

THE HIGH COURT

[2022] IEHC 166

[Record No. 2020/1022 JR]

BETWEEN

ANTONIO CASIMIRO LOPES

APPLICANT

AND

LEGAL AID BOARD

RESPONDENT

EX TEMPORE RULING of Ms. Justice Siobhán Phelan delivered on the 24th day of March, 2022

INTRODUCTION

1. This matter came before me by way of an application for leave to proceed by way of judicial review seeking to quash the decision of the respondent to refuse legal aid for medical negligence proceedings which have been maintained by the applicant as a litigant in person to Notice of Trial stage. The application was heard on notice to the respondent.

2. The refusal which is challenged is a refusal made pursuant to s. 28(4)(d) of the Civil Legal Aid Act, 1995 [thereafter “the 1995 Act”] which provides:

“(4) Notwithstanding subsection (2), the Board may refuse to grant a legal aid certificate if it is of the opinion that—

(d) such information as is reasonably required by the Board from the applicant to enable it to make a decision on whether to grant a legal aid certificate or not has not been provided by him or her..”

3. According to the Court records, papers were filed in the Central Office on the 18th of December, 2020. The matter appears to have been opened before the Court on the 1st of

February, 2021 and thereafter it appears to have come before Mr. Justice Meenan on an *ex parte* application for leave to proceed by way of judicial review in March, 2021. By Order drawn on the 22nd of March, 2021, Mr. Justice Meenan directed that the respondent be put on notice of the application. The Order recites that the applicant seeks leave to quash the respondent's decision dated the 22nd of July, 2020 refusing an application for legal aid. Two replying affidavits were subsequently filed on behalf of the respondent, namely the affidavit of Thomas O'Mahony sworn on the 2nd of June, 2021 and the further affidavit of Garret Searson sworn in February, 2022. It appears from these affidavits that the Decision of the 22nd of July, 2020 was subject to an internal review process and was affirmed on review. The review decision was communicated by letter dated 27th of November, 2020.

BACKGROUND

4. By way of brief overview, the applicant issued two sets of proceedings in 2016.
5. Specifically, he issued proceedings against his former GP, Dr. Anthony Lee and subsequently joined Menanrini Pharmaceuticals as a co-defendant [hereinafter "the Lee/Menanrini proceedings"]. Mr. O'Mahony on behalf of the respondent avers that the gravamen of these proceedings is that Dr. Lee and the pharmaceutical company "*effectively colluded to conduct experiments on the Applicant in the use of the medication prescribed.*" In the said medical negligence proceedings my understanding is that the applicant claims that the first named defendant prescribed a drug manufactured by the second named defendant for blood pressure but without this drug being suitable for persons such as the applicant who suffers from a kidney impairment.
6. The applicant issued separate but related medical negligence proceedings against University Hospital Waterford entitled *Lopes v. University Hospital Waterford 2016/5219P* [hereinafter the "University Hospital Waterford" proceedings]. These proceedings are described in the respondent's correspondence as relating to renal treatment received in Waterford University Hospital from named doctors (including a consultant nephrologist) between October 2012 to date. The said proceedings were issued in January, 2016. The applicant has not sought legal aid in respect of these proceedings.

7. Both sets of proceedings appear to concern the management of the applicant's health and treatment in view of his condition of kidney impairment and the link between the claims advanced in both sets of proceedings is clear. The fact that the sets of proceedings are relevant to each other is reflected in the Order of the High Court in the Lee/ Menanrini proceedings directing discovery in relation to the University Hospital Waterford proceedings, an order which in normal course requires the Court to be satisfied that discovery was necessary and relevant having regard to the issues the Court is required to determine in the Lee/ Menanrini proceedings.

8. The applicant first made an application for legal aid in May, 2019. This was the first of two applications in respect of the same proceedings, namely the Lee/ Menanrini proceedings. The applicant attaches importance to the fact that he made no such application in the University Hospital Waterford proceedings. By the time the application for legal aid was made proceedings were significantly advanced as the Personal Injuries Summons in the Lee/ Menanrini proceedings had issued in March, 2016 with an appearance entered that same month. The proceedings were set down for hearing on 11th of June, 2018. Thereafter an application for discovery was made and came before Ms. Justice O'Hanlon in February, 2019 when she made an order for discovery against the applicant. Discovery was also ordered against the second named defendant.

