

THE HIGH COURT
JUDICIAL REVIEW

2011 480 JR

BETWEEN

BRYAN O'DUFFY

APPLICANT

AND

THE LEGAL AID BOARD

RESPONDENT

JUDGMENT of Mr. Justice Michael White delivered on the 26th day of January, 2012

1. The applicant was granted a Legal Aid Certificate on 27th February, 2007, to bring equity proceedings in the Circuit Court to overturn a deed of assignment which the applicant alleged was fraudulent. The respondent terminated the certificate on 1st April, 2011. The applicant appealed this decision to an appeal committee of the Board, which upheld the decision.

2. By order of the court on 28th June, 2011, the applicant was given leave to apply for an order of *certiorari* to overturn the respondent's decision to terminate the certificate.

3. Leave was granted on the affidavit of the applicant sworn on 13th June, 2011. He claimed that the Legal Aid Certificate was terminated in a manner unbefitting due diligence, as he believed that the appeal committee did not study or adequately study his case to allow it to make an informed decision. The order permitted the applicant to file a supplemental affidavit sworn on 4th July, 2011. In that affidavit, the applicant made a number of other complaints one of which is relevant to this case, the failure to hold an oral appeal hearing.

4. The statement of opposition of the respondent, together with a replying affidavit was filed on 26th September, 2011. The statement of opposition set out the statutory remit of the Board and the regulations governing the issue and termination of certificates and the right of review and appeal once a certificate has been terminated. The respondent accepted that a Legal Aid Certificate had been granted on 27th February, 2007, but was subsequently terminated by the Board on 1st April, 2011, in accordance with regulation 9(3)(c) of the Civil Legal Aid Regulations.1996.

5. An appeal was considered on 19th May, 2011, and the appeal committee upheld the Board's decision to terminate the Legal Aid Certificate.

6. The respondent asserts that the applicant was invited to furnish such additional documentation as he wished to have considered by the Board and provided no documents other than four emails.

7. It was denied that the Legal Aid Certificate was terminated in a manner unbefitting due diligence and also denied that the appeal committee did not adequately study the applicant's case to the extent as would have allowed it to make an informed decision.

History of the Proceedings for which the Legal Aid Certificate was granted

8. The applicant was married to Angela O'Duffy. They acquired a family home in Celbridge, County Kildare in 1976. They had two children. Following matrimonial difficulties, by a purported indenture of assignment of 20th August, 1998, the applicant assigned his interest in the family home to his spouse. The deed of assignment was accompanied by a statutory declaration in respect of the Family Home Protection Act 1976, allegedly sworn on 20th August, 1998, and a declaration of solvency allegedly sworn on 4th July, 1998. The applicant lived abroad for some time but sought legal advice in 2006 when he alleged he had not signed any of the documentation, and claimed, the assignment was a fraud.

9. A Legal Aid Certificate was granted to the applicant on 27th February, 2007, for the purposes of instituting equity proceedings in the Circuit Court.

10. The certificate in the notes at (ii) reserved the right to at any time amend, revoke or terminate the certificate in accordance with the Civil Legal Aid Act 1995 and Regulations made thereunder.

11. The solicitor nominated was Thomas Nally of the Clondalkin Law Centre and he procured counsel's opinion from Mr. Michael Hourican B.L. An Equity Civil Bill was issued in the Circuit Court County of Kildare on 17th October, 2007. The Civil Bill sought a declaration that the purported indenture of assignment of 20th August, 1998, was void and of no effect and other ancillary declarations were sought.

12. His spouse, Angela O'Duffy, the Defendant in the Equity proceedings filed a full defence and counterclaim on 16th April, 2008.

13. As part of the advice from counsel, a report was received from a forensic document examiner, Sean Lynch. Dated 16th November 2009. There was some delay in procuring this report. The report was not definitive, but indicated there was handwriting evidence to

support the proposition that the applicant was the author of the questioned signature Brian O'Duffy in the original deed. Mr. Lynch, however, did express concern about the time difference between the specimen signatures of the applicant given in 2006, and the signature in the deed alleged to have been signed in 1998. Mr. Lynch also wished to examine the original declarations as he had only examined photocopies.

14. After this report was received Mr. Nally sought counsel's opinion from Laura Farrell, B.L.

15. Ms. Farrell in her opinion of 22nd January, 2010 advised that a specimen signature should be procured from around 1998 and also that Mr. Lynch be in a position to inspect the declarations in their original form.

