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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**15/10/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY NEIL HEGARTY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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KEEGAN J

Ex Tempore ruling

[1] Given the time limits and the urgency in this case I intend to give an ex tempore ruling in this matter.

[2] This is an application for judicial review of a decision taken by the Civil Legal Aid Services Appeal Panel of the Legal Services Commission of Northern Ireland of 8 May 2018. The substance of the decision is a refusal of the appeal panel to grant the applicant legal aid for an appeal brought by him against a dismissal of a judicial review by McCloskey J. That decision is dated 13 February 2018.

[3] In this hearing Mr Hutton BL appeared for the applicant and Mr Sands BL for the proposed respondent. The hearing came before me with some alacrity given that the substantive appeal is listed in the Court of Appeal tomorrow 16 October. I had hoped to be able to rule last week but additional information and evidence came in and that has necessitated the ruling today. The case management directions made by McCloskey J fixed the matter for a rolled-up hearing before me.

[4] I have already referred to the fact that the matter is listed before the Court of Appeal on 16 October. I note that by agreement that hearing date was taken on 29 June 2018. I am reassured by Mr Hutton that no application was made to adjourn the case pending the legal aid issue and indeed commendably Mr Hutton has indicated that he will appear in the case notwithstanding the issue of legal aid. I am of course not concerned with the ultimate merits of an appeal but rather whether or not the decision of the Legal Aid Panel can be successfully impugned. Mr Justice

McCloskey's judgment sets out the context of this case and I am not going to repeat it here but he crisply summarises the nature of the challenge in his judgment by highlighting that the applicant (who was incarcerated when McCloskey J heard the judicial review) directed the challenge to two matters:

(i) the decision of the Single Commissioner dated 6 December 2017 recommending that the licence upon which the applicant had been released from sentence custody be revoked; and

(ii) the decision of the Department of Justice of the same date revoking the licence.

From this the judge extracted two grounds of challenge:

(a) irrationality viz a viz breach of the *Wednesbury* principle; and

(b) a failure to conduct adequate enquiries and take into account all material facts and considerations.

[5] In his judgment the judge then refers to the statutory framework which emanates from the Criminal Justice (Northern Ireland) Order 2008. At paragraph 11 he sets out the uncontentious material facts and then he goes on to set out a narrative of the chronology in this case in terms of why the licence was revoked. That history is grounded in the failure to comply with the tagging requirement under the licence. The difficulties with that are explained in the police evidence which went to the Single Commissioner and thereafter to the Department of Justice, the ultimate decision maker.

[6] Paragraph 15 of the judgment looks at the core impugned passage which I summarise as follows: the PSNI outline of case states that the applicant displayed wilful disengagement with prison authorities during the licence process and affirmed before leaving prison that he would not be consenting to the fitting of electronic monitoring equipment. It is argued that that evidence was essentially adopted by the Single Commissioner and formed part of her consideration which led to her recommendation and that recommendation was ultimately followed by the Department of Justice decision maker. I pause there, because the judge has relied on the evidence of the Department of Justice decision maker, Mr Allison, which seems to me to have been of critical import, see paragraph 25 of the judgment. Following from that the next step was obviously recall and the point made by the judge was that there is an automatic right to a hearing before the Parole Commissioners and that ultimately took place on 20 February 2018, so relatively soon after the decision and the applicant was released by decision of the Commissioner.

[7] In his judgment the judge comprehensively sets out the legal framework governing this type of decision making and there is no substantive dispute about that. For the purposes of today I am not going to repeat all of it but I have

particularly borne in mind the dicta from *Re Mullan's Application* 2006 NIQB 30 which refers to the nature of these types of adjudication in that they do not attract the full adjudicative panoply. Also, the case of *Re Rainey's Application* 2017 NIQB 98 which refers to the broad discretion afforded to a decision maker. I also bear in mind paragraph 48 of the judge's ruling where he refers to the issue of the final decision maker although he says there was no substantial argument on the point.

[8] In a nutshell, the judge comes down to making some criticisms of the Single Commissioner's decision on the basis of the information gleaned from police but he says that the official who made the decision in the Department of Justice had a more complete knowledge and considered the case himself. That is set out in an affidavit which was not put before me so I take that from the judge's ruling. Ultimately, the judge adopts the evidence of the decision maker that whilst there was clear potential for contamination in the decision making process this was avoided given the steps that were taken by the ultimate decision maker. A Notice of Appeal was very swiftly drafted on 19 February 2018.

[9] I turn then to the application for legal aid and the chronology as follows:

(i) An application for legal aid to appeal was made on 14 February 2018. It enclosed counsel's opinion of 13 February 2018 the same day as the judgment. They both refer to a case being made for appeal. The form does not set out any particular grounds but refers to counsel's opinion. I note as I did during the hearing that the Notice of Appeal was not forwarded to legal aid. Counsel's opinion was 151 paragraphs and 50 pages of information were provided. The refusal was then sent on 20 February 2018 by email and reasons were given namely; it was considered on the information available the merits of the appeal have not been sufficiently addressed; reference is made to the Single Commissioner decision of 20 February 2018 and reference is made to the fact that the applicant has been released so the applicant's liberty will therefore be restored. This decision goes on to state that a private paying client of moderate means would not be advised to pursue an appeal to the Court of Appeal in those circumstances. I paraphrase the decision but that seems to be the thrust of it.

(ii) Then there was an appeal request and a second opinion of counsel of 3 May 2018 which deals with this issue of the utility of an appeal. Then there is a decision of the panel of 8 May 2018 and from that the panel decide that legal aid should not be granted, three main reasons are given:

    (a) The applicant did not set out adequately the grounds upon which it is alleged the judge erred in law.

    (b) The applicant did not raise an important point of public law.

