



## OUTER HOUSE, COURT OF SESSION

[2017] CSOH 155

P284/17

### OPINION OF LORD WOOLMAN

In the petition

GLASGOW CITY COUNCIL

Petitioner

against

THE SCOTTISH LEGAL AID BOARD

Respondent

and

PQ

Third Party

**Petitioner: Poole QC, Roxburgh; Glasgow City Council**

**Respondent: Crawford QC; Scottish Legal Aid Board**

**Third Party: I G Mitchell QC; Drummond Miller LLP**

22 December 2017

### Introduction

[1] In 2016 PQ brought two petitions for judicial review. He challenged linked decisions made by Glasgow City Council ("GCC"). Both related to the welfare rights of his mother. Following a debate, Lord Boyd dismissed both petitions.

[2] PQ sought legal aid to appeal. The Scottish Legal Aid Board ("the Board") initially refused the application, but changed its mind after a review. GCC seeks to quash the

decision to award legal aid. It contends that the application procedure was unlawful and unreasonable, because it did not receive the information to which it was entitled. In consequence it could not participate fully in the process.

[3] The Board (supported by PQ) maintains that it complied with its obligations. As PQ refused to give consent to the disclosure of the information sought, its hands were tied by an express statutory prohibition. Any disclosure to GCC might have resulted in criminal sanctions.

## **Background**

[4] PQ's mother is elderly and infirm. For several years GCC has made direct payments to fund daily care at her home. In 2010 she granted a power of attorney in PQ's favour. Her mental capacity has since deteriorated. He is therefore now responsible for her affairs. GCC formally assessed her needs in 2010 and again in 2015. On both occasions, it decided that it would be appropriate to transfer her to a residential establishment. GCC did not implement those decisions, because of PQ's views.

[5] PQ considers that it is in his mother's best interests for her to continue to live at home. He lodged two petitions for judicial review, one challenging each assessment. Lord Boyd issued a single opinion dealing with both petitions: [2016] CSOH 137 ("the judgment"). He concluded that the 2010 assessment was "wholly academic", as it had been superseded by the later assessment and would not revive (para 7). With regard to the 2015 assessment, he held that GCC had fulfilled its statutory duties. It had been carried out by "an experienced social worker who, I was informed, is also qualified as a nurse" (para 19).

## Application for Legal Aid

[6] PQ sought legal aid to reclaim the judgment. His solicitors sent various materials to the Board in support of the application. They included a terse 'statutory statement'. It simply said that Lord Boyd had "erred in law in refusing judicial review".

[7] On 4 November 2016, the Board notified GCC of the application and enclosed the statutory statement. Two weeks later Richard Fisher, GCC's legal manager, replied on its behalf. He asked for more specification about the precise basis of the appeal. At the same time he urged the Board to refuse legal aid. His representations were general in character. He maintained that the judgment should be respected and that it was unreasonable for the Board to make further public funds available to PQ. Mr Fisher agreed that the Board could disclose GCC's views to PQ.

[8] The Board initially refused to grant legal aid. Shortly after receiving notification of the decision on 6 December 2016, PQ requested a review. On learning of the request, Mr Fisher wrote to the Board. He asked for (a) sight of any additional information provided by PQ; and (b) an opportunity to comment before the Board took a decision. By return it acknowledged receipt of GCC's "representations". A week later, it wrote again to say that it could not give further information without PQ's consent. Mr Fisher replied that legal aid had been granted for at least 12 similar petitions, none of which had been successful.

[9] On 7 February 2017, the Board told Mr Fisher that PQ had refused his consent. It added:

"We have asked applicants on many occasions whether they are willing to provide consent to disclose, and I am not aware of any situation where consent has been provided, so the applicant's approach is not unusual. This is not an area in which we have any discretion."

[10] Mr Fisher tried another route. On 9 February 2017, he wrote directly to PQ's solicitors. He asked them to seek their client's consent to disclose any additional documents

that had been lodged in support of the review. They did not respond. On 20 February 2017, the Board reversed its decision and granted legal aid. It did not furnish GCC with reasons for either decision.

