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CO/1480/2018

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2018] EWHC 3198 (Admin)

Royal Courts of Justice

Tuesday, 6 November 2018

Before:

MR JUSTICE OUSELEY

B E T W E E N :

THE QUEEN

ON THE APPLICATION OF

KHAN Claimant

- and -

DIRECTOR OF LEGAL AID CASEWORK Defendant

J U D G M E N T A P P E A R A N C E S

MR R BOWERS QC (instructed by FARADAYS) appeared on behalf of the Claimant.

MR S MCLOUGHLIN (instructed by the Government Legal Department) appeared on behalf of the Defendant.

\_\_\_\_\_ MR JUSTICE OUSELEY:

1 The claimant challenges by way of judicial review the decision of the Director of Legal Aid Casework on 28 December 2017 to make a capital contribution order against him in the sum of £103,484.53. The de-

cision was made under Regulation 29 of the Criminal Legal Aid (Contribution Orders) Regulations 2013 SI number 483. I shall call these "the Regulations".

2 The claimant was granted a Representation Order in 2015 for crown court proceedings in which he was charged with a single count of conspiracy to launder money, contrary to s.1 Criminal Law Act 1977. After the first week of trial, and by agreement, a further count of perverting the course of justice, contrary to common law was added to the indictment. The claimant pleaded guilty to this count. He was found not guilty on the money laundering charge. The plea of guilty was on 11 October 2016 and he was sentenced on 23 June 2017. As I have said, the decision at issue was made on 28 December 2017.

3 Enforcement proceedings in respect of the order then ensued. On 15 February 2018 Oxford County Court made an order permitting the Lord Chancellor to enforce the capital contribution order and two weeks later a charging order over the claimant's property was made. It was these proceedings that led to the judicial review challenge to the crucial decision of the Director.

4 The issue in these proceedings is whether the Director, making a determination under Regulation 29, has the power to take into account the fact that the claimant was acquitted of money laundering. The claimant submits that he can do so when making a capital contribution order and here should have done so. The claimant says that the money laundering defence accounts for almost all of the costs which are the subject matter of the capital contribution order. It is not necessary for me to decide that issue at all but for the purposes of this case I am prepared so to assume.

5 The Director says, on the other hand, that the Regulations on their true construction prevent him taking account of the fact of the acquittal or indeed any matter other than that set out in Regulation 29 itself. If the claimant had wished to say that there should have been some apportionment of the costs as between the count upon which the claimant was convicted and the count upon which he was acquitted, the procedure and the only procedure available to him was to apply to the crown court under Regulation 26 of the Regulations. The claimant did not make such an application.

6 It is now necessary to set out the relevant parts of the Regulations which were made under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.23 and other powers.

7 Regulation 25 provides that:

"25. Where--

(a) an individual is sentenced or otherwise dealt with for any offence following conviction in the Crown Court;

(b) the trial judge considers that there are exceptional reasons why an individual who is acquitted in the Crown Court should be liable to make payments under a contribution order; or

(c) the determination under section 16 of the Act that an individual qualifies for representation for the purposes of the criminal proceedings to which this Part applies is withdrawn,

the Director must calculate the cost of representation of the individual in the proceedings in the Crown Court."

8 Regulation 2 defines the cost of representation as the cost of representation of an individual calculated in accordance with Regulation 25. "The proceedings in the crown court" referred to in Regulation 25 are

the entirety of the proceedings in which the individual was dealt with. So regulation 25b, which is the material part for these purposes, enables the trial judge exceptionally to order an acquitted person to be liable to make payments under a contribution order. The calculation of the cost of representation in the crown court must then be undertaken by the Director accordingly.

9 Regulation 25 deals for these purposes with what happens when there is a conviction and also deals with what is to happen exceptionally where there is an acquittal. But it is clear from Regulation 26 that it only deals with the position where there is either a conviction or an acquittal. Regulation 26 deals with the assessment by the court of the proportion of the cost of representation where the proceedings as a whole have led to conviction and acquittal on different counts. It says:

"26.--(1) This regulation applies where an individual is--

(a) charged with more than one offence; and

(b) convicted of one or more, but not all, such offences.

