THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 569

[RECORD NO. 2021/1045JR]

BETWEEN:

B.A.

APPLICANT

AND

LEGAL AID BOARD

RESPONDENT

RULING of Ms. Justice Siobhan Phelan, delivered on the 9th day of October 2023

INTRODUCTION

1. This matter comes before me as an application for leave to proceed by way of judicial review seeking relief in respect of a decision to refuse legal aid. The Civil Legal Aid Act, 1995 [hereinafter "the 1995 Act"] provides for the provision of State funded legal assistance and aid on satisfaction of statutory criteria prescribed under the Act.

2. The substantive issue for consideration on this application for leave is whether it is arguable that the Legal Aid Board [hereinafter "the Board"] did not properly consider and determine the Applicant's application both as to its merits and in view of his disability.

BACKGROUND

3. During the course of 2019, the Applicant applied for legal aid in respect of enforcement proceedings which had issued against him in the District Court and subsequently appealed by him to the Circuit Court under the provisions of the Residential Tenancies Act, 2004 [hereinafter "the 2004 Act"] on foot of a decision of the Residential Tenancies Board that his

tenancy had been lawfully terminated and that the tenants were liable to pay rent arrears and damages in the combined sum of €3,382.47 together with rent continuing to accrue at a daily rate as set out in the Determination Order.

4. The Applicant met with a solicitor at a Legal Aid Board Law Centre in December 2019. In the history given to that solicitor he explained that he was a party to a landlord and tenant dispute which had come before the RTB and had been decided against him by an adjudication officer. He explained that he had sought but had not been granted an adjournment of the adjudication hearing on health grounds. He raised a number of issues in respect of the proceedings before the RTB including alleged procedural irregularities in the service of the notice of the RTB hearing (due to a delay on the part of the Applicant in opening correspondence which he duly received), an alleged error in the calculation of the period of notice (due to dating the term from the date he signed the lease rather than the date he entered occupation or his co-tenant became principal tenant) and the alleged erroneous backdating of rent due (a difficulty caused by the termination of HAP payments). The Applicant complains that the Adjudication Officer determined the dispute based on the evidence of the landlord which he did not have the opportunity to challenge because of his absence due to ill-health and which he disputes.

5. Despite being advised of the availability of an appeal to the Tenancy Tribunal established under the 2004 Act, the Applicant did not appeal. In the absence of an appeal to the Tenancy Tribunal an enforcement application was brought against the Applicant in the District Court. His application for an adjournment on medical grounds was renewed before the District Court but this was refused. The District Court made the orders sought in the face of the Applicant's objections as made by him in person before the District Court. The District Court did not exercise its powers to direct a new adjudication under s. 125 of the 2004 Act. The Applicant then appealed against the District Court order to the Circuit Court but in the absence of a stay on the eviction order he was evicted before the appeal came before the Circuit Court and was no longer in possession on the date of his consultation with the Board's solicitor. He further instructed the Law Centre solicitor that he had unsuccessfully brought proceedings in the High Court and costs were awarded against him. The nature of these High Court proceedings is not entirely clear but a High Court search confirms no less than eight sets of High Court proceedings in his name since 2019 including these proceedings, an appeal against the RTB (2019) as well as two sets of proceedings naming his former landlords.

6. There is some confusion as to why the Applicant did not appeal to the Tenancy Tribunal. The Board had understood from him that it was because he had been given an incorrect email address (but never provided evidence of this) but in his submissions to me the Applicant maintained it was because he was too unwell to represent himself. It is clear from the documentation that the RTB sought to facilitate the Applicant with an extension for time for an appeal but no appeal was ever pursued by him. At the time of the Applicant's meeting with the Law Centre solicitor in December 2019, the appeal from the District Court order enforcing the RTB determination order stood adjourned before the Circuit Court and the Circuit Court judge dealing with the appeal appears to have been anxious that the Applicant secure legal representation from the Board who, at that time had made no decision on the legal aid application.