(c) The application was such that in the opinion of the panel a paying client of moderate means would not be advised to pursue the appeal.

[10] The evidence that I had to adjudicate on this challenge is comprised firstly in an affidavit of Mr Shields of 10 September 2018 which I have considered and then two affidavits of Mr Mark Orr QC who was chair of the Legal Aid Panel. I have also very helpfully had skeleton arguments from both counsel and oral submissions. When I heard the case I allowed (by consent) Mr Orr to file a second affidavit and that led to a short delay in this case and both counsel filed additional arguments which I have now read in relation to that. Counsel did not request any further oral hearing but in any event I have read all of those arguments. A number of issues arise which I deal with as follows:

[11] There is an issue of delay which Mr Sands raised. By that I mean delay in bringing this judicial review and I have helpfully been referred to *Re Osborne's Application* and the dicta of Lord Justice Deeny in that case in relation to delay. It is reported [2018] NIQB 44. In that case Lord Justice Deeny considered Order 53 Rule 4(1) whereby the court must consider if good reasons have been given for an extension of time. He also says that cases are fact specific but consideration is needed of whether there are good reasons for extension of time. The chronology of actions taken are important, but also an overall view of any case is required. In this case there is nothing in the affidavit that assists me in terms of establishing a good reason why there was a delay between 10 May 2018 and the issue of pre-action correspondence on 16 July 2018. I understand the issues after that date given the summer holiday vacation but prior to that I struggle to find a reason of any substance explained in the affidavit and in oral submissions. Mr Hutton offered an explanation for this which was based on the need to get the instructions from the client. However, I have difficulty agreeing with that given that an appeal notice was lodged, an appearance was undertaken at the Court of Appeal on 29 June and a listing date was taken for 16 October. So there remains a difficulty with the delay point. I do however have to look at it in the overall context of the case which I will now do.

[12] In terms of the broader case I break that down into two aspects. The first aspect relates essentially to what I consider procedural matters. These arguments were made in rather an *ad hoc* way. Firstly, there was an issue raised about whether there should have been an oral hearing. That was not requested and it seems to me that *Re McCord's Application* 2016 NIQB 19 deals with that issue comprehensively. It is a matter within the discretion of the decision maker and I accept Mr Sands' arguments on that point which seem to me to be the more compelling. There was a further very *ad hoc* challenge made throughout the course of the hearing before me that the panel may not have considered the second opinion of Mr Hutton. That argument is clearly unsustainable because a letter has been filed saying that it was forwarded to the panel and indeed it was put forth as such in the second affidavit of Mr Orr so that argument achieves no traction whatsoever.

[13] The substance of the case then comes down to a broad irrationality challenge. In that regard I bear in mind a number of things. Primarily, the adjudication is by a panel made up of a body of lawyers. They must obviously consider materials and apply the facts to the case applying a statutory test bearing in mind the overriding objective to protect the fund. It is for the applicant to show some grounds for appeal. There is clearly a wide discretion imparted to a decision maker in this context; a principle which was rightly not under serious challenge in this case.

[14] The legal context of the case is the Access to Justice (Northern Ireland) Order 2003 Article 14(2)(a) which states a grant of representation for an individual for the purposes of proceedings:

(a) shall not be made unless the individual shows there are reasonable grounds for taking, defending or being a party to proceedings; and

(b) may be refused if in the particular circumstances of the case it appears unreasonable that representation should be granted.

The test is whether or not the grant is reasonable. The rationale of the panel is set out in the two affidavits of Mr Orr and I am not going to repeat those. The consideration in the case is whether or not the decision is rendered irrational in the *Wednesbury* sense on the basis of the explanations given read in the context of the decision making letters. In relation to the three grounds given it has been of use that the second affidavit clarifies that the merits were considered in this case and in that context I bear in mind that an experienced senior counsel has averred to that and I do not look behind it. It seems to me that really answers the issue raised by the first ground set out in the decision making letter and applying the *Wednesbury* standard I cannot say that that is an irrational course to take. The second ground speaks for itself and again I cannot say that that is irrational. In relation to the third ground, the language may not have been particularly apposite, but broadly this was something that the panel were entitled to take into account i.e. the overall protection of the fund. The law in England and Wales is interesting and I commend Mr Hutton for his industry in taking me to that but I must apply the law in Northern Ireland in relation to this case. Having looked at that, I cannot see that that outcome was irrational.

[15] The real challenge to Judge McCloskey's ruling was that he made an error in assessing the facts of this case. However, he made a factual finding on the basis of Mr Allison's affidavit in relation to whether or not the entire decision making process was vitiated by what he perceived and properly highlighted was a mistake at the first stage. It is not clear to me that there is any challenge in terms of the relevant law in this area, flowing from the case of *Gulliver* 2007 EWCA Civ 1386. The judge also refers at paragraph 48 to the issue of ultimate decision maker which he says was not a major part of the argument.

[16] Overall, it seems to me, as I have said, that there is no reasonable explanation for the delay in this case. In any event, looking at the overall merits, I cannot see that the decision maker strayed outside the bounds of the discretion afforded or that this case reaches the very high standard of *Wednesbury* irrationality. It seems to me that the decision maker reached a decision which was within the margins of the discretion afforded to the decision maker.

[17] I consider that on balance an arguable case was made out because I required some further clarification evidence but ultimately the merits have not been made out by the applicant. I offer a final word as this case has raised some process issues of wider application. Firstly, there is the need to progress swiftly if a date is taken in the Court of Appeal for a hearing. Secondly, there is the need to clearly state the grounds on the form applying for legal aid. Thirdly, there is what may appear a very obvious point namely the need to send the Notice of Appeal along with documentation to the adjudicating authority.

[18] This is my ruling. As I have said I have given this judgment today under some pressure of time given that the hearing is listed tomorrow.