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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Thompson's (Ciara) Application [2010] NIQB 120

IN THE MATTER OF AN APPLICATION BY CIARA PATRICIA THOMPSON FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND (PLANNING SERVICE)

TREACY J

INTRODUCTION

[1] On 4 November 2008 the applicant was granted leave to apply for judicial review of a planning permission granted for a housing scheme at lands at 45 Bryansford Village.

[2] At a review hearing on 15 June 2010 Counsel on behalf of the applicant indicated that she may not wish to proceed and the matter was then adjourned for one week to ascertain whether the applicant wished to proceed. When the matter came before the Court on 23 June 2010 the Court was informed that the applicant wished to proceed and that the solicitor for the applicant was concerned about whether or not there were sufficient funds and that it was likely that there would be an application to come off record. On the same date the Court laid down a timetable for the future progress of the case including its listing for two days commencing 2 November 2010.

[3] By order dated 8 September 2010 the applicant's solicitors came off record and the Court ordered that the case be listed for further mention on 22 September 2010.

[4] The applicant did not appear on that date and on subsequent occasions when the matter was placed in the list on 6 October and 18 October. The Court was not informed that she would not be appearing and no proper explanation has been furnished for her non-appearance. Aside from the contemptuous discourtesy to the Court management of a case is very difficult when the unrepresented personal litigant does not even bother to appear. It is hardly consistent with a determination to proceed either at all or in a manner which fairly respects the interests of other parties and the Court. Indeed, her repeated non-appearance might be thought to be more consistent with the earlier indication that she may not wish to proceed. Given that she secured a Protective Costs Order ("PCO") on the basis that there was a matter of public interest to be litigated she has demonstrated a distinct lack of enthusiasm for vindicating it.

[5] Following the applicant's non appearance on 22 September 2010 the Court wrote to her in the following terms:

> **"Dear Ms Thompson**
>
> **YOUR APPLICATION FOR JUDICIAL REVIEW**
>
> **I understand from your former solicitor that he wrote to you to tell you that your application for Judicial Review was listed for mention in the High Court on Wednesday, 22 September 2010 to enable you to tell the Court what you intended to do with your application following your former solicitors having obtained an Order permitting them to cease representing you. When the case was called this morning Court Service staff arranged for you to be paged but you did not appear nor did anyone appear on your behalf.**
>
> **The Judge therefore listed the case for mention again on Wednesday, 6 October at 9.30 am at the Royal Courts of Justice, Chichester Street, Belfast. He directed that I write to you to tell you that the case has been so listed and to tell you that if you do not attend and if no one attends on your behalf he will be minded to dismiss the case. The Judge has also asked that you write to the Court to let the Court know what you intend to do with the case.**
>
> **Yours etc"**

[6] In her email of 5 October the applicant furnished her new address in Newcastle (she had resided at a housing development in Bryansford close to the impugned development at the time of the grant of leave). In this email she made a number of points:

(i) That due to the excessive potential costs involved she intended to progress the case on a pro bono basis or failing that, if the Court permitted, on a "self representation basis using a friend;"

(ii) That she had obtained pro bono representation using a Dublin based barrister specialising in environmental and European law who unfortunately died on 31 August 2010 and that she was not informed until sometime later;

(iii) Requesting the Court to allow her time to locate another pro bono legal representative;

(iv) Pointing out that due to unpaid legal fees to her former solicitor he would not release the case papers;

(v) That she was hopeful of again obtaining pro bono representation and requesting that the Court accept her request to make a submission for a review of the PCO.

[7] The reference to the PCO was a reference to the earlier judgment of the Lord Chief Justice in March 2010 where, in light of the issue of general public importance therein identified, he ordered that any award of costs made against the applicant in respect of the hearing at first instance should not exceed £10,000.

[8] There were two further emails received on 18 October reiterating inter alia that she had not yet received the case papers from her previous solicitor, apologising for her non appearance in Court ("I simply could not appear") and requesting that her father be allowed to speak on her behalf in Court as she would be "completely unable" to speak for herself because she was "too shy and tongue tied". The issue of the PCO was raised again and on 20 October 2010 she furnished written submissions with reference to appropriate case law and requesting that the appropriate PCO level should be zero. On 21 October a further email was sent in which she applied for rights of audience for her father as her representative or alternatively, if refused, that her father could act as a *McKenzie Friend* ("MF"). The Court sat on Friday 22 October when the applicant was present together with her father.