7. An opinion of counsel was sought by the Legal Aid Board regarding the merits of the appeal to the Circuit Court for which legal aid was sought. Counsel's opinion when received in February, 2020, concluded that there was little merit in the case having regard to the evidence provided. The opinion furnished ran to 6 pages in which he addressed the issues which had been raised by the Applicant in his application for legal aid. She identified a preliminary issue as to whether a right of appeal to the Circuit Court existed at all but proceeded to address the arguments raised on the basis that the Circuit Court had the jurisdiction to hear an appeal which jurisdiction was confined by the terms of s. 124 of the 2004 Act. Addressing the threshold for a successful appeal under s. 124 of the 2004 Act and the limited scope of an appeal under that provision, counsel reached certain conclusions which I do not propose to repeat here in view of the fact that an appeal remains pending before the Circuit Court. Suffice to say that she had considered in a coherent and logical manner the arguments presented by the Applicant.

8. Counsel in her opinion attached some weight to the fact that the Applicant did not appeal to the Tenancy Tribunal despite being made aware of an appeal option at a time when it remained open to him to appeal. Without straying into the substance of her opinion, other matters considered by Counsel included the fact that the complaint regarding service related to the Applicant's own failure to open his post; the Applicant did not attend to present his evidence in support of the adjournment; any issue arising from the failure of the housing authority to notify the Applicant that HAP had been discontinued was with the housing authority and not the Landlords; the fact that whatever issues there might be with regard to service of the District

Court proceedings; the Applicant was on notice of same having been also served by post and email and was present in court and the fact that the Applicant was no longer in possession.

9. On the basis of her sequential assessment of each of the issues raised on her instructions, counsel concluded that there was very little merit to the appeal and the prospects of success of the appeal were low. She further referred to s. 24 of the 1995 Act and said that she would not advise a private client who was in a position to pay for services without undue hardship to pursue an appeal and she did not consider a reasonably prudent person would be likely to seek such services in the circumstances at his or her own expense.

10. The Applicant was appraised of the terms of this Opinion and advised that the solicitor would be recommending that a legal aid certificate be refused in view of the conclusions reached as to the merits of the appeal. The Applicant was afforded an opportunity to give further instruction or information in respect of the opinion and advised that counsel could be asked to review her opinion on foot of new information. The Applicant was also requested to provide contact details for a doctor who could confirm he had capacity to give instructions to a solicitor.

11. There followed several letters advising the Applicant that the file would be closed unless he responded with further information in support of his application for legal aid (including letters dated 23rd of June, 2020; 3rd of September, 2020 and; 11th of January, 2021). Further information was furnished by email on the 27th of January, 2021 in the form of some medical evidence but no instructions were given in respect of the opinion of counsel. It appears that the appeal to the Circuit Court stood struck out at that stage with liberty to re-enter. Ultimately, counsel was asked to review further correspondence from the Applicant including medical documentation but while noting the medical information received, she confirmed that her opinion remained unchanged as to the substantive matters arising in the appeal.

12. A formal application for legal aid was made on behalf of the Applicant on the 2nd of March, 2021. On the 15th of March, 2021 this application was refused with reasons expanded upon with reference to s.28(2)(b), s.28(2)(c) and s.28(2)(e) of the 1995 Act. The basis for refusal was that the Applicant was not considered to have reasonable grounds of appeal as a matter of law. The Applicant was advised of his right to review or appeal the decision.

