Neutral Citation No [2013] NIQB 107

Ref:	**TRE9025**

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

Delivered:	**24/10/13**

IN THE HIGH COURT OF JUSTICE IN Northern Ireland

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Siuksteris (Arturas)'s Application [2013] NIQB 107

IN THE MATTER OF AN APPLICATION BY ARTURAS SIUKSTERIS FOR JUDICIAL REVIEW

AND

AND IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND PRISON SERVICE MADE ON 7 NOVEMBER 2012

TREACY J

Introduction

1. Following a '*Salem*' hearing I earlier dismissed the applicant's challenge to the Respondent's decision refusing to admit the applicant to Foyleview at HMP Magilligan. The application had been rendered academic as the Respondent changed its course and decided to admit him. Against that background I held that there were no public interest grounds to proceed to a hearing. The applicant however still sought his costs which was resisted by the Respondent who asserted that its change of course was a decision arrived at 'entirely independently' of these proceedings. I directed the parties to lodge skeleton arguments on the issue of costs. For the reasons which follow the applicant is entitled to an order of costs against the respondent.

Order 53 Statement

2. By Amended Order 53 Statement served on 21 December 2012 the applicant relied on the following additional grounds:

> "3.(b) The conclusions reached in the decision made on 7 November 2012 that 'due to the deportation order, area of low supervision deemed unsuitable.

Behaviour with the prison. Attitude towards the offence. Attitude towards offence within the prison. Attitude to incident of self-harm. Increased likelihood of attempting to abscond' are unreasonable, irrational and *ultra vires*. In particular:

(i) the decision-maker misdirected himself about an established and relevant fact: there is no deportation order. The Applicant was served with a deportation decision and that decision is under appeal before the Immigration and Asylum Chamber (First-tier Tribunal).

(ii) the decision-maker failed to consider the application closely enough on its merits and failed to engage in reasonable inquiry or investigation so that he was sufficiently informed about the case to make a rational decision.

(iii) the decision was disproportionate.

(iv) Contrary to the Applicant's legitimate expectation, the decision-maker failed to set out the legal basis for the decision in the reasons for refusal."

[3] The general principles to be applied to the issue of costs where the judicial review is being discontinued were considered in R (Boxall) v London Borough Waltham Forest (2001) 4 CCL Rep 258 [see para 22]. The Boxall principles must now be read in light of the judgment in R (on the application of Bahta) and others v Secretary of State for the Home Department [2011] EWCA Civ 895 [see paras 59-61]. The Bahta judgment was applied by the Court in M v Croydon London Borough Council [2012] 3 All ER 1237 and McTaggart's Application [2012] NIQB 79.

[4] The impugned decision was the refusal to transfer the Applicant to Foyleview made on 7 November 2012. The grounds of challenge in the Amended Order 53 Statement were based on EU principles of law and on principles of Wednesbury unreasonableness and irrationality. The Respondent maintained a defence of the judicial review but following the determination of the Immigration and Asylum Chamber by which the Applicant succeeded in his appeal against deportation on EU law and human rights grounds, it changed course and decided to admit the Applicant to Foyleview.

[5] The Applicant has been successful in achieving his goal in bringing the proceedings in that he has been transferred to Foyleview. Had the substantive issues been fought to a conclusion, the Applicant's arguments in the amended Order 53 Statement had real merit. The reasons for refusal of transfer to Foyleview set out

in the decision of 7 November 2012 were flawed. One of the reasons given for this decision was the 'deportation order'. But there was no such order. As Ms Connolly points out in her written argument the misrepresentation of the legal status of the deportation determination was a material error because of the distinction between the actual decision (a deportation decision) and a deportation order. There was no deportation order (final in nature and without a right of appeal); there was a deportation decision which the Appellant was in the process of appealing. There is force in Ms Connolly's submission that there was a lack of evidence to support the concern about absconding. She relied on the Respondent's own evidence as contradicting such a finding in particular the letter dated 2 October 2012 prepared by the Respondent (General Office at HMP Magilligan), that "Mr Siuksteris has been assessed as an ACE of 9 which means that he has been assessed as low risk of re-offending & has no risk of serious harm. He is currently a Category C prisoner which poses a low security risk and is an enhanced regime prisoner."

[6] I consider in light of the above that it is appropriate to make an order for costs against the respondent.