



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 62  
P697/16

Lady Clark of Calton

OPINION OF THE COURT

delivered by LADY CLARK OF CALTON

in causa

WILLIAM FREDERICK IAN BEGGS

Petitioner

against

SCOTTISH MINSTERS

Respondents

**Petitioner: K Campbell QC; Drummond Miller LLP**  
**Respondents: Byrne; Scottish Government Legal Department**

11 October 2017

**Summary**

[1] The petitioner made an application for Judicial Review challenging certain matters in relation to the way in which his correspondence was dealt with during a period of custodial sentence in prison. The application for Judicial Review is subject to the provisions in sections 27A-D of the Court of Session Act 1988 (“the 1988 Act”). The petitioner applied to the court for permission for the application to proceed in terms of section 27B. Following an oral hearing, the Lord Ordinary, in his opinion dated 6 July 2017, granted permission to

proceed in respect of two distinct issues. He refused permission to proceed in respect of other matters advanced on behalf of the petitioner at the oral hearing. There is provision in section 27D(2) for appeal by a person making the application within a time limit of 7 days beginning with the day on which the court made its decision. The petitioner enrolled a motion on form 23.2 seeking various orders to progress what was described as “the Reclaiming Motion”. This motion came before the court in terms of Rule of Court 38.12(5)(a) to consider the opposed motion. In particular the court was invited to decide, in the event that the motion was marked out of time by one day, whether it was competent for the court to exercise discretion in terms of Rules of Court 38.8(d) and 38.10 to allow the Reclaiming Motion to be received although one day late.

### **The Relevant Statutory Context**

[2] Significant changes to the procedure of judicial review were introduced in Scotland by section 89 of the Court Reform (Scotland) Act 2014 (“the 2014 Act”). Section 89 specified that sections 27A-D of the 2014 Act be inserted after section 27 of the Court of Session Act 1988 (“the 1988 Act”). The most important provisions relate to new time limits, a requirement specific to Judicial Review for what I describe as a threshold criteria for such proceedings, namely permission by the court for an application to proceed and new provisions for challenging a decision of the court refusing permission. For convenience I set out the provisions as inserted into the 1988 Act in some detail:

#### **“27A Time limits**

(1) An application to the supervisory jurisdiction of the Court must be made before the end of—

- (a) the period of 3 months beginning with the date on which the grounds giving rise to the application first arise, or

(b) such longer period as the Court considers equitable having regard to all the circumstances. ...

**27B Requirement for permissions**

(1) No proceedings may be taken in respect of an application to the supervisory jurisdiction of the Court unless the Court has granted permission for the application to proceed.

(2) Subject to subsection (3), the Court may grant permission under subsection (1) for an application to proceed only if it is satisfied that—

(a) the applicant can demonstrate a sufficient interest in the subject matter of the application, and

(b) the application has a real prospect of success.

(3) Where the application relates to a relevant Upper Tribunal decision, the Court may grant permission under subsection (1) for the application to proceed only if it is satisfied that—

(a) the applicant can demonstrate a sufficient interest in the subject matter of the application,

(b) the application has a real prospect of success, and

(c) either—

(i) the application would raise an important point of principle or practice, or

(ii) there is some other compelling reason for allowing the application to proceed.

(4) The Court may grant permission under subsection (1) for an application to proceed—

(a) subject to such conditions as the Court thinks fit,

(b) only on such of the grounds specified in the application as the Court thinks fit.

(5) The Court may decide whether or not to grant permission without an oral hearing having been held. ...

**27C Oral hearings where permission refused, etc.**

(1) Subsection (2) applies where, in relation to an application to the supervisory jurisdiction of the Court—

(a) the Court—

(i) refuses permission under subsection 27B(1) for the application to proceed, or

(ii) grants permission for the application to proceed subject to conditions or only on particular grounds, and

(b) the Court decides to refuse permission, or grant permission as mentioned in paragraph (a)(ii), without an oral hearing having been held.