13. By email dated the 22nd of March, 2021, the Applicant sought a review of the decision to refuse his application. Counsel's opinion was again sought in respect of the appeal for the purpose of the review and arising from new material received from the Applicant. By addendum opinion dated the 21st of May, 2021 running to some five pages, she addressed a series of additional matters. This included the alleged fraudulent evidence of the landlord at the RTB hearing, reliance placed on the ability of his co-tenant to attend even if the Applicant could not, the opportunities afforded the Applicant to appeal and the need for the RTB to balance the Applicant's medical issues against the landlord's rights to finality. She further addressed the Applicant's complaint that an adjournment was wrongly refused given his medical issues. She considered the refusal of an adjournment request reasonable in circumstances where there were two tenants and the other tenant was in a position to give evidence. She then addressed the Applicant's contention that s. 125 of the 2004 Act applies to his case and circumstances noting that the District Court did not agree. In circumstances where the Applicant's co-tenant was in a position to attend before the Adjudication Officer, however, counsel did not consider s. 125 of the 2004 Act to avail the Applicant.

14. Having reviewed the file in full again including the new information provided, counsel's updated opinion remained the same as to the merits of the Circuit Court appeal and the Applicant's prospects of success. In her two detailed written opinions she addressed each of the Applicant's complaints about the RTB determination and explained why she concluded that the Applicant's appeal had little merit. She set out why she would not advise an appeal to an individual obtaining private legal services and that a reasonably prudent person would be very unlikely to pay for legal services to pursue an appeal. Both opinions were furnished to the Applicant and both were available for the purpose of the review of the refusal of legal aid.

15. By email dated the 10th of June, 2021, the Applicant was advised that his review application had been unsuccessful and the decision to refuse stood. He was advised that the refusal was made having regard to s. 28(2)(b)(c) and (e) of the 1995 Act. He was afforded a further opportunity to appeal to the Appeals Committee. The decision on review expressly recites consideration of the new information received from the Applicant and both opinions by counsel. and the subsequent appeal. The Board also had regard to the nature of an enforcement application in the District Court, which is not an appeal against the Determination of the RTB, and the limited grounds for interference with such a determination under s. 124 of the RTB Act, 2004. It was concluded for the reasons set out that the appeal for which legal aid was

sought was not considered reasonably likely to be successful. It was further noted that the Applicant was no longer in possession of the property and it was considered that it would not be reasonable to grant legal aid to the Applicant given the costs involved. Further reference was made to ss. 24(a) and 24(b) of the 1995 Act as justifying refusal of the application having regard to the unlikely prospects of success and what a reasonable person who could pay for legal services without undue hardship and funding their own litigation might decide to do in the circumstances.

16. The Applicant instructed an appeal against the review decision in August, 2021. By letter dated the 10th of September, 2021, it was confirmed that on appeal the decision to refuse a legal aid certificate had been affirmed on the same grounds and for the same reasons as given on review. This is the negative decision which the Applicant now seeks to challenge in the within proceedings.

17. It is unclear from the affidavit evidence what precise medical information the Applicant put before the RTB in support of his adjournment application in 2018. Despite a range of medical evidence, much of which post-dates 2018, I have seen no report which says the Applicant was unable to attend a hearing at that time or identifying a date by which he might be recovered for the purpose of a rescheduled hearing. Medical reports placed in evidence by the Applicant confirm that the Applicant has a history dating to 2015 of persistent and increasing concerns regarding somatic symptoms. It is recorded in one medical report dating to November, 2020 that he believes that he has an undiagnosed or undetected physical illness. The working diagnosis recorded in this letter is delusional disorder somatic (hypochondrial) sub-type with significant cognitive decline and restriction with daily functioning. His condition is described as long-standing and the prognosis guarded. It is also recorded that the Applicant does not agree with his neurology assessment.