Application for Leave of the Court for Representation by Her Father

[9] Representation in the High Court is normally by Counsel, instructed by a Solicitor, or self representation as a personal litigant.

[10] Section 106 of the Judicature Act (NI) 1978 governs the right of audience in the High Court and Court of Appeal and the circumstances in which representation other than by Counsel or as a personal litigant can be permitted. Section 106 provides:

> **"106. Rights of audience in the High Court and Court of Appeal**
> **(1) A solicitor of the Supreme Court shall have a right of audience in any proceedings in the High Court or the Court of Appeal respecting—**
> **(a) any matter relating to individual voluntary arrangements or bankruptcy under Parts VIII to X of the Insolvency (Northern Ireland) Order 1989;**
> **(b) any matter relating to company voluntary arrangements, receivership or the winding up of a company under Parts II and IV to VII of that Order of 1989**
> **(c) any matter to be heard in chambers or which is adjourned from chambers into court; or**
> **(d) any matter in which counsel already instructed is for any reason unable to appear,**
> **without being required to instruct counsel, or other counsel as the case may be, and may act and plead therein as counsel might have acted or pleaded.**
> **(2) Where in any proceedings in the High Court or the Court of Appeal (other than proceedings to which subsection (1) relates) a solicitor has had no reasonable opportunity, having regard to all the circumstances, of adequately instructing counsel, the court, if of opinion that it is desirable in the interests of justice to do so, may grant the solicitor a right of audience as ample as that which counsel would have enjoyed.**
> **(3) A solicitor of the Supreme Court shall have a right of audience in any enquiries or proceedings before a statutory officer sitting in the exercise of his jurisdiction whether original or delegated; and any such officer may in his discretion permit such right of audience to be enjoyed by an experienced solicitor's clerk acting on behalf of his principal.**
> **(4) Nothing in this section shall take away or affect the inherent powers of any court or judge to confer a right of audience."**

[11] The applicant's application for representation by her father is thus governed by the Court's inherent powers to grant a right of audience as recognised by Section 106(4).

[12] The question arises as to the principles to be applied when that power is sought to be invoked. Rights of audience to represent a party before the Court of Judicature are reserved for Counsel and, in certain limited circumstances, Solicitors. Those limited circumstances are set out in Section 106 and were described by Kerr LCJ in ***R v Bothwell*** **[2006] NICA 35** at para 6 as for "emergency situations". In ***Bothwell*** the Court of Appeal refused the application of Solicitor Advocates to be conferred rights of audience in the criminal appeal which was under consideration in that case.

[13] In the same paragraph he stated:

> **"... Although section 106(4) preserves the right of the court to have recourse to its inherent power to confer a right of audience, it seems to us that this power should be exercised with the earlier subsections in mind. ..."**.

[14] And at para 8 he stated:

> **"... It could not be correct that, as a matter of general practice, restrictions on rights expressly conferred by the statute should be undermined, or wholly dispensed with simply by the exercise of the inherent power."**

[15] And at para 16 he said:

> **"Besides this, the interests of justice require that there be a system of ensuring that those who present cases, particularly in criminal courts where the liberty of the subject is at stake, are sufficiently competent and qualified to do so. Those interests cannot be overridden by the wish of an individual to be represented by someone who does not fulfil the eligibility requirements for advocates in the superior courts in this jurisdiction."**[1]

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[1] Para.19 of the guidance issued by Lord Neuberger MR and Sir Nicholas Wall **(Practice Note [2010] 1 WLR 1881)** in respect of McKenzie Friends makes a similar point:
"19. The Court should be slow to grant any application from a litigant for a right of audience or a right to conduct litigation to any lay person, including a McKenzie friend. This is because a person exercising such rights must ordinarily be properly trained, be under professional discipline (including an obligation to ensure against liability for negligence) and be subject to an overriding

[16] Whilst the ***Bothwell*** case involved a different factual context and was a criminal case it nonetheless provides a helpful analysis as to the nature of the inherent jurisdiction. Relying upon the principle in ***Braithwaite*** at paras 18 and 22 of his judgment Kerr LCJ held that the circumstances in which the Court should consider the exercise of an inherent power (where statute otherwise appears to provide for this situation) should be where it is satisfied that justice requires its invocation. However, as appears from paras 6 and 8 of the judgment set out above the power contained in Section 106(4) was to be "exercised with the earlier sub-sections in mind" and in a manner that did not undermine the statutory restrictions.