(2) The person making the application may, within the period of 7 days beginning with the day on which that decision is made, request a review of the decision at an oral hearing.

(3) A request under subsection (2) must be considered by a different Lord Ordinary from the one who refused permission or granted permission as mentioned in subsection (1)(a)(ii).

(4) Where a request under subsection (2) is granted, the oral hearing must be conducted before a different Lord Ordinary from the one who refused or so granted permission.

(5) At a review following a request under subsection (2), the Court must consider whether to grant permission for the application to proceed; and subsections (2), (3) and (4) of section 27B apply for that purpose.

(6) Section 28 does not apply —

(a) where subsection (2) applies, or

(b) in relation to the refusal of a request made under subsection (2).

### **27D Appeals following oral hearings**

(1) Subsection (2) applies where, after an oral hearing to determine whether or not to grant permission for an application to the supervisory jurisdiction of the Court to proceed, the Court —

(a) refuses permission for the application to proceed, or

(b) grants permission for the application to proceed subject to conditions or only on particular grounds.

(2) The person making the application may, within the period of 7 days beginning with the day on which the Court makes its decision, appeal under this section to the Inner House (but may not appeal under any other provision of this Act).

(3) In an appeal under subsection (2), the Inner House must consider whether to grant permission for the application to proceed; and subsections (2), (3) and (4) of section 27B apply for that purpose.

(4) In subsection (1), the reference to an oral hearing is to an oral hearing whether following a request under section 27C(2) or otherwise.

### **28 Reclaiming.**

Any party to a cause initiated in the Outer House either by a summons or a petition who is dissatisfied with an interlocutor pronounced by the Lord Ordinary may, except as otherwise prescribed, reclaim against that interlocutor within such period after the interlocutor is pronounced, and in such manner, as may be prescribed."

### The Rules of the Court of Session

[3] Within the Rules of the Court of Session there are no new specific rules tailored to the sections 27A-D procedures. There is however a relevant provision to be found in Rule 38.8(d) of Chapter 38. This rule states:

*“Appeals Treated as Reclaiming Motions*

38.8. In respect of the following appeals, the rules in this Chapter shall apply to those appeals as they apply to reclaiming—

...

(d) an appeal from a decision of the Lord Ordinary concerning permission to proceed in petitions for judicial review under section 27D of the Act of 1988 (appeal following oral hearings).”

Chapter 38 makes general provision about reclaiming. In particular Rule 38.2 makes detailed provision in a variety of circumstances for time limits for reclaiming under the general heading of “Reclaiming days”. Rule 38.5 sets out the method of reclaiming and states:

*“(1) A party who seeks to reclaim against an interlocutor shall mark a reclaiming motion by enrolling a motion for review in Form 38.5 before the expiry of the reclaiming days. ”*

and detailed provision is made in Rule 38.5(2) about the documents to be lodged. Provision is also made for reclaiming out of time in Rule 38.10 which states:

*“38.10.—(1) In a case of mistake or inadvertence, a procedural judge may, on an application made in accordance with paragraph (2), allow a motion for review to be received outwith the reclaiming days and to proceed out of time on such conditions as to expenses or otherwise as the judge thinks fit.*

*(2) An application under paragraph (1) shall be made by motion included in the motion for review made under rule 38.5(1).”*

[4] Various other provisions are made in Chapter 38 of the Rules including dealing with objections to the competency of reclaiming, by any party other than the claimer, which is

dealt with in Rule 38.12. In Rules 38.13 to 38.21, there are detailed provisions about procedural matters and timetabling.

[5] In the rules relating to Judicial Review under the heading “The Permission Stage: Appeals to the Inner House” Rule 58.10 states:

“58.10. An appeal under section 27D(2) of the Act of 1988 (appeals following oral hearings) is made by reclaiming motion (see rule 38.8(d)).”