TEST FOR LEAVE IN JUDICIAL REVIEW PROCEEDINGS

18. The relevant rule to be applied on an application for leave (save for special statutory exceptions) to proceed by way of judicial review is that set out in O.84, r.20 of the Rules of the Superior Courts, 1986. The application of the test was considered by the Supreme Court in its decision in *G v Director of Public Prosecutions* [1994] 1 I.R. 374. Unlike here, the Supreme Court in *G v. DPP* was dealing with an unopposed application where leave had been refused

in the High Court. Finlay C.J., with whom the other two judges agreed, set down the test in the following terms at pp. 377 to 378:

> *"An applicant must satisfy the court in prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:-*
> *(a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20(4).*
> *(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.*
> *(c) That on these facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.*
> *(d) That the application has been made promptly and... within the ... [relevant] time limits...*
> *(e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be in order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, in all the facts of the case, a more appropriate method of procedure."*

19. As I noted in my decision in *Lopes v. Legal Aid Board* [2022] IEHC 166 referred to in argument in this application, in *Gordon v Director of Public Prosecutions* [2002] 2 I.R. 369 this test was described as a "*low threshold*", per Fennelly J. at p. 372. The aim of the leave application is to effect a screening process of litigation against public authorities and officers so as to prevent an abuse of the process or trivial or un-stateable cases proceeding, thus impeding public authorities unnecessarily. It is now well settled law that for a *prima facie* case to be established, it must be arguable. A point of law is only arguable if it could, by the standards of a rational preliminary analysis, ultimately have a prospect of success (see *O.O. v Min for Justice* [2015] IESC 26) and this is the threshold which an applicant for leave must meet.

APPLICATION FOR LEAVE

20. The Applicant is a lay litigant and the precise nature of his claim in respect of the refusal of legal aid is difficult to make out. His grounding affidavit is directed in its entirety (all 90

odd paragraphs of it) to the proceedings before the RTB and his dealings with his former Landlords. As the application for leave was on notice to the Board pursuant to earlier order, I had the benefit also of a helpful affidavit from the solicitor employed by the Board who dealt with the Applicant's application for legal aid in respect of the RTB matter. This affidavit was addressed to the history of the Board's involvement with the Applicant and exhibited the opinions of counsel obtained in respect of the legal aid application and the documents generated in the decision-making process culminating in the refusal of the legal aid application in circumstances where this information had not been put before the Court by the Applicant.

21. While the Applicant was supported during the leave application by a friend, he presented most of the argument himself. Based on what can be discerned from the papers as a whole and from his oral submissions before me, the essence of the challenge the Applicant wishes to make to the Board's decision is that the refusal of legal aid was unreasonable, failed to have adequate regard to s. 125 of the Residential Tenancies Act, 2004 in assessing the merits of his appeal to the Circuit Court and did not have proper regard to his need for support as a person with disabilities.

DISCUSSION AND DECISION

22. I am easily satisfied that the Applicant meets several of the requirements for leave identified in *G v. DPP* [1994] 1 I.R. 374. I am satisfied that the Applicant has a sufficient interest in the matter for which leave is sought (at (a) of the test). The application was opened on an *ex parte* basis in December, 2020 and a direction was made that the application proceed on notice to the Board. Accordingly, the Applicant moved by way of *ex parte* application to seek leave for judicial review within 3 months of the decision he seeks leave to challenge and therefore meets the requirements at (d) of the test. There is no suggestion in the affidavit filed on behalf of the Board that there was some other remedy open to the Applicant in respect of the refusal of his application for legal aid. As the Applicant exhausted the internal avenues of review and appeal which were afforded, I am further satisfied that the requirements at (e) of the test in *G v. DPP* has been met to my satisfaction. Accordingly, it seems to me that the only issue for me on this leave application is whether the Applicant meets an arguability threshold having regard to the test set out (b) and (c) in *G v. DPP*.