16. There were other concerns expressed by both Mr. Hourican and Ms. Farrell in respect of other aspects of the deed of assignment. The applicant's signature was not witnessed and the declaration of solvency was sworn on 4th July, 1998, prior to the deed of assignment.

17. Ms. Farrell was also concerned about the delay in the applicants challenge to the deed of assignment.

18. Mr. Nally wrote to the applicant on 20th January, 2010, expressing concern about the contents of Mr. Lynch's forensic report and referred to the possibility that the Legal Aid Certificate would be revoked.

19. Mr. Nally wrote to the Legal Services Department of the Legal Aid Board on 21st January, 2010, expressing his concern about the continuation of the certificate. He stated there was no intention on the applicant's part not to disclose a material fact and the termination should be pursuant to s. 9(c) of the Regulation.

20. Mr. Nally wrote again to the Legal Services Department of the Legal Aid Board on 12th February, 2010, expressing his concern about the prospects of success.

21. There followed a gap in the correspondence exhibited. On 15th July, 2010, the applicant emailed Mr. Nally and informed him the gardaí are now actively investigating this matter and asked him to hold off. There followed an exchange of correspondence between Mr. Nally, the applicant and Detective Garda John T. Cribbin of Leixlip Garda Station. From this correspondence it seems that the examination of the original declarations was to take place in the context of a garda investigation, rather than by Mr. Lynch the expert originally retained.

22. Mr. Nally wrote to Legal Services Department on 13th September, 2010, to keep them up to date. In that letter, Mr. Nally stated:-

"I wrote to Mr. Duffy on 28th July and on 13th August and I spoke with Garda Cribbin on 8th September and Mr. O'Duffy had not been in further contact with the gardaí in Leixlip".

23. In an email to Legal Services on 27th September, 2010, Mr. Nally stated that in fairness to the applicant, he was asking that the decision to terminate be deferred until he heard from the gardaí, providing of course this was done with all due expedition. They had to forensically examine the statutory declarations given at the time of the transfer.

24. Mr. Nally informed the applicant, that he was relying on him to provide specimen signatures from around 1998 to the gardaí.

25. Another letter was written to the applicant on 7th February, 2011, by Mr. Nally, enclosing a copy letter sent to Detective Garda Cribbin asking the applicant to contact the garda as a matter of urgency and see what the present position is in relation to the enquiry that was to be undertaken. The applicant replied by email on 12th February, 2011 which did not address the issue of the applicant getting specimen signatures from 1998.

The Termination of the Certificate

26. Mr. Nally wrote to the applicant on 16th February, 2011, advising the applicant of the referral of the matter to the respondent, who would have a discretion to terminate the certificate. He expressed his belief that the applicant would be unsuccessful in the proceedings.

27. The applicant has expressed concern at an allegation that he misled the respondent. Mr. Nally, did not make this allegation. His recommendation was that the Legal Aid Certificate would be terminated not revoked on the basis that the case would not be successful. Unfortunately, when the matter was referred to the Board for decision by the legal services department of the respondent the recommendation was that the Certificate be revoked in accordance with Regulation 9(4) of the Civil Legal Aid Regulations 1996 on the grounds that the applicant misled the Board.

28. This issue was corrected by C. O'Connor, assistant director on 1st April, 2011, when he wrote back to Ms. Laura O'Mahony, indicating that it was appropriate to terminate the certificate and that the appropriate Regulation was Regulation 9(3)(c).

29. Regulation 9(3)(c) states:-

"On being satisfied by the report of the legally aided person's solicitor that the certificate should be terminated."

30. By letter of 5th April, 2011, the applicant was advised in writing that under the terms of Regulation 9(3)(c) of the Civil Legal Aid Regulations 1996, it had been decided to terminate Legal Aid Certificate No. 04/0398. The applicant was informed he had the right to have the decision reviewed or appealed.

31. By email of 14th April, 2011, the applicant lodged an appeal against the decision to terminate the Legal Aid Certificate.

32. The applicant set out his case in an email of 27th April, 2011, which was forwarded to the respondent. He did not refer to any illness which prevented him from complying with the request for specimen signatures from 1998.

33. The appeal committee considered the appeal on 19th May, 2011, and by letter of 24th May, 201, Mr. Nally was notified that the appeal committee had upheld the decision to terminate the Legal Aid Certificate on the same ground as the executive. The applicant was notified of this decision by letter of 27th May, 2011.

