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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	12/04/2022

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 SAMUEL COLEMAN (KNOWN AS 'KATIE COLEMAN') FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE SOUTHERN HEALTH AND SOCIAL CARE TRUST

AND IN THE MATTER OF A DECISION OF THE BELFAST HEALTH AND SOCIAL CARE TRUST

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Ms Bobbie-Leigh Herdman (instructed by MacAllister McAleese Solicitors) for the Applicant
Mr Aidan Sands (instructed by Directorate of Legal Services) for the Respondents

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RULING ON COSTS

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COLTON J

Introduction

[1] This matter initially came before the court by way of an urgent application against the Southern Health and Social Care Trust ("SHSCT"). Leave was granted on the papers on 12 August 2021. At that stage, the applicant was resident in the SHSCT area but had not been provided access to Forensic Learning Disability Services since her move there on 24 March 2020. The applicant had been receiving Forensic Learning Disability Services from Belfast Trust since 2011. Her connection with the Southern Trust was solely by reason of having been temporarily placed in the Probation Hostel in Portadown upon release from prison. Pre-action correspondence to the SHSCT issued on 23 April 2021 challenging the decision not to admit the applicant to the relevant service. A response from the Trust dated 23 April

2021 indicated that a further assessment would be undertaken and would be complete within two weeks. By June 2021 a decision admitting the applicant to the Forensic Learning Disability Service still had not issued and the applicant's solicitor wrote again to the SHSCT on 8 June 2021. A response was received on 11 June 2021 indicating that a detailed update would be provided the following week. By the date of the issue of proceedings in August 2021 no further correspondence had been received from the Trust.

[2] Pursuant to directions issued when leave was granted the SHSCT provided a replying affidavit on 9 September 2021 indicating that it did not accept that it had responsibility to provide the applicant with access to Forensic Learning Disability Services. The SHSCT had been in discussions with the Belfast Health and Social Care Trust ("BHSCT") on this issue with the SHSCT regarding the BHSCT as having responsibility to finance the applicant's access to the relevant service as the "Home Trust." An agreement could not be reached between the Trusts.

[3] In light of this information the applicant requested that the full hearing listed for 11 October 2021 be downgraded to a mention on 27 September 2021 in order to allow for an application to be made to join the BHSCT to the proceedings.

[4] At the review on 27 September 2021 leave was granted to add BHSCT to the proceedings on the basis that their failure to agree to pay for the relevant services had left the applicant without access to those services.

[5] A replying affidavit dated 25 November 2021 was filed by BHSCT. In the intervening period, the application had become academic as the applicant had been moved to a longer term placement in the BHSCT who were providing the applicant with access to the relevant services. The court was notified of this and the hearing listed for 13 January 2022 was downgraded to a mention. In light of the developments the issues between the parties had been resolved and the only outstanding issue relates to the costs of the application. The parties agree that the proceedings can be dismissed as they are now academic.

[6] The court is grateful to counsel for their able and helpful written submissions on this issue. Ms Bobbie-Leigh Herdman appeared for the applicant and Mr Aidan Sands for the respondents.

The applicable legal principles

[7] The court is regularly confronted with the issue raised in this case. Almost inevitably circumstances "on the ground" in relation to vulnerable persons such as the applicant evolve and change with the result that frequently by the time proceedings are ready for hearing no relief is required. This is particularly so in relation to cases involving the provision of services by Trusts.

[8] The starting point is that the court has a broad discretion in relation to the issue of costs.

[9] The powers of the High Court to deal with costs of, and incidental to, proceedings are set out in the Rules of the Supreme Court and, primarily, in Order 62. The general rule is the unsuccessful party should normally pay the costs of the successful party. Order 62 Rule 3(3) provides:

> "If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole, or any part, of the costs."

[10] There is no particular rule in relation to costs for proceedings in judicial review applications, although the matter has been considered in a number of judgments.