23. The Board is a creature of statute and must determine applications for legal aid in accordance with its statutory powers. Patently, it does not have a statutory power to grant a legal aid certificate to every applicant for same. The 1995 Act determines certain areas of exclusion from eligibility for legal aid and vests a discretion in respect of others. Where no discretion to grant legal aid is vested, the Board simply cannot grant legal aid under the 1995 Act. Clearly, where it has a power it must exercise that power in accordance with the statutory guidance provided, the requirements of constitutional justice (including due respect of the right of access to the Courts) and s. 3 of the European Convention on Human Rights Act, 2003 (including Articles 6 & 8 of the Convention). A failure to do so may render a subsequent decision liable to challenge as *ultra vires*. That said, neither the Constitution nor the European Convention on Human Rights requires that the State provide for funded legal representation in every case. A substantial body of case-law exists in respect of the types of cases where a right to State legal funded legal representation has been found to exist, principally related to the significance of the subject matter and the complexity of the proceedings.

24. In this case the Applicant sought legal aid in respect of enforcement proceedings arising from a RTB determination against which he had not pursued a statutory appeal. Noting that the Applicant is not in possession, I know of no case in which a right to State funded legal representation has been found to exist in such circumstances and no such case was identified in argument before me. Had the Applicant pursued an appeal he would have been entitled to a full *de novo* hearing and all of his grievances with regard to the first instance adjudication, which proceeded in his absence following the refusal of an adjournment given the Applicant's non-attendance, could have been addressed. Having exhausted his appeal to the Tenancy Tribunal the Applicant could also then have availed of an appeal on a point of law to the High Court. The potential to apply for legal aid, subject to statutory criteria, exists in respect to such an appeal.

25. In circumstances where the Applicant failed to avail of the remedy of an appeal to the Tenancy Tribunal with the potential of an appeal on a point of law to the High Court, he still has a remedy under ss. 124 and 125 of the 2004 Act but these are relatively limited or constrained remedies. These are the remedies which were the subject of the application for legal aid which has resulted in these judicial review proceedings.

26. The District Court's discretion (and presuming a right of appeal, the Circuit Court's discretion on appeal) to refuse to enforce a determination order under s. 124 of the 2004 Act is constrained by the terms of that provision. Section 124 vests the District Court with a statutory discretion to refuse to make an enforcement order where it considers there are substantial reasons (related to one or more of the matters mentioned in s. 124 (3)) for not making an order under that subsection including: (a) a requirement of procedural fairness was not complied with in the relevant proceedings under this Part, (b) a material consideration was not taken account of in those proceedings or account was taken in those proceedings of a consideration that was not material, (c) a manifestly erroneous decision in relation to a legal issue was made in those proceedings, (d) the determination made by the adjudicator or the Tribunal, as the case may be, on the evidence before the adjudicator or Tribunal, was manifestly erroneous.

27. The Applicant in his oral submissions also places significant reliance on s. 125 of the 2004 Act which provides that where a person establishes to the satisfaction of—(*a*) the Board, or (*b*) if the determination order is the subject of an application under s. 124 , the Court, on the hearing of that application, that, in relation to a determination order embodying the terms of a determination of the Tribunal or an adjudicator, there are good and substantial reasons for his or her having failed to appear at the relevant hearing conducted by the Tribunal or the adjudicator, the Board or the Circuit Court may cancel the determination order and direct that a fresh determination of the matter shall be made by the adjudicator or the Tribunal as appropriate (and the making of any such fresh determination shall be preceded by a re-hearing of the matter by the adjudicator or the Tribunal).

28. There is no evidence before me that the Applicant made an application to the Board under s. 125 but the RTB certainly corresponded with the Applicant in terms of the appeal avenue open to him. Whether or not an application under s. 125 of the Act was ever made to the RTB, it appears that the District Court was not satisfied to exercise a power under s. 125 of the 2004 Act on the facts and circumstances of this case. Despite the fact that an appeal was not brought to the Tenancy Tribunal and there is no evidence that an application was made to the RTB under s. 125, he potential remains for an order under s. 124 or s. 125 of the 2004 Act in the Applicant's favour in the event of a successful appeal to the Circuit Court (presuming an avenue of appeal is available which on the advice to the Board remains an open question). The question for the Board therefore was whether the Applicant was entitled to a legal aid certificate in respect of an appeal to pursue either of these remedies by way of appeal.