### **The Submissions of the Parties**

[6] In the motion, as drafted, the petitioner sought to argue that the appeal was timeous and was within the 7 day statutory period. There was an issue between the parties as to the correct calculation of the 7 day period. But in oral submission it was conceded by counsel for the petitioner, that on a proper interpretation of section 27D(2), the 7 day statutory period expired at midnight on 12 July 2017, the Lord Ordinary’s Opinion having been advised on 6 July. It was submitted therefore that the appeal was one day late. This was accepted by the respondents. The parties joined issue on the question of whether it was competent for this court to apply Rule of Court 38.10 and allow the appeal to proceed out of time. In advancing their oral submissions counsel for both parties adopted their written submissions. I summarise the submissions briefly.

### **Submissions on behalf of the Scottish Ministers, the Respondents**

[7] Counsel for the respondents submitted that the claimer’s motion was misconceived for three reasons. Firstly the time limit is a statutory time limit under section 27D(2) as inserted in the 1988 Act and there is no discretion given in the statutory provisions to extend the appeal time limit. The petitioner sought to rely on Rule of Court 38.8(d) but the court’s

power to regulate its own practice and procedure, as set out in the Rules of Court, can only be exercised in so far as it does not conflict with statute. Reference was made to *Newman Shopfitters Limited v MJ Gleeson Group Plc* 2003 SLT (Sheriff Court) 83 at 88c; *Maitland petitioner*, 1961 SC 291 at 293; *L petitioner (No 1)* 1993 SLT 1310; *Anderson v HM Advocate*; *Brogan v O'Rourke Limited* 2005 SLT 29 at 35 E-G; *Hepburn v Royal Alexandria Hospital* 2011 SC 20. It was plain from the statutory innovations that Parliament intended that the new procedure for Judicial Review be subject to a strict timetable. Counsel submitted secondly, that on a plain reading of Rule of Court 38.10, the rule relates to the extension of reclaiming days only. It is not a legitimate interpretation to equate the 7 day period allowed under section 27D with "reclaiming days". Thirdly the statutory context is consistent with a new system in which there is no judicial discretion under the rules to extend the statutory time limit.

[8] In conclusion, counsel submitted that in the event that the court concluded it was competent to consider an extension under Rule of Court 38.10, he had no submissions to make about the merits of such an extension and was content to leave that to the court.

### **Submissions by Counsel for the Petitioner**

[9] Counsel for the petitioner submitted that the statutory appeal under section 27D did not provide any detailed mechanism for an appeal. No permission to appeal is required. It is plain from Rules of Court 38.10 and 38.8 that the mechanism provided for the statutory appeal is that it is treated as a Reclaiming Motion and the Chapter 38 rules apply. That must include the discretionary power under Rule of Court 38.10. On the face of the Rules of Court, there is therefore a power for the court to allow the statutory appeal under

section 27D to proceed, although late, if the court is satisfied that the conditions set out in the rule are met. The application of Chapter 38 is unqualified. Counsel pointed out that if there is no discretion in relation to the petitioner, there appears to be an inequality in that it is only the petitioner who is excluded from reclaiming under section 28 of the 1988 Act. By implication, a respondent is not so excluded and would be entitled to reclaim in the normal way under section 28 of the 1988 Act which would include a right to rely on Rule of Court 38.10. This would give an advantage to the respondent which would be unfair.

Counsel accepted that where primary legislation provided a complete code for appeal with a time limit, the Rules of Court could not extend that time limit but that was not the situation in this case. It is plainly envisaged that there would be further provisions and these are to be found in Chapter 38 of the Rules of Court.

[10] In relation to the merits of the motion to extend, counsel invited the court to exercise its discretion taking into account the reasons set out in the motion. In particular the appeal application was only one day late; there were practical difficulties; there was no prejudice to the respondents and in any event the case is to return to the Lord Ordinary for further procedure in respect of other matters.