[11] When faced with determining the issue of costs where a judicial review has been dismissed the courts in this jurisdiction tend to adopt the principles set out in the case of *R(Boxall) v London Borough of Walton Forest* [2000] All ER (D). In the judgment of the court Scott-Baker J set out the relevant principles as follows:

> "(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial where the parties have not agreed about costs.
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> (ii) It will ordinarily be irrelevant that the application is legally aided.
>
> (iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional costs.
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> (iv) At each end of the spectrum there will be cases where it is obvious which side who would have won had the substantive issues been fought to a conclusion. In between the position will, in differing degrees, be less clear.
>
> (v) How far the court was prepared to look into the previously unresolved substantive issues will depend on the circumstances of a particular case, not least the amount of costs at stake and the conduct of the parties.

(vi) In the absence of a good reason to make any other order the fall back is make no order as to costs.

(vii) The court should take care to ensure that it does not discourage parties from settling the judicial review proceedings for example by a local authority making a concession at an early stage."

[12] In this jurisdiction McCloskey J has reviewed the general principles and, in particular, the evolution of the *Boxall* principles in the case of *YPK and others* [2018] NIQB 1. He did so in light of two subsequent decisions of the English Court of Appeal in *R(Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895 and *M v London Borough of Croydon* [2012] EWCA Civ 59.

[13] Having conducted that review McCloskey J observed the two overarching principles which "shine more brightly than any other." The first is that costs lie in the discretion of the court. The second is that the unsuccessful party should normally pay the costs of the successful party.

Application of the principles to this case

[14] A reading of the affidavit evidence, particularly that of Catherine Lynn, on behalf of the BHSCT, reveals that the factual background here was complex.

[15] The applicant says she is entitled to costs because proceedings were required for two reasons. Firstly, the failure of the respondent Trusts to agree a position between themselves as to the financing of the applicant's care necessitated proceedings. Secondly, it is argued that the failure of the SHSCT to set out this issue in correspondence necessitated the issue of proceedings. It was only when the SHSCT filed its affidavit that the applicant was able to obtain the basic information required to demonstrate that the BHSCT was an appropriate co-respondent in the matter.

[16] Ms Herdman submits that the applicant did not rush to issue proceedings but waited for responses in accordance with the judicial review protocol.

[17] On behalf of the respondent Mr Sands submits that the applicant over simplifies the case. He strongly asserts that the respondents would have contested any application and have made no concession that they have acted unlawfully. There has been no change in their position as a result of these proceedings.

[18] He points out (and I accept) that this was a highly complex and unusual case. The applicant's case fell just on the cusp of learning disability with a level of functioning that is "markedly different" to a person who normally accesses learning disability services. The major problem in the case was the applicant's serious sexual offending background (she is a category 2 sex offender who is subject to a Sex

Offenders Prevention Order), matters in which she has been determined to have a full capacity. Persons accessing learning disability services tend to be vulnerable, and there was an obvious difficulty in making arrangements for the applicant to be placed in such environments. For the same reasons, it has proved extremely difficult to find suitable accommodation for the applicant.

[19] The issue, had the matter proceeded to court, would be whether the Trusts have done enough to discharge their statutory duties. The court is aware that judicial assessment of the extent of legal duties owed under Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972 is far from straightforward. The nature and extent of the social care duty is highly fact specific, depending on the Trusts' assessment of need. The courts recognise that Trusts are entitled to take a range of factors into account in determining how to meet that need.

[20] Mr Sands points out that the BHSCT has provided, and continues to provide, a range of social care services to the applicant and states that the approach it has taken was entirely lawful.

[21] Returning to the *Boxall* principles it could not be said that it is obvious which side would have won had the substantive issues been fought to a conclusion. This is not a case where the respondents have made a concession or have agreed a "pragmatic settlement" or changed its position as a result of these proceedings being issued.

[22] Having considered all the circumstances of the case I have decided that the fifth *Boxall* principle applies here, namely that "in the absence of a good reason to make any other order the fall back is to make no order as to costs."

[23] Accordingly, I order that the proceedings be dismissed and that no inter partes order be made in relation to costs.

[24] Since the applicant is legally aided the court makes the usual order that her costs are to be taxed in accordance with the second schedule of the Legal Aid Order.