9. The applicant was requested by the respondent to provide documentation in relation to both sets of proceedings to allow for an assessment of the merits of the legal aid application. While the applicant provided some of the documentation sought, he did not provide other documents. The solicitor dealing with the matter in the Legal Aid Board communicated with the applicant identifying the additional information required. The efforts made to procure documentation in support of the application for legal aid from the applicant are outlined in some detail in the affidavit of Thomas O'Mahony. The applicant's response to the request for further information was to accuse the respondent of impropriety. Further efforts were made to procure documentation from the applicant by letters dated the 14th of June, 2019, the 24th of October, 2019, the 29th of October, 2019, the 19th of November, 2019, and the 17th of December, 2019. In particular, by detailed letter dated the 24th of October, 2019, the respondent summarised the results of its review of the documentation submitted to that point and identified further documentation which it required to consider the application. In addition to documentation relating to the proceedings in respect of which legal aid was sought, the

pleadings in the *Lopes v. University Hospital Waterford* 2016/5219 P were also sought together with a complete set of the applicant's medical records.

10. By letter dated the 27th of October, 2019, the applicant refused to provide the additional documentation sought until the respondent had come on record. He maintained that the respondent had enough information to make a decision on whether to represent him or not. An accusation of impropriety was again made (and periodically repeated thereafter). By further letter dated the 20th of November, 2019, however, the applicant moderated his position explaining that he did not have some records – some were awaited, some had been mislaid and he had never sworn an affidavit of verification and so therefore could not provide it. In a further letter dated the 17th of December, 2019, the solicitor in the Legal Aid Board again set out in detailed fashion information which was outstanding. This information included the pleadings in the *University Hospital Waterford* case which had been made the subject of a discovery order in favour of the second named defendant, but which had not been furnished in full, as well as medical records which were also the subject of a court order. The failure to provide supportive independent expert evidence to establish the liability of the defendants in the form of a liability report in the medical negligence case was highlighted.

11. Ultimately, the applicant's first application for legal aid was refused. The applicant submitted a complaint in relation to the handling of his application. He confirmed that he was not seeking a review of the decision but would reapply for legal aid. In his complaint, he pointed to the fact that an application to dismiss his proceedings as showing no reasonable cause of action had not succeeded and also asserted that he was not seeking legal aid for the case against University Hospital Waterford which in his view meant that this case was irrelevant. He accused the solicitor of harassment in seeking further information from him. He further maintained that he could not get a medical report because it was impossible to get a doctor in this country to issue one and he needed assistance in procuring a report from the UK. He repeated allegations against the solicitor who had sought to assist him with his application for legal aid.

12. The applicant's complaint was not upheld. While it is not clear to me that the applicant sought a review, it appears that the refusal of legal aid was referred for review internally and the refusal was upheld on the 22nd of January, 2020.

13. A further application for legal aid was made in March, 2020. While this second application was accompanied by enclosures, outstanding documentation was still not furnished. The applicant was informed of deficiencies with this second application by letter dated the 24th of March, 2020 and was asked to provide the outstanding documentation to allow for an assessment of the merits of his application. The applicant's response to this correspondence was to seek to have a different solicitor assigned to deal with the application. When this request was refused, the applicant wrote again making further allegations of professional impropriety, which allegations are denied by the solicitor dealing with the matter.

14. The applicant's persistent position as confirmed through the correspondence was to refuse to provide the respondent with documentation regarding what is described as his separate but related proceedings against University Hospital Waterford.

15. By letter dated the 10th of July, 2020, the said solicitor employed by the respondent wrote again acknowledging the documentation received which is listed in an appendix to the letter but referring to repeated correspondence seeking further documentation which had not been provided. Documents identified as missing included certain interim and further orders in the proceedings for which legal aid was sought as well as a list of documents from the *Lopes v. University Hospital Waterford* proceedings and the medical records which had been the subject of an order of Ms. Justice O'Hanlon in February, 2019 in the proceedings in respect of which legal aid was sought.

16. The second application was referred for decision by the Legal Aid Board Head Office on the 20th of July, 2020 and on the 22nd of July, 2020 the legal services section of the Legal Aid Board decided to refuse the application pursuant to s. 28(4)(d) of the 1995 Act. The applicant was so informed on 22nd of July 2020 and was also informed of his entitlement to seek a review or an appeal of the decision. The applicant responded by email of 31st of July, 2020 again alleging misconduct in the management of the file and indicating his intention to appeal the refusal decision. The Appeal Committee Panel ultimately dismissed the appeal and this decision was notified by letter of 27th of November, 2020. It is this decision of the 22nd of July, 2020, as affirmed on appeal in November, 2020, which is sought to be impugned in these proceedings.

LEGAL TEST IN APPLICATION FOR LEAVE ON NOTICE

17. 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 Order 84, rule 20 of the Rules of the Superior Courts. The application of the test was considered by the Supreme Court in its seminal 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.

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

“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. In *Gordon v Director of Public Prosecutions* [2002] 2 I.R. 369 this test has been described as a “*low threshold*”, per Fennelly J. at p. 372.

