deliberately perverse, should be the same Chairman who judges whether the public record of such related proceedings should be made available".

[19] Contrary to the submission of the Applicant it is plainly envisaged by the Practice Direction that the Chairman who presided over the relevant hearing will ordinarily make the decision on provision of a transcript. This makes sense since, as the Respondent argued, the presiding Chairman will be best placed to appreciate and weigh an applicant's contentions as to why a transcript is necessary for the purposes of any appeal. Nor is there is anything inherently unreasonable or unusual about making applications to the tribunal whose decision is under appeal. For example various applications for leave to appeal to the Court of Appeal from High Court are made in the first instance to the High Court Judge who made the impugned decision. Likewise the Court of Appeal on the civil side decides in the first instance whether to grant leave to appeal to the Supreme Court. On the criminal side the Court of Appeal decides whether a point of law of public importance is involved in its decision and if it is whether to grant leave to the Supreme Court.

[20] The impugned decisions refusing transcripts were not only lawful and reasonable but inevitable. Leave is refused and the application dismissed.