29. As noted above, under the provisions of the 1995 Act, the Board cannot give legal assistance to every person who presents an application and satisfies the means test fixed by law. The Board is required to apply what is colloquially known as a "*merits test*". Sections 24 and 28 of the 1995 Act are particularly relevant as statutory provisions from which the "*merits test*" derives. They are the two provisions relied upon by the Board in refusing the application for a legal aid certificate in this case and warrant further scrutiny. Section 24 provides:

> ***"24.****—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."*

30. Accordingly, where the Board forms the opinion that a reasonably prudent person, whose means were such that the costs of seeking legal services at his own expense would not cause undue hardship, would not engage those services at his or her own expense and further that he or she would not be advised to obtain such services by a solicitor or barrister, the Board is mandated to refuse the application. While the opinion must be a reasonably held opinion, once the Board is of that opinion it has no discretion to grant a certificate for legal aid. The test is not whether the Applicant would pay for legal services privately if he could afford to but whether a reasonably prudent person would and would be advised to.

31. Section 28 of the 1995 Act is couched in different terms in that it vests a discretion in the Board to refuse an application for legal aid in certain circumstances and provides in relevant part as follows:

> *"28.—(1) A person shall not be granted legal aid unless the person is granted a legal aid certificate under this section in respect of the legal aid sought.*

(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 (Deleted 2013) under this section to a person, other than a person referred to in subsection (2A), if, in the opinion of the Board —

(a) the applicant satisfies the criteria in respect of financial eligibility specified in section 29,

(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,

(d) the proceedings the subject matter of the application are the most satisfactory means (having regard to all the circumstances of the case, including the probable cost to the applicant) by which the result sought by the applicant or a more satisfactory one, may be achieved, and

(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."

32. Suffice to say that the Board is entitled under the statutory scheme within which it operates to refuse legal aid where it considers that the maintenance or defence of proceedings for which a legal aid certificate is sought lacks merit such that there are no reasonable grounds for maintaining or defending the proceedings, the proceedings are not reasonably likely to succeed and all the circumstances of the case including the cost versus the likely benefit mean that it is not reasonable to grant it. While the Board's opinion as to the merits of granting a legal aid certificate must be a reasonably held opinion informed by relevant considerations and must not be irrational, to ultimately succeed in a challenge to a decision to refuse legal aid on rationality or reasonableness grounds the Applicant must meet a high test. The court cannot

interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it. The governing principles have been identified in by the Supreme Court in *Meadows v. Minister for Justice and Equality* [2010] IESC 3; [2010] 2 I.R. 701.

33. Considering then the rationality or reasonableness of the decision to refuse legal aid based on an opinion that his appeal lacked merit, it is clear that all of the issues raised by the Applicant in seeking a certificate for legal aid were fully considered by counsel and by the Board through its initial decision, the review carried out and the decision of the Appeals Committee. For the reasons set out in two detailed written counsel's opinions and expanded upon by the Board in its reasoning during the decision-making process, it was concluded that the Applicant, already unsuccessful in the District Court, did not have a likely prospect of successfully resisting the enforcement application in respect of a final determination order of the RTB. I am quite satisfied that the Board's well-reasoned decision in this regard was rational and that there is no arguable basis for seeking to interfere with it on reasonableness grounds.

34. I do not accept as arguable the Applicant's contention that there was a failure to properly consider s. 125 of the 2004 Act as it is clear that s. 125 was addressed in Counsel's second opinion and she sets out cogent reasons why it is unlikely to avail the Applicant including the fact that it is relevant to the exercise of the discretion under s. 125 that the Applicant could have appealed to a Tenancy Tribunal but did not and that the Applicant's co-tenant was in a position to attend. It is my view that the Applicant has not demonstrated an arguable basis for impugning this decision on the basis that it is irrational or unreasonable.