The Legal Framework

34. The grant of a Legal Aid Certificate is governed by statute and statutory instrument.

35. The general criteria for the grant of legal aid is set out at s. 24 of the Civil Legal Aid Act 1995 which states:-

"Without prejudice to the other provisions of this Act a person shall not be granted legal aid or advice unless, in the opinion of the Board –

(a) a reasonably prudent person, whose means were such that the cost of seeking such services at his or her own expense, while representing a financial obstacle to him or her would not be such as to impose undue hardship upon him or her, would be likely to seek such services in such circumstances at his or her own expense, and

(b) a solicitor or barrister acting reasonably would be likely to advise him or her to obtain such services at his or her own expense."

36. Specific criteria for obtaining legal aid is set out at s. 28(2) of the Act which states:-

"(2) Subject to sections 24 and 29 and the other provisions of this section and to regulations (if any) made under section 37, the Board shall grant a legal aid certificate under this section to a person if, in the opinion of the Board –

...

(b) the applicant has as a matter of law reasonable grounds for instituting, defending, or, as may be the case, being a party to, the proceedings the subject matter of the application,

(c) the applicant is reasonably likely to be successful in the proceedings, assuming that the facts put forward by him or her in relation to the proceedings are proved before the court or tribunal concerned,

...

(e) having regard to all the circumstances of the case (including the probable cost to the Board, measured against the likely benefit to the applicant) it is reasonable to grant it."

37. Section 37 of the Act permits the relevant Minister to make regulations pursuant to the statute.

38. The relevant regulations are contained the Civil Legal Aid Regulations 1996 S.I. 273 of 1996.

39. Regulation 9 governs the revocation or termination of a Legal Aid Certificate and states:-

"(2) The Board or a certifying committee may, subject to the Act of 1995 and these Regulations, either revoke or terminate a certificate including a certificate by a solicitor of the Board issued under paragraph (7) of Regulation 5. A person whose certificate is revoked shall be liable for all costs incurred by the Board in connection with the proceedings to which the certificate relates and a person whose certificate is terminated shall, from the date of the cesser, cease to be a legally aided person in the proceedings.

(3) Subject to the provisions of paragraph (5), the Board or a certifying committee may at any time terminate a certificate from such date as it considers appropriate when satisfied that this is justified and in particular may do so –

(a) at the request of the legally aided person, or

(b) where a legally aided person has failed to comply with any condition imposed in connection with the grant of a certificate and, especially, where he or she has been required to make a contribution and any payment in respect thereof is more than twenty-one days in arrears, or

(c) on being satisfied by the report of the legally aided person's solicitor that the certificate should be terminated, or

(d) where it considers that the legally aided person is no longer eligible for legal aid on financial grounds, or

(e) where it considers that the legally aided person is behaving unreasonably in connection with the conduct of the proceedings or that it is unreasonable in the particular circumstances of the case (including the cost of the proceedings) that that person should continue to receive legal aid,

(4) Subject to the provisions of paragraph (5), the Board or a certifying committee may revoke a certificate if it considers that the legally aided person, in relation to his or her application for the certificate, has made an untrue statement as to his or her resources or otherwise or has failed to disclose any material fact whether the statement was made or the failure occurred before or after the issue of any certificate but if the legally aided person satisfies the Board or the committee that he or she used due care and diligence to avoid the mis-statement or failure, the Board or the committee may terminate rather than revoke the certificate."

40. Reviews and appeals are governed by s. 12 of the 1996 Regulations which state:-

"(1) An applicant who is aggrieved by any decision of the Board or a certifying committee, the Chief Executive, an officer

of the Board or, a solicitor of the Board may submit such further information in writing to the Board as he or she deems appropriate with a view to having the decision reviewed. The review of the decision in the light of the information provided, shall, so far as possible, be made by a certifying committee, the Chief Executive or the officer or solicitor of the Board, as the case may be, who made the original decision.

(2) If a review is requested under the provisions of paragraph (1), the applicant's solicitor shall convey to the Board an opinion as to whether the decision should stand.

(3) If, following a decision or a review of any decision under the provisions of paragraph (1), other than a decision of the Board, the applicant continues to be aggrieved, he or she may appeal to a committee of Board members which shall be known as the appeal committee. The appeal committee shall consist of members of the Board, not being members of the certifying committee which made the original decision, comprising a chairperson and four other members of whom two shall be members who, prior to their appointment as Board members, were either practising barristers or practising solicitors and the quorum for a meeting of the appeal committee shall be four.