[17] And whilst ultimately as appears from para 22 of the judgment the question whether the Court should exercise its inherent jurisdiction to confer rights of audience "must be answered primarily by considering whether it is necessary in the interests of justice that this should be done" the interest of justice (per para 16) "require" that there be a system of ensuring that those who present cases are sufficiently competent and qualified to do so.

[18] The Court should be slow to overturn the specific statutory regime for rights of audience set out in Section 106 by the use of the inherent jurisdiction unless it is clearly apparent that the interests of justice require that to be done. I accept that in order to be satisfied that one lay person should be given rights of audience to represent another lay person before the Court of Judicature that the Court would require very compelling evidence that this was necessary. Such a case has not been made out.

[19] The interests of justice (identified in para 16 of the judgment in ***Bothwell***) did not extend to permit the solicitor to appear in a criminal case before the Court of Judicature on his client's behalf. It might be thought somewhat incongruous if the inherent power of the Court was exercised to confer rights of audience upon a *lay* person. Whilst one cannot discount some exceptional case which, in the interests of justice might require such an outcome, it will ordinarily not be permissible. This is because it would not be consistent with the intention of Parliament expressed in the restrictions enshrined in Section 106 and also because it would undermine the longstanding system regarding rights of audience which have served so well for so long.

[20] The application is based on the applicant's contention that she would not be able to speak for herself because she would be too shy and tongue tied. This case was first expressly made by the email of 18 October 2010. Although as early as 23 June 2010 it had been flagged up that the applicant's solicitors might come off record this was the first occasion on which she claimed that she would be unable to represent herself because she was too shy and tongue tied. In her earlier email of 5

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duty to the Court. These requirements are necessary for the protection of all parties to litigation and are *essential* to the proper administration of justice."

October 2010 she had indicated that she intended to progress the case on a pro bono basis preferably or failing that on a "self representation basis using a friend". She refers in the same email to having obtained "pro bono representation" from Stephen Devaney (deceased as of 31 August 2010) who is described in an email of 18 October 2001 as a qualified barrister and architect. The email of 5 October referring to Mr Devaney was, I believe, the first occasion on which his role was adverted to by the applicant.

[21] The email of 18 October refers to the history of his serious illness from late June and his death from aggressive liver cancer on 31 August. The extent of his commitment to the case was unknown to Mr Devaney's companion as was the date of the impending case. The email also refers to Arthur Thompson, the applicant's father, having phoned on 13 September 2010 "to make arrangements" with Mr Devaney for the upcoming court case and being unaware of his recent and sudden death.

[22] If the contents of this email are correct then it suggests that Mr Devaney was playing a role at a time when Counsel and Solicitors were both instructed and retained in the case. His role had never been previously mentioned. Furthermore, if it had ever been the intention of the applicant to be "represented" in the High Court by someone other than Counsel no such application was ever made and had it been made it is almost inevitable that it too would have foundered as a result of the provisions of Section 106 of the Judicature Act and the established case law.

