Neutral Citation No: [2023] NIKB 3 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **COL12039** *ICOS No:* **22/09361 22/19951** *Delivered:* **19/01/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF:

(1) EDWARD ROONEY
(2) JR181(3)
(3) BELFAST CITY COUNCIL

FOR JUDICIAL REVIEW

and

THE DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS "DEFRA"

and

DERRY CITY AND STRABANE DISTRICT COUNCIL
Notice Parties

AND IN THE MATTER OF THE DECISION MADE BY THE MINISTER FOR THE DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS ON 2 FEBRUARY 2022

AND IN THE MATTER OF THE NORTHERN IRELAND PROTOCOL

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Ms Karen Quinlivan KC with Mr Conan Fegan BL (instructed by Paul Campbell, Solicitors) for the Applicant (Edward Rooney)
Mr Ronan Lavery KC with Mr Colm Fegan BL (instructed by McIvor Farrell, Solicitors) for the Applicant (JR181(3))
Mr Stewart Beattie KC with Professor Gordon Anthony BL (instructed by Belfast City Council Legal Services) for the Applicant (Belfast City Council)
Mr John Larkin KC with Mr Aidan Sands BL (instructed by the Departmental Solicitor's Office) for the Respondent
Mr Gregory Jones KC with Mr Kevin Morgan BL (instructed by Philip Kingston, Solicitor) for the Notice Party (Derry & Strabane District Council)

Dr Tony McGleenan KC with Mr Philip McAteer BL (instructed by the Crown Solicitor's Office) for the Notice Party (DEFRA)

COSTS RULING

COLTON J

[1] The court gave judgment in this matter on 15 December 2022. As appears from the written judgment delivered on that date each of the applicants was successful in their applications for judicial review against the respondent. They achieved the relief they sought.

[2] After the judgment was delivered each of the successful applicants sought an order for costs against the respondent. The court acceded to the request from the respondent that the parties should file written submissions on the issue of costs.

[3] The court has now received those written submissions.

General principles

[4] In general terms the court has a broad discretion in relation to the award of costs in applications for judicial review.

[5] The powers of the High Court to deal with costs of and incidental to proceedings are set out in the Rules of the Supreme Court and, primarily, in Order 62. The general rule is that the unsuccessful party should normally pay the costs of the successful party. Order 62 rule 3(3) provides:

> "(3) If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

[6] In *Re YPK & Ors' Applications* [2018] NIQB 1 McCloskey J carried out a detailed review of the authorities on costs in judicial review proceedings and set out the relevant principles in detail at para [5] of his judgment as follows:

> "(1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
> (b) the amount of those costs; and
> (c) when they are to be paid.

(2) If the court decides to make an order about costs -

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
(b) the court may make a different order.

….

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including -

(a) the conduct of all the parties;
(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and …

(5) The conduct of the parties includes -

(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;
(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

[7] There are no particular principles applicable to costs in judicial review proceedings. In *YPK* McCloskey J noted with approval the guidance provided by the English Court of Appeal in *M v London Borough of Croydon* [2012] EWCA Civ 595 as to how the general costs principles are to be applied in the context of judicial review. In that judgment the following guiding principles were set out:

"(i) Where a claimant has been wholly successful whether following a contested hearing or via settlement `… it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary': see [61]."

[8] As a general principle therefore, having succeeded fully in their applications the applicants are entitled to an order for costs against the respondent unless there is some good reason to the contrary.

[9] In this regard Mr Larkin on behalf the respondent asked the court to take into account three relevant factors which point to "a good reason to the contrary" namely:

(a) the extent to which the parties followed the pre-action protocol;

(b) the manner in which the litigation was conducted and, in particular, the reasonableness of more than one applicant advancing the same argument in public law proceedings;

(c) the overriding objective dealing with cases in a manner that is just and proportionate.

[10] In relation to the pre-action stage (one of the relevant factors identified by McCloskey J in *YPK*) the judicial review Practice Direction 3/2018 provides that a pre-action protocol letter "will be used in every case."

[11] In these applications the applicant Rooney did send a pre-action protocol letter on Wednesday 2 February 2022. The complaint on behalf of the respondent was that he was given insufficient time to reply.

[12] It is argued that had the pre-action process been followed in the normal way, and there was sufficient time and space to allow the parties to co-operate in an orderly manner in the litigation process, it is likely that a lead applicant could have been identified to bring the challenge.

[13] Part A para [3] of the Practice Direction provides:

> "The duty of strict compliance with the PAP applies in every case, except in the most urgent or compelling circumstances and irrespective of whether the proposed Respondent is legally empowered to revoke or alter the impugned decision or action. Judicial direction should be promptly and proactively sought in every such case." (Emphasis added)

[14] It will be clear from the judgment that the circumstances of this case required the applicants to act with urgency.

[15] The decision under challenge in these applications was issued on 2 February 2022. The decision entered the public domain when the respondent held a press conference at 5.30pm on Wednesday 2 February 2022 at which he stated publicly:

> "I have now issued a formal instruction to my Permanent Secretary to halt all checks that were not in place on December 31st, 2020 from midnight tonight."

The intention of the Minister was clear.

[16] This prompted the pre-action protocol letter on behalf of the applicant Rooney and the two judicial review applications from Rooney and JR81(3) on 3 February 2022. As part of those applications the applicant sought interim relief suspending the instruction pending the determination of their applications.