20. Acknowledging that the threshold is “*low*”, I am satisfied that the applicant meets the requirements for leave set out in *G v. DPP* at (a) in that he has a sufficient interest in the matter

to which the application relates to comply with rule 20(4). I do not consider that he falls foul of (d) in relation to the obligation to move promptly or (e) in relation to the only effective remedy. The difficulty with the application of the test in this case, as I see it, is in relation to (b) and (c). In my view the applicant has a hurdle to climb in relation to (b) and (c) as regards the facts averred on affidavit and whether on these facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.

21. This brings us to the test for an arguable case. What an arguable case might mean was amplified by Denham J. in the *G* decision, with whom Blayney J. agreed. At p.382, she stated:

“This preliminary process of leave to apply for judicial review is similar to the prior procedure of seeking conditional orders of the prerogative writs. The aim is similar – to effect a screening process of litigation against public authorities and officers. It is to prevent an abuse of the process, trivial or unstatable cases proceeding, and thus impeding public authorities unnecessarily. ... It is a preliminary filtering process for which the applicant is required to establish a prima facie case. Ultimately on the actual application for judicial review the applicant has an altogether heavier burden of proof to discharge.”

22. In contrast and as an elaboration on the test, in *S and Others v Minister for Justice and Equality* [2013] IESC 4, (cited in *O.O. v Min for Justice* [2015] IESC 26 by Charleton J.) Clarke J. referred at para. 5.1 of his judgment to “*a sufficiently arguable case... for the grant of leave to seek judicial review in the light of the existing jurisprudence.*”

23. More recently, in *O.O.*, the Supreme Court had further occasion to consider the arguability threshold. In his judgment in *O.O.* Charleton J., referred back to the earlier decision of Clarke J. in the *S* case, before proceeding to observe (para. 15):

“Any issue in law can be argued: but that is not the test. A point of law is only arguable within the meaning of the relevant decisions if it could, by the standards of a rational preliminary analysis, ultimately have a prospect of success. It is required for an applicant for leave to commence judicial review proceedings to demonstrate that an argument can be made which indicates that the argument is not empty. There would be no filtering process were mere arguability to be the test without, at the same time, taking

into account that trivial or unstateable cases are to be excluded: the standard of the legal point must be such that, in the absence of argument to the contrary, the thrust of the argument indicates that reasonable prospects of success have been demonstrated. It is still required to be shown that a prima facie legal argument has been established. In terms of evidence, the requirement for a prima facie case is regarded as that which “if not balanced or outweighed by other evidence, will suffice to establish a particular contention”; Halsbury’s Laws of England (5th edition) volume 11, paragraph 767. In terms of law, the test is no different: it is a point of law which if not balanced or outweighed by other principles will suffice to establish the contention. This is the filter, which the leave application is designed to be, in order to ensure that there is sufficient reason to disrupt administrative decisions and to litigate them.”

24. Accordingly, the test I must apply is whether the applicant has demonstrated a *prima facie* legal argument that has a reasonable prospect of success and whether the evidence is such as to support that *prima facie* argument being advanced.

GROUNDS ADVANCED FOR SEEKING RELIEF BY WAY OF JUDICIAL REVIEW

25. There are three broad grounds of challenge discernible in the case as pleaded. In essence, the applicant contends that the decision to refuse legal aid is unsustainable by reason of:

1. Error of law and/or fact in the conclusion reached that the applicant had not provided information reasonably required by the Board to enable a decision on whether to grant a legal aid certificate or not in circumstances where the applicant contends that the information identified by the respondent as outstanding was not reasonably required for the purpose of an assessment of the merits of his case and he was entitled to withhold it;
2. Unfairness in the Internal Appeals Process regarding the request for an itemised list of documents from Appeal Panel;
3. Impropriety deriving from communication with third parties to secure information.

Failure to Provide Information Reasonably Required

26. In arriving at his recommendation that legal aid be refused, the solicitor dealing with the file had regard to the numerous requests for information. He pointed out that the material requested relating to medical records and the *University Hospital Waterford* case was the subject of a discovery order in favour of one of the defendants but had not been furnished. He also pointed to the lack of an independent medical liability report to substantiate a claim for liability for medical negligence.