[23] The content of the various emails ostensibly written by the applicant are clear and well expressed. Moreover, I had the benefit of listening to and observing the applicant as she made some submissions to the Court on Friday 22 October 2010. Whilst I got the distinct impression that she would have preferred not to be in Court and appeared to be under the influence of her father I did not consider that she was too shy or tongue tied or would have been unable to represent herself. Her demeanour and presentation in Court and the content and source of the emails convey a very clear impression that this applicant is a conduit for her father who she notes in her email of 21 October had been involved in many major developments during his career and was not anti-development. The contention that she would be unable to represent herself because she would be too shy and/or tongue tied is, in my view, in the light of what I have previously said, too slender a basis to justify departing from the long standing system regarding rights of audience before the Court of Judicature now enshrined in Section 106 of the Judicature Act. Shyness or getting tongue tied are nothing that the Court has not seen before in the context of personal litigants who can and in any event will be assisted by the Court in being put at ease insofar as this is possible. Moreover, judicial review, unlike other cases which will require the examination and cross-examination of witnesses, involves a considerable amount of written submission in the form of skeleton arguments. An applicant therefore has ample opportunity in a calm and reflective setting, having studied the agreed papers in detail, to make such legal submissions as they consider appropriate. In this endeavour they may of course be assisted by whoever is

prepared to give them assistance. By the time the judicial review comes before the Court both sides will have exchanged their written skeleton arguments and both sides should be fully appraised as to what the respective arguments are and the respective strengths and weaknesses of each other's case. The hearing before the Court gives both parties the opportunity to develop and supplement their written submissions.

[24] Given the clarity of expression and knowledge of appropriate case law developed in the emails (even without the benefit of Mr Devaney) there is little reason to suppose that the applicant (and her father) would not be up to the task of developing written submissions. This application for judicial review was brought some time ago and until very recently the applicant had the benefit of very experienced solicitors and Counsel and apparently the benefit of advice from Mr Devaney. Any legal arguments in her favour should therefore be well known to her and, in any event, the respondent's case has already been set out in some detail in writing during the course of the PCO application. For all of these reasons the applicant should be well versed in the issues arising in this judicial review and she should be reasonably well placed to be in position to make sufficient written representations and to develop and supplement them orally as required. Moreover, the Court will assist the applicant as far as possible in presenting her case and in a manner which takes due account of the inherent stress for a personal litigant. The appearance of litigants in person is not a recent phenomenon and indeed in the last decade for a variety of reasons there has been a significant increase in the number of litigants in person. Difficulties in communication are issues that the Court has grappled with frequently in the context of personal litigants.

McKenzie Friend

[25] The applicant has, in the alternative, sought to have her father appointed a McKenzie friend and "allow a short time to consider if *we* are able to progress the case in this way".

[26] The right to a McKenzie friend has long been recognised – see for example ***R v Leicester City Justices*** **[1991] 3 WLR 368** and ***Valentine on the Supreme Court*** at para 3.46.

[27] As the English practice note states, litigants have the right to have reasonable assistance from a lay person, sometimes called a McKenzie friend ("MF"). Litigants assisted by MFs remain litigants in person. MFs have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation. What they may do is:

(i) provide moral support for litigants;
(ii) take notes;
(iii) help with case papers;
(iv) *quietly* give advice on any aspect of the conduct of the case.

What they may **not** do is:

(i) act as the litigant's agent in relation to the proceedings;
(ii) manage litigants' cases outside Court, for example by signing Court documents; or
(iii) address the Court, make oral submissions or examine witnesses.

[28] Para 6 of the guidance makes it clear that a litigant who wishes to exercise this right should inform the Judge as soon as possible indicating who the MF will be. The proposed MF should produce a short *Curriculum Vitae* or other *statement* setting out relevant experience, confirming that he or she has no interest in the case and understands the MFs role and the duty of confidentiality.

[29] Para 7 provides that if the Court considers that there might be grounds for circumscribing the right to receive such assistance or a party objects to the presence of or assistance given by MF that it is not for the litigant to justify the exercise of the right. It is for the Court or the objecting party to provide sufficient reasons why the litigant should not receive such assistance. When considering whether to circumscribe the right to assistance or refuse a MF permission to attend the right to a fair trial is engaged. The matter must be considered carefully and the litigant should be given a reasonable opportunity to argue the point. The proposed MF should not be excluded from that hearing and should normally be allowed to help the litigant.

[30] Para 13 of the guidance provides that a litigant may be denied the assistance of a MF because his provision might undermine or has undermined the efficient administration of justice. Examples of circumstances where this might arise are:

(i) The assistance is being provided for an improper purpose;
(ii) The assistance is unreasonable in nature or degree;
(iii) The MF is subject to a civil proceedings order or a civil restraint order;
(iv) The MF is using the litigant as a puppet;
(v) The MF is directly or indirectly conducting the litigation;
(vi) The Court is not satisfied that the MF fully understands the duty of confidentiality.