(2) The individual may apply in writing to the judge for an order that the individual pay a proportion of the amount of the cost of representation in the proceedings in the Crown Court, on the ground that it would be manifestly unreasonable to pay the whole amount.

(3) An application under paragraph (2) must be made within 21 days of the date on which the individual is sentenced or otherwise dealt with for the offence following conviction in the Crown Court."

10 By sub-regulation (4) the judge may:

"(a) make an order specifying the proportion of the cost of representation for which the individual is liable; or

(b) refuse the application."

11 The definition provisions in Regulation are again relevant. The "recoverable costs of representation" are defined as follows. They mean:

"(a) except where regulation 26 (assessment by the court of proportion of the cost of Representation) applies, the cost of representation; or

(b) where regulation 26 applies, the proportion of the cost of representation specified in the Order of the court".

12 Regulation 29, the determination by the Director of liability to make a payment out of disposable specified capital, provides:

"29. Except where regulation 31 applies, where the Director calculates that an individual has disposable specified capital, the Director must--

(a) make a determination that the individual is liable to make a payment of--

(i) the amount of the recoverable costs of representation, less the amount of any payment already made under an income contribution order and any relevant outstanding amount; or

(ii) where the amount of the individual's disposable specified capital is less than the amount in sub-paragraph (i), the amount of the individual's disposable specified capital; and

(b) issue a capital contribution order recording the determination."

13 It is clear from the use of the words "the recoverable costs of representation" set out in Regulation 29a(i) that that is a reference back to recoverable costs of representation as defined in Regulation 2 and imports the relationship to Regulation 26 such that where there has been an apportionment by the crown court it, is the apportionment which is recoverable, or forms the basis for recovery. That explains why there is no reference specifically to the interaction between Regulations 26 and 29 in Regulation 29 itself, though there is a reference to Regulation 31, which is immaterial for these purposes. It is because there is an interaction and it is made clear how it operates in the definition regulation.

14 Mr Bowers QC for the claimant, submits that the language of Regulation 29, which requires the Director to make a determination, necessarily imports a discretion on the part of the Director as to how that determination is to be made and what factors he is enabled to consider in making that determination. The factor which Mr Bowers says he is allowed to take into account is the relationship between costs incurred in proceedings where a defendant was acquitted and where he has also been convicted. In other words, it covers the same territory as Regulation 26, but submits Mr Bowers, why else would the language of "making a determination" be used if what the Regulation intended was simply the mechanical exercise set out in sub-para.1 or sub-para.2. He submits that it would run contrary to the purpose of the Act and Regulations, which is to prevent, save exceptionally, an acquitted person having to pay costs which are properly or exclusively attributable to the proceedings in which he was acquitted. Otherwise, a represented person would be paying for his own defence in proceedings where he has been acquitted. If there is uncertainty about it, the court ought to take into account the provisions of s.3 of the Human Rights Act 1998 and read down that provision. A failure to read that provision down so as to reflect, before a capital contribution order was made, that a defendant had been acquitted, would amount to an interference with his property rights contained in Art.1 of the First Protocol to the Convention.

15 An alternative approach, namely that contended for by Mr McLoughlin for the Director, would mean that large numbers of people in fact, without the benefit of legal aid, would be having to make applications to a crown court which would scarcely welcome the large number of applications being made to it.