(4) The submission of further information under paragraph (1) or the lodgement of an appeal under paragraph (3) shall be made within a period of one month from the date on which he or she has been informed, in accordance with Regulations 4(4) and 5(9), that he or she is not entitled to legal aid or advice.

(5) The appeal committee may affirm, reverse or otherwise alter any decision which is the subject of an appeal and, if the appeal committee considers it desirable to review not only the particular decision which is the subject of the appeal but the application generally, it may do so and may, following that review, make a decision either affirming, reversing or otherwise altering any decision made in connection with the application."

Judicial Review of Administrative Decisions

41. The appropriate test to be applied in reviewing the rationality or unreasonableness of an administrative decision that affects constitutional or fundamental rights is that which was stated by Henchy J. in *State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. at 658:-

"I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted *ultra vires*, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, *inter alia*, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."

42. Quirke J. in *Gannon v. Information Commissioner* [2006] 1 I.R. at p 278 para 26 stated:-

"It is well settled that the courts will not intervene with the decisions of administrative bodies on grounds of unreasonableness or irrationality unless satisfied either; (a) that there was no relevant material before the decision maker which could reasonably have given rise to the impugned decision, or (b) that the decision maker wholly failed to take into account relevant material or (c) that the impugned decision "flies in the face of fundamental reason and common sense."

Decision

43. The applicant is entitled to challenge the decision to terminate the legal aid certificate not just the appeal determination. The court also considers it appropriate to allow the applicant to argue the case that he should have been granted an oral hearing.

44. A solicitor employed by the respondent has to have regard to the legislation and regulations set out in this judgement. This is an ongoing responsibility, and if as a case develops the solicitor considers that the chances of success are diminished, that is a matter which has to be brought to the attention of the Board.

45. Such a report if acted upon by the Board is subject to scrutiny on judicial review, in accordance with the test set out by the court.

46. There was no factual dispute between the applicant and his solicitor, but there was a conflict of opinion. The applicant believed and still does that he has a strong case to void the Deed of Assignment, while in the light of Sean Lynch's Report, Mr. Nally formed a contrary view.

47. This would not cause an insuperable problem in a commercial solicitor and client relationship, as either the solicitor would continue to act having given advice to the client on the chances of success, or in the alternative the client would be free to engage the services of another solicitor.

48. In the case of a client who is legally aided the situation is more complex. The solicitor employee of the respondent is duty bound if he has formed an opinion that the case does not have a reasonable chance of success, to report this matter to the Board. It is a matter for the solicitor to decide if he recommends termination or not.

49. There is certainly some confusion in the case in that Laura Farrell B.L. had advised that Sean Lynch the handwriting expert retained originally be asked to inspect the Family Home Protection Act Declaration and the Declaration of Solvency. The position changed, as there developed an expectation that this examination would be carried out in the course of a garda investigation being carried out by Detective Garda John T. Cribbin of Leixlip garda station.

50. The Court would have preferred to have exhibited before it a detailed minute of the appeal committee meeting or a document setting out in writing the reasons for the refusal of the appeal. However there is no evidence to suggest that either decision of 1st April, 2011, by the Board or of 19th May 2011 by the appeal committee is irrational or contrary to common sense.

51. Once the written report was received from Sean Lynch, the opinion of the solicitor as to the chances of success of the equity action changed, and in those circumstances he was entitled to recommend termination of the Legal Aid Certificate and the Board acted on his report by terminating the certificate pursuant to the provisions of s. 9(3)(c) of the 1996 Regulations.

52. The appeal committee had sufficient written documentation to enable it to decide the appeal.

53. The applicant did not seek an oral hearing of the appeal. There was no conflict of fact, as between the documentation furnished by Mr. Nally and the content of the e mails of the applicant grounding his appeal. There was no statutory requirement that an oral appeal take place.

54. While the applicant is entitled to feel aggrieved that the certificate was terminated, the legislation and the regulations made thereunder, grants to the respondent, a discretion to terminate a Legal Aid Certificate, in accordance with the regulations. That decision did not fly in the face of fundamental reason and common sense.

55. In those circumstances the applicant is not entitled to an order for *certiorari*, on any of the grounds.