[17] As explained in the judgment the matter came before the court on an emergency basis on the same date, 3 February 2022.

[18] At that stage the solicitor acting for the Minister had not yet instructed counsel or been served with papers. She took instructions from her clients and provided an undertaking that the instruction from the Minister would not be acted upon before noon on Monday 7 February 2022.

[19] The matter was listed again the following morning on 4 February 2022 at which hearing the Minister was represented by counsel. Counsel formally indicated to the court the Department's position was that "the instruction given to officials is entirely lawful." Counsel referred to Article 4(1) of the Departments (Northern Ireland) Order 1999 which provides that:

> "The functions of a department shall at all times be exercised subject to the direction of the minister."

It was clear the Minister intended that his instruction would be carried out by midnight on 2 February 2022.

[20] The court considered that the test for leave had been met on the papers and granted interim relief to the applicants suspending the effect of the Minister's instruction on the basis that the principles set out in the well-known authority of *American Cyanamid Company* [1975] AC 396. The court considered that the balance of convenience pointed to maintaining the status quo which had been in place for 13 months in circumstances where there was clearly an arguable case that the instruction was unlawful. In the course of an ex-tempore judgment the court considered that the injunction was necessary for "maintaining the status quo, preserving good administration and good order."

[21] An application for leave to challenge the Minister's instruction was subsequently made by Belfast City Council which was granted on 21 March 2022.

[22] Thereafter, all three applications were subject to judicial direction and case management by the court and were listed for hearing together in May 2022. In the interim Derry City and Strabane District Council were permitted to join the proceedings as a notice party by order of the court on 29 March 2022.

[23] As explained in the judgment because of a new legal point raised on behalf of the Minister the matter was not able to proceed in May 2022. The court directed that Her Majesty's Government be put on notice of the proceedings and invited to intervene if it deemed appropriate. In fact, Her Majesty's Government did intervene in the form of DEFRA who made submissions on the occasion of the relisted substantive hearing in September 2022.

[24] In the court's view none of the applicants can be criticised for any failure to comply with the pre-action protocol. The applicant Rooney in fact did issue a pre-action protocol letter. The matter was properly brought before the court on an emergency basis at which stage judicial direction and management was provided in relation to the proceedings. The urgency of the situation was emphasised by the fact that the First Minister resigned his office, effective from 3 February 2022 which meant that as of 4 February 2022 the Northern Ireland Executive Committee collapsed and there were no Ministers in office.

[25] In terms of the subsequent management of the proceedings it is relevant that the interim injunction granted by the court was not appealed. At no stage did the respondent object to the hearing of the cases together. No application was made to stay any of the applications with a view to identifying a lead applicant.

[26] In any event the court was alive to the different arguments put forward by each of the applicants. This was addressed at the outset when leave was granted on 4 February 2022. As appears from the judgment the applicant Rooney focussed on the breach of Article 5 of the Withdrawal Agreement and para 1.4 of the Ministerial Code. He argued that no Executive Committee approval was required in relation to the implementation of the checks at the heart of the dispute. It was for this reason that the applicant Rooney also joined the Secretary of State as a respondent, although that application was stayed pending the outcome of the application against this respondent.

[27] Distinctly, JR181(3) argued that the respondent was under an obligation to refer the impugned decision back to the Executive Committee before it could lawfully be made.

[28] In relation to Belfast City Council it was indisputably directly and seriously adversely affected by the impugned decision. It will be noted that the respondent at the substantive hearing argued that neither the applicant Rooney nor JR181(3) had standing. Given the direct interest of the Council it would have been inappropriate for it to be involved merely as a notice party subject to the decisions of the other applicants in relation to the conduct of the proceedings. Obviously, the scenario was

different for Derry City and Strabane District Council who were properly joined as notice parties given their similar interest to Belfast City Council. Mr Beattie was also careful in his submissions to point out that the Council sought clarification on the issues surrounding the impact of European Union law and the statutory obligations as they affected the implementation of the Protocol, a matter in which it has a direct interest. The decision by the Council to issue proceedings did not enjoy full political support and it was important to maintain a separate identity from the other applicants in the case.

[29] Thus whilst there was a degree of overlap between the submissions of the parties each of the applicants made distinct and separate submissions.

[30] The court agrees that the conduct of the parties in the proceedings is an important factor. I have already referred to the urgency of the matter. At the hearing on 4 February, it was open to the respondent to give an undertaking or alternatively seek further time to consider the matter if necessary. However, the clear indication to the court was that the respondent (and the Department) was standing by the decision which it was considered was entirely lawful. Thereafter the case was managed as set out above.

[31] At the hearing the respondent objected to the standing of the applicants Rooney and JR181(3). The matter was fully contested and each of the applicants' legal arguments were disputed. Further the respondent introduced a new and unique argument which required the engagement of a further notice party. The respondent in Mr Lavery's words "strenuously defended the proceedings from start to finish."

[32] The respondent is an experienced Minister, with experience in defending judicial review actions. He was in a position to make a considered and informed assessment of the costs which were involved in defending these applications. Such decisions are the norm for Government Departments and Ministers.

[33] In all the circumstances the court concludes that there is no reason to depart from the general rule that costs should follow the event.

[34] The court therefore directs that the respondent pays each of the applicant's costs with those costs to be taxed in default of agreement.

[35] The court makes no inter-party orders in relation to the costs of the notice parties.