16 I cannot accept Mr Bowers' submissions. I start from the language of Regulation 29 itself. The obligation is to "make a determination that the individual is liable to make a payment of" an amount calculated in a particular way. The language of "making a determination that an individual is liable" is wholly inapt to import a discretion such that the Director may make no determination that an individual is liable or is liable to make some other payment. Mr Bowers' argument that a discretion should be imported in order to take account of apportionment is not merely a difficult one on the language of Regulation 29 itself, but Regulation 29 also provides no reference to any factors to be taken into account for the purposes of the exercise of any such discretion, it contains no basis upon which it can be related to Regulation 26, and it does not contain the words "manifestly unreasonable", which would guide the crown court. There is thus a conflict, on Mr Bowen's approach, between Regulation 29 and Regulation 26. That does not suggest that there is some alternative procedure or choice which can be exercised by an applicant as to whether he applies under Regulation 26 or Regulation 29. Nor is there some basis, as Mr Bowers suggests there might be, for a relationship between Regulation 26 and 29, whereby the more complex cases went to the crown court and the simpler ones to the Director. All of those issues would arise if Regulations 26 and 29 had a relationship which enabled them to cover the same material at the same time or sequentially. How even the structure of

the legislation and in particular the definition regulation make it clear beyond peradventure that that sort of relationship for which Mr Bowers contends, is what the Regulations have deliberately prevented.

17 It would, in any event, have been an extraordinary provision, even without the definition regulation, for there to be two provisions which were capable of covering the same territory, one which spelt out how it was to be done and the other of which was entirely silent, both as to how it was to be done and as to its relationship to the earlier specific provision dealing with precisely the point at issue.

18 The existence of Regulation 26 also points to why the contention that there is some potential Human Rights Act argument is wrong. Regulation 26 enables the apportionment of costs as between offences where there was an acquittal and offences where there was a conviction. I also note that both Regulation 25 and Regulation 26, which in their differing ways require some understanding of how the particular trial was conducted and how much time was spent on what aspect, to be dealt with if at all possible by the judge who heard the trial and who would be in the position to arrive at a rather more informed view on those matters than would the Director, better informed though the Director might be as to the precise figures.

19 In my judgment, therefore, there is no sound foundation for the challenge which has been brought. I am not persuaded by Mr Bowers' arguments as to convenience in the light of the clear wording of the Act but in any event it seems to me that there is considerable advantage in apportionment exercises being carried out, if possible, by the judge who heard the case. It may be that there are sound reasons why the provisions of Regulation 29 and 26 have not become particularly well-known. Mr McLoughlin told me on instructions, and I accept, that in the last year or so only 30 to 50 applications were made under Regulation 26. It may just be that partially successful defendants see no real point in making such application, because they can see how the costs would actually be apportioned. It may be that they are not concerned, as they face substantial confiscation orders. It may be the sort of problem faced here is a comparatively unusual one. It may be that the Regulations are not particularly well-known, although the provisions are in fact not just contained in the Criminal Costs Practice Direction 6.1.3 2015 but are also set out in the Crown Court Index 2018 by His Honour Judge Lucraft, QC, who sets out how such an apportionment exercise and the manifestly unreasonable test under Regulation 26 might be approached.

20 In my judgment, the Regulations work perfectly fairly without any words being read into Regulation 29. They work perfectly fairly provided that the relevant applications are made in time. That appears not to have happened here and it is now too late. Regulation 29 does not permit a second bite at the cherry or rather a first bite at a cherry that ought to have been consumed already. It does not permit Mr Bowyers' approach, and accordingly, this application for judicial review is dismissed.

MR MCLOUGHLIN: My Lord, I have an application for costs.

MR JUSTICE OUSELEY: Yes.

MR MCLOUGHLIN: Schedules were served on the claimant. I do not know whether one has made it to the court file.

MR JUSTICE OUSELEY: What is the total?

MR MCLOUGHLIN: The total is £6,634.20, inclusive of VAT on counsel's fees.

MR BOWERS: All I would say, given what your Lordship knows about how much my client is paid, I cannot argue about the principle. I can prevail on your Lordship to exercise discretion not to award costs in this case.

MR JUSTICE OUSELEY: Thank you, Mr Bowers.

This is not an appropriate case for exercising a discretion of that sort. Proceedings were brought, an issue was raised and they have lost. There will be an award for the payment of the costs in the sum of £6,634.20.

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#### CERTIFICATE

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This transcript has been approved by the Judge.