27. I recognise that procuring such an independent and appropriate medical report may require legal assistance and may itself warrant the grant of a certificate of legal aid to cover the expense involved in obtaining such a report. Such a report is essential to the maintenance of medical negligence proceedings. Accordingly, while such a report is clearly relevant to an assessment of the merits, given the expense and difficulty in obtaining such a report it may in appropriate cases be necessary for an application for legal aid to be made for this purpose. Clearly the contents of such a report is of first importance when considering the merits of medical negligence proceedings and their prospects of success. Were the absence of such a report the reason cited for refusing legal aid an issue could arise on the facts of a given case as to whether it was a proper exercise of discretion to refuse on this basis without first procuring a report. However, in this case the absence of a medical report confirming liability on the part of the defendants is not the basis for the ultimate decision of the respondent, notwithstanding that it featured as a consideration in the solicitor's recommendation for refusal. The basis for the ultimate decision is as set out in the letter of the 22nd of July, 2020 and confirmed by letter dated the 27th of November, 2020 following review:

“Reason: The applicant has failed to supply the Board with necessary information to enable it to make a decision on whether or not to grant legal aid, specifically a complete set of medical records and pleadings in relation to his related cases against University Hospital Waterford. The medical records and pleadings are essential as they would constitute information reasonably required by the Board to assess the merits of the case. It is noted that on 18th of February, 2019 the High Court made an order directing the applicant to make discovery of the medical records, documents and pleadings to the defence. As this information remains outstanding, the Board is refusing legal aid.”

28. During the course of the hearing, the applicant confirmed that the discovery issue with the defendants in his medical negligence proceedings, the subject of the legal aid application, has been resolved on the basis of his consent that they be at liberty to take up his records directly and would furnish him with a copy of the records. This position has been confirmed in the recent past and is not information which was available to the respondent when it made its decision. For this information to be considered by the respondent, a further application for legal aid setting out these changed circumstances would be required.

29. Accordingly at the time of the respondent's decision, the applicant continued to maintain that the respondent was not entitled to the material sought in relation to the Waterford University Hospital claim notwithstanding efforts by the solicitor dealing with the application to explain the relevance of this material by letter dated the 17th of December, 2019 and again by letter dated the 30th of April, 2020.

30. In my view there was ample justification for requiring this information in order to make an informed assessment of the merits of the proceedings the subject of the application for legal aid in circumstances where the related proceedings also arose from the alleged failure to properly treat the applicant's kidney condition. In order to procure an order for discovery, the defendants had satisfied a requirement that the material was relevant and necessary to the claims in the proceedings. It is manifestly the case that it was also a relevant consideration for the respondent in assessing the merits of the applicant's Personal Injuries proceedings.

31. I must conclude that the applicant has not demonstrated arguable grounds for contending that in seeking a copy of the Waterford University Hospital file and the material required by the discovery order (which included the Waterford University Hospital papers), the respondent made a request for information which had not been properly identified as information reasonably required by the Board to assess the merits of the case.

Unfairness in the Internal Appeals Process

32. The applicant complained of unfairness in the internal appeals process because of the communication between the Appeals Panel and the solicitor dealing with the application whose

recommendation to refuse legal aid was under consideration. In this communication the Panel sought an itemised list of the information provided with the application.

33. The solicitor has confirmed on affidavit that no new material was considered by the Appeal Panel. The solicitor dealing with the matter within the Legal Aid Board responded to the query from the Appeal Panel by providing copies of the correspondence which was issued on the 10th of July, 2020 and already formed part of the file in the application for legal aid and had already been furnished to the applicant. Indeed it is clear that the correspondence issued to the applicant repeatedly included a list of materials received and a list of materials required. There is no evidence to support a complaint that any unfairness derived from the placing of new material before the Appeals Panel and no new material was provided. The applicant was advised in writing of the Appeal Panels request for details of the information which had been provided and the information which had not been provided and copied with the correspondence by letter dated 28th of September, 2020.

34. In circumstances where the applicant was alerted to the communication from the Appeal Panel and had an opportunity to address it and where it is clear that no new material was submitted to the Appeal Panel, I am satisfied that the evidence does not support *prima facie* arguable grounds for contending that the appeal process was unfair.

Impropriety / Information from Third Party

35. From the date of his first application, the applicant has accused the respondent of improperly obtaining information from third parties. No proper evidential basis for this serious allegation is identified and the respondent has confirmed that they have been in a position to identify missing documentation from the documents they hold and from the record and have not relied on third parties. From reviewing the correspondence, I see nothing in the correspondence of the respondent to substantiate a claim that information was received from a third party or to substantiate the serious allegations of impropriety levelled against the solicitor dealing with the file and the respondent. In my view the applicant has failed to demonstrate a *prima facie* case of arguable grounds on this third broad ground of challenge also. I consider the repeated allegations of impropriety levelled against the solicitor dealing with the application for legal aid to be wild in nature and made without any proper consideration for

the impact (including reputational) of the liberal and excessive ventilation by the applicant of mere suspicion and conspiracy theory. No reasonable basis in fact or on the evidence is identified for the arguments advanced that there has been any impropriety in the management of the application. No basis in fact, supported by real evidence rather than the applicant's perception of events, is set out on affidavit.

CONCLUSION

36. In circumstances where I have concluded that no arguable grounds have been advanced, I will dismiss the application for leave to proceed by way of judicial review.