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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY CRAIG WATTERSON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Blaine Nugent (instructed by Toal & Heron Solicitors) for the Applicant
Aidan Sands (instructed by the Departmental Solicitor's Office) for the proposed Respondent

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HUMPHREYS J

Introduction

[1] This is an application by Craig Watterson in which he seeks leave to apply for judicial review of a decision by the Legal Services Agency whereby it determined that he would be granted a single civil legal aid certificate to pursue an application for High Court bail.

[2] At the material time, the applicant was a remand prisoner at HMP Maghaberry and faced two separate sets of charges. He had been arrested on foot of bench warrants issued in respect of both charges pending before Magherafelt Magistrates' Court and Dungannon Magistrates' Court.

[3] The applicant's solicitors applied for civil legal aid by way of two emergency applications on 5 November 2018. The High Court bail application was heard and determined on 6 November 2018 with the applicant being granted bail subject to conditions by O'Hara J.

[4] On 6 November 2018 the applicant's solicitors received a single legal aid certificate in respect of the bail application being moved for both outstanding sets of criminal charges. The solicitors objected on the basis that two separate certificates ought to have been issued, one for each of the sets of criminal charges.

The Grounds of Challenge

[5] There are three principal grounds set out in the applicant's Order 53 statement:

(1) Illegality, based on the proposition that the Agency ought not to have refused to grant two certificates;

(2) Irrationality; and

(3) A breach of the Article 6 right to a fair hearing

Delay and Extension of Time

[6] The application for judicial review was not originally launched until 28 May 2019. However, this application suffered from a number of defects and a fresh application made on 21 June 2019. The decision which the applicant seeks to impugn was made on 6 November 2018 and therefore, *prima facie*, this application is out of time and it is necessary for the applicant to seek an extension of time pursuant to Order 53, rule 4(1) of the Rules of the Court of Judicature (NI) 1980.

[7] In order for the court to grant such an extension it needs to be satisfied that there is *'good reason'* for the delay.

[8] The applicant's solicitor, Colin Donnelly, has sworn an affidavit setting out the history of the matter. In summary, a pre-action protocol letter was written on 12 December 2018 which was not responded to until 29 January 2019. An application for civil legal aid in respect of these proceedings was not made until 25 February 2019. This was refused two days later and an appeal against this decision submitted on 11 March 2019. This appeal was successful on 10 May 2019. As indicated earlier, the initial proceedings herein were defective and the application before the court was not commenced until 21 June 2019. The application for leave to apply for judicial review ought to have been commenced within three months, i.e. by 6 February 2019. The total period of delay under consideration is therefore over 19 weeks.

[9] The leading case in this jurisdiction on the question of delay and the extension of time is *Re Laverty's Application* [2015] NICA 75. The Court of Appeal stated at paragraph [21]:

> *"The Court may extend time for good reason. Although not stated in legislation in this jurisdiction, consideration of good reason would include consideration of the likelihood of substantial hardship to, or substantial prejudice to the rights of, any person and detriment to good administration. Also*

included would be whether there was a public interest in the matter proceeding."

[10] At paragraph [26], the court considered the impact of an outstanding application for legal aid:

> *"There is no good reason for extending time based on the outstanding application for legal aid. Although an application for legal aid may be a factor contributing to good reason to extend time an applicant must make and pursue the legal aid application in a timely fashion."*

[11] In *Re Fionda (A Minor)* [2018] NIQB 51, Sir Anthony Hart commented:

> *"When a prospective applicant for judicial review is already well outside the three month period within which Order 53 proceedings are to be brought there is a heavy burden on the applicant's advisers to move as rapidly as possible to institute proceedings… If legal aid is being sought in my opinion an applicant should issue the Order 53 summons and then ask the court not to proceed until the legal aid position is resolved."*

[12] There was an element of delay in responding to the applicant's pre-action protocol letter and I would have been sympathetic to an application for an extension of time to reflect this. However, the majority of the delay in the instant case has been occasioned by reason of the delay in obtaining legal aid to pursue the judicial review application. The chronology of events reveals that no application for legal aid was made until after the time for the bringing of these proceedings had expired.

[13] I have considered the evidence carefully and concluded that the applicant has not satisfied me that the *'heavy burden'* referred to by Sir Anthony Hart has been satisfied in this case. The Order 53 application ought to have been issued and the court asked not to deal with the matter until a final determination had been made.