35. Neither am I satisfied that there is an arguable basis for successfully challenging the proceedings by way of judicial review on the grounds that the opinion formed under s. 28 was made without regard to the Applicant's disabilities. It is clear that regard was had to the fact that the Applicant had presented medical evidence in support of his original unsuccessful application for an adjournment, medical evidence had been sought to establish his fitness to give instructions and counsel expressly stated that the medical evidence provided by the Applicant did not affect her conclusions as to the merits of the proceedings.

36. I accept, however, that depending on the facts an applicant might have arguable grounds to complain that a decision of the Board is flawed where the Board does not consider the particular needs, by reason of disability or a language impairment or otherwise, of an applicant in weighing questions of "*benefit*" under s. 28(2)(e) of the 1995 Act in refusing an application. The concept of "*benefit*" under s. 28(2)(e) very arguably expands beyond a benefit measured with reference to the likely outcome of the case which seems to be the primary consideration in this case. The Board is not required to refuse an application for a legal aid certificate if it forms a reasonable opinion that the proceedings are unlikely to succeed and therefore to yield no benefit in terms of the litigation outcome to be achieved. Under s. 28 of the 1995 Act the Board may still grant a legal aid certificate which it considers is unlikely to succeed where the Board is of the opinion that there is a benefit arising to an applicant (perhaps because of the extent of a disability which undermines their ability to represent themselves and therefore vindicate a right of access to the Courts) in so doing when regard is had to all the circumstances including the cost of so doing.

37. As there may be cases where the Applicant may be likely to fail but there may still be a benefit to him which would warrant the grant of legal aid, it is conceivable that a stateable or arguable case might be made that the Board erred in construing benefit in the narrow sense of outcome as opposed to the wider sense of vindicating a right of access to the Court through a focus on likely prospects of success. In this case, however, such an argument does not reach a threshold of arguable grounds for challenge as s. 28(2) of the 1995 Act is not the sole basis for refusal but reliance is also placed on s. 24 of the 1995 Act and an entitlement to legal aid under s. 28 is made subject to s. 24 of the 1995 Act.

38. While the Board has a power under s. 28 of the 1995 Act to grant a legal aid certificate notwithstanding poor prospects of success of the proceedings themselves, it is clear that the Board must refuse a legal aid certificate if it forms a reasonably held opinion in accordance with s. 24 of the 1995 Act that a reasonably prudent person who could afford to (without undue hardship) would not pursue the proceedings and would not be advised to do so. The Board formed such an opinion in this case in a reasoned and rational manner and I am satisfied that the Applicant has not identified an arguable basis for contending otherwise. This being the case, the Board was obliged to refuse the application notwithstanding the Applicant's disabilities as evidenced in the medical reports furnished to the Board and had no discretion to grant a legal aid certificate under s. 28 by reason of the operation of s. 24. The test is not

whether the Applicant would pursue these proceedings notwithstanding the negative advice received and using his own resources to retain legal representation but whether a reasonably prudent person (with or without disabilities) would.

CONCLUSION

39. For the reasons set out I am refusing this application for leave. The Applicant has failed to satisfy me that there are arguable grounds for contending that a Court should interfere with the decision of the Board to refuse a certificate for legal aid in respect of the Circuit Court appeal pending on behalf of the Applicant in respect of an RTB determination in all the circumstances of this case which include that he is no longer in possession of the former dwelling the subject of the tenancy agreement. While there can sometimes be benefits in securing legal representation in litigation even where one is unlikely to succeed and the fact of disability or language impediment may be relevant considerations for the Board in deciding whether or not to exercise a power to grant a certificate, the Applicant has failed to present an arguable case that the Board's opinion that a reasonably prudent person of adequate means (in the sense set out in s. 24) would not pay for legal representation from their own resources and would not be advised to do so in this case was flawed in any way. This was an opinion rationally formed for which coherent reasons have been given in writing.