[31] The Notice Party has raised a large number of many pertinent questions about the applicant's father bearing upon, inter alia, the appropriateness of him discharging this role. These matters have not been addressed by the applicant or her father on affidavit or otherwise.

[32] So far as the use of MFs is concerned the practice direction embodies good practice which should, all else being equal, be followed in this jurisdiction. The applicant was put on notice about the practice direction by letter from the Court Office. Despite the requirement to furnish a Curriculum Vitae or statement providing the information above referred to nothing of that nature was furnished by

the applicant or her father. This was not done despite the fact that the affidavit from Mr Carville states that the notice party believes the applicant's father is a major player in groups trying to prevent development in Newcastle. Notwithstanding the guidance and the issues raised in Mr Carville's affidavit the Court has not been furnished with any document by the applicant or her father in support of the MF application. The applicant had every opportunity to furnish such material and has failed to do so. In light of the concerns that have been raised and the failure to fully appraise the Court in the manner set out above I am not prepared to accede to the applicant's application.

Post-script

[33] The applicant made oral submissions in support of her MF application and the respondent and Notice Party responded. It was only when the Court invited the applicant to respond to their submissions that it transpired that she had, without notice to anyone (including the Court) absented herself from the hearing. This led to some disruption of the Court proceedings.

[34] When I was satisfied that the submissions process was complete I indicated to the parties that I would not be acceding to the application by the applicant to be represented by her father or for him to be permitted to act as a MF and said that I would give my written reasons at a later date.

[35] Following this there was an exchange between the applicant's father and the Court Clerk which gave rise to the letter dated 26 October 2010 which was in the following terms:

> **Dear Madam,**
>
> **Re: In the matter of application by Ciara Patricia Thompson for Judicial Review**
>
> **This case was listed for mention today before The Honourable Mr Justice Treacy in the Judicial Review Court in order for the Court to make a ruling in relation to your application for your father to represent you in your upcoming Judicial Review.**
>
> **Mr Justice Treacy refused your application and also refused your secondary application for your father to act as a McKenzie friend. After the Judge gave his ruling he allowed you sometime to consider your position.**
>
> **You failed to return to the Court; however your father returned to Court and spoke to the clerk. He**

informed the clerk that "she is going to proceed with the case, she can't give you a date" Whenever the Judge attempted to address your father he simply replied "that's what she told me to say" and left the Court.

The Court would like to take this opportunity to confirm that this case is listed for full hearing on the 2nd & 3rd November 2010.

Yours etc"

Protective Costs Order

[36] The applicant applied to review the PCO. I see no basis whatsoever in any of the written submissions advanced by the applicant to alter the order that was made by the Lord Chief Justice. In my view, there has been no material change in circumstances which would justify interfering with the order which has already been made even assuming that I had the power to do so.

[37] Moreover, I do not understand the assertion in the email of 18 October 2010 that the basis for the original order was that she could afford legal representation. It is quite clear in para 3 of the judgment that the Lord Chief Justice recorded that the applicant had a low income and was financially eligible for legal aid and indeed that this was a factor in the decision that she was the one who ought to bring these proceedings. In fact her exposure to legal costs has diminished since the time the PCO was made since she proposed to appear with a pro bono representative or self represented by her friend. Whereas at the time of the original PCO she was represented by Solicitor and Counsel.

[38] The Court was referred to the recent Court of Appeal decision in ***R (Garner) v Elmbridge Borough Council*** **[2010] EWCA Civ 1006** in which the Court held that the ***Corner House***[2] conditions must be modified so as to ensure compliance with relevant EU directives in environmental cases. But since the Lord Chief Justice in his judgment, even without the benefit of that decision, decided to make such an order it does not appear that this case is to the point.

Conclusion

[39] Accordingly, for the above reasons, the Court refuses the application of the applicant to be represented by her father or to be permitted to have his assistance as a so-called McKenzie friend. Furthermore, the application that the Court should alter the PCO is refused.

[2] [2005] EWCA Civ 192