### **Decision and Reasons**

[11] Sections 27A – 27D, which were inserted into the 1988 Act by section 89 of the 2014 Act, introduced an initial threshold criteria or barrier for a petitioner seeking to bring an application to the supervisory jurisdiction of the court by way of Judicial Review. The new statutory provisions restricted the right of a petitioner to raise any Judicial Review proceedings regardless of merit or relevancy. There is no corresponding threshold at the

initial stage in respect of a respondent seeking to lodge answers. As I read section 27D, provision is made only for an appeal by the applicant seeking to bring the action in specified circumstances. Counsel for the petitioner submitted that unless the rules were interpreted in the way he put forward, this would lead to an imbalance as a respondent who wished to appeal is not restricted by section 27D and could rely on section 28. I was not fully addressed about the rights of a respondent but my initial view is that I am not persuaded that there is an appeal for a respondent who is dissatisfied with the judicial decision granting leave. The new statutory procedure is designed to tighten up time limits and give the power to the court to “weed out” applications which do not fit the criteria set out in section 27B(2). It is not designed to give respondents an opportunity to challenge at the initial stage of proceedings a judicial decision that the action should proceed in whole or in part. A respondent may make such a challenge in due course at a later stage. But even if a respondent does have a right to appeal or reclaim with different time limits, I do not consider that this assists the petitioner who appeals under statutory provisions.

[12] Section 27A introduced strict time limits albeit there is a specific dispensing provision in section 27A(1)(b) but only in relation to time limits for applications. A review provision in section 27C(2) sets out a strict time limit of 7 days to request review of a decision at an oral hearing and it is made plain in section 27C(6) that in such a case, where there has been a refusal of a request to review, reclaiming under section 28 does not apply. This situation therefore is not covered by Rule of Court 38.8. I consider that such an applicant who has had a refusal of a request to review, without an oral hearing, is left in a position that the court has no power to extend the 7 day period or relieve the applicant from a failure to apply timeously. Such an applicant therefore would have no further remedy

regardless of compelling reasons which existed for the failure to request a review within the period of 7 days.

[13] An applicant who has had the advantage of an oral hearing may take advantage of the provisions in section 27D. The argument for the petitioner is that such a person is in a better position, than the applicant who had no oral hearing, if the restricted time period of 7 days is not obtempered because such appeals are to be treated as Reclaiming Motions and therefore such an applicant can rely on Rule of Court 38.10. I consider that the problem with this submission is that Rule of Court 38.10 is designed to relieve a party in certain circumstances of a failure to comply with the rules relating to reclaiming days. The rules relating to reclaiming days are to be found in Rule 38.2. I am unable to interpret this as giving power to the court to relieve a party from the consequences of a failure to comply with the 7 day period set out, not in the rules, but in the statutory provisions relating to appeal.

[14] In addition in enacting section 27A, the Scottish Parliament plainly considered that there might be a need for an equitable power to extend the time limit for application and provided such a power in section 27A(1)(b) but no such provision appears in section 27D.

[15] Having carefully considered all the submissions by counsel for which I am grateful, I have come to the conclusion that it is not competent for the court to exercise powers in respect of this late application to appeal and in particular that Rule of Court 38.10 is not applicable.

[16] I also observe that there does not appear to be a motion for review in this case under Rule 38.5(1) as required by the Rules. No issue was taken about this by the respondents and my decision does not take this into account.

[17] If I had been entitled to deal with the merits of the motion, I would on balance have refused to exercise my discretion in favour of the petitioner under Rule of Court 38.10. I accept that there is an explanation for the delay, that the delay is minimal and that there is no prejudice to the respondents. Nevertheless I consider that I am entitled to take into account in the circumstances of this case the wider public interest requiring parties to comply with the rules and the time limit is plainly stated. This new procedure is focused on judicial control, within strict time limits, of applications to the supervisory jurisdiction of the court. That wider public interest may of course give way to other important considerations in appropriate cases. In the particular circumstances of this case I am not persuaded that the balance falls in favour of the petitioner.

### **Decision**

[18] For these reasons the motion in all its four parts is refused and, in terms of Rule of Court 38.12(7)(a), I refuse the Reclaiming Motion as incompetent. I also observe that there appears to be some tensions highlighted in this case between the primary legislation and the Rules of Court which may merit further consideration.