[14] Practitioners ought to be aware that delays caused by the processing of legal aid applications and appeals will not automatically be accepted as good reasons for the extension of time under Order 53, rule 4(1). In *R (on the application of Kigen) v Secretary of State for the Home Department* [2015] EWCA Civ 1286 the Court of Appeal in England & Wales considered whether delay awaiting a decision of the Legal Aid Agency provided a good reason for failure to adhere to time limits. Moore-Bick LJ stated:

> *"Delay of any kind in proceedings for judicial review is to be avoided as far as possible… The explanation provided, namely, that the appellants were awaiting the outcome of their application for legal aid, is not one that I think can be regarded as satisfactory in the circumstances of this case. The appellants'*

solicitors were alive to the time limit, but appear to have taken no steps to ensure that the relevant form was lodged or to advise the appellants that they should lodge it themselves in order to preserve the position."

[15] *Kigen* has been cited with approval by the Court of Appeal in this jurisdiction in *Dillon v Chief Constable of the PSNI* [2016] NICA 15. Furthermore, in *Re Osbourne's Application* [2018] NIQB 44 the Divisional Court took the view, in the circumstances of that case, that the delay in applying for legal aid was not a good reason to extend time.

[16] The situation in this case is that there are two unexplained periods of delay: firstly, from 29 January 2019 to 25 February 2019 and secondly, from 15 May 2019 to 21 June 2019. It is necessary for all periods of delay to be adequately explained. In these circumstances, no good reason has been shown sufficient to ground an extension of time.

[17] There is no particular public interest in the determination of this dispute. It is essentially an issue between the applicant, his representatives and the Legal Services Agency as to the basis upon which he was entitled to be represented before the High Court.

[18] I am not minded to grant an extension of time and would refuse leave to apply for judicial review on that basis. However, having heard submissions on the issues, I will nonetheless proceed to consider the merits of the challenge.

The Merits of the Challenge

[19] The proposed respondent raised an issue about the standing of the Applicant to bring the application for leave to apply for judicial review. It was contended that this was essentially a dispute about remuneration and the proper applicant would have been the legal representatives themselves. The case of *Re John Finucane's Application* [2012] NICA 12 was cited in support.

[20] In the *Finucane* case the issue was which set of legal aid rules applied to the legal aid certificate which was granted in criminal proceedings. The outcome of this dispute had a significant financial impact on the legal representatives. The same could be said in the instant case but the applicant in this situation made two applications for civil legal aid but was only granted one certificate. In such circumstances, I would be minded to conclude that the applicant is the correct person to challenge the determination of the Legal Services Agency.

[21] The grant of civil legal aid is governed by the Civil Legal Services (General) Regulations (Northern Ireland) 2015 ('the Regulations'), which are made under Part 2 of the Access to Justice (Northern Ireland) Order 2003.

[22] Regulation 15(2) of the Regulations provides:

> *"The Director may grant an application for a certificate in whole or in part and may impose such conditions or limitations as to the conduct of proceedings as the Director considers appropriate"*

[23] Further, the Regulations state, at Regulation 15(9):

> *"Each certificate shall relate to only one set of proceedings except where –*
>
> *(b) the Director considers that two or more sets of proceedings are so closely related that they should be covered under a single certificate."*

[24] The Regulations clearly give the Director a discretion to grant only one certificate to cover two or more 'proceedings'. The decision maker has therefore acted *intra vires* in granting one certificate.

[25] There is no arguable case that the proposed respondent has breached the applicant's rights under Article 6 ECHR. The applicant's bail application was dealt with by the High Court and was successful following representations being made by the applicant's counsel. There can be no conceivable claim that the applicant's right to a fair hearing was undermined or compromised by the determination of the Legal Services Agency.

[26] This leaves the applicant's rationality challenge. It is suggested that since there were two sets of criminal proceedings in play it was unreasonable, in the *Wednesbury* sense, for the Legal Services Agency to refuse to grant two certificates for the High Court bail applications. The legislature took the view that there would be circumstances, where proceedings were *'so closely related'*, that it would be appropriate for a single legal aid certificate to issue. The reality of this situation is that the applicant's bail application was presented as a single application, albeit one which had two separate sets of offences as part of the narrative. This is precisely the sort of case which arguably falls into regulation 15(9)(b). It is simply not arguable that this was a decision so unreasonable that no competent decision maker could have come to it.

[27] Even on the basis of the relatively modest hurdle imposed on applicants for leave to apply for judicial review, this applicant has not satisfied the court that he enjoys an arguable case with a realistic prospect of success.

Conclusion

[28] Both on the grounds that the court declines to extend the time for the bringing of this application, and on the merits of the challenge itself, the application for leave to apply for judicial review is dismissed. I will hear the parties on the issue of costs.