### **Grounds of Appeal**

[11] PQ lodged the grounds of appeal in the reclaiming motion after GCC commenced these proceedings. They assert that the social worker who carried out the 2015 assessment was not properly qualified. They also make claims relating to (i) the correct method of calculating the benefit payments due to Mrs Q; and (ii) the validity of the 2010 assessment, should the 2015 assessment be declared invalid.

[12] Mr Fisher was surprised when he saw them. He believes PQ's assertions to be incorrect. Had he known of them at the time, he would have sent detailed representations to the Board. By way of illustration, GCC maintains that the 2015 assessor was properly qualified. It has obtained a certificate from the Nursing and Midwifery Council to vouch that claim. It argues that it should have been able to put this point to the Board for three reasons. First, it bears upon probable cause and reasonableness. Second, it might have avoided the upset caused to the employee in question. Third, it might have prevented PQ persisting in his allegation that GCC misled the court on this point.

### **The Legal Aid Scheme**

[13] Legal aid occupies a place of central importance in our system. It provides many individuals with a bridge to justice. With the benefit of financial support from the legal aid fund, they can obtain legal representation to ascertain and vindicate their rights. It enables

them, for example, to challenge the acts of large companies and public authorities. That promotes the rule of law.

[14] The legislative framework comprises the Legal Aid (Scotland) Act 1986 and the Civil Legal Aid (Scotland) Regulations 2002 (respectively “the Act” and “the Regulations”). Further guidance is provided in a booklet published by the Board: the *SLAB Civil Handbook* (the “handbook”). I have also had the benefit of an affidavit from Ms Whyte, a senior Board official, setting out the operation of the scheme in practice.

[15] The Board applies a tripartite test for civil legal aid: sections 14 and 15 of the Act. Before making funds available, it must be satisfied that: (i) the applicant meets the financial criteria, (ii) there is probable cause, and (iii) it is reasonable to provide support.

[16] The main features of the application procedure are as follows:

- (a) Individuals provide materials to the Board on a confidential basis in support of their signed application form. Typically, they will include precognitions, documents vouching their financial status, and legal opinions.
- (b) Applicants must also provide a statutory statement, which is one of the three “essential elements” of the application. It should set out “the nature of the case and the interest of the applicant”: Regulation 5(1)(b).
- (c) Where applicants seek legal aid to mount an appeal, they must provide the Board with a copy of the first instance judgment, together with a statement of the grounds of appeal, and an opinion on the prospects of success: the *Handbook* (para 4.91)
- (d) The Board sends the statutory statement to opponents when notifying them of the application. It invites them to make representations (normally

within 14 days), which it considers before determining the application:

Regulation 7(1)(b)8.

(e) The Board asks opponents for their consent to disclose any such representations, so that applicants get “an opportunity to tell us their side of the story”. Some opponents edit their representations for this purpose.

(f) The Board decides what inquiries to carry out depending on the individual circumstances. If an opponent issues a bare denial of the facts, it will generally not investigate. But if an opponent raises an issue, or claims that he has made a reasonable settlement offer, it may ask the applicant to comment.

(g) If the applicant asks for a review after a refusal, he should specify any matters which he wishes the Board to take into account, and provide any further documents: Regulations 19 and 20.

[17] If the legal aid application succeeds and the case proceeds, a separate regime comes into play in respect of expenses: sections 18 and 19 of the Act. The court may modify the assisted person’s liability to pay any award made against him. In appeals, it may make an award out of the legal aid fund to a successful unassisted party if either (i) that party would otherwise suffer financial hardship, or (ii) it is just and equitable in all the circumstances to pay the award out of public funds.

[18] The Board will withdraw legal aid if it is no longer satisfied that the relevant criteria are met: Regulations 23 and 31. Applicants must (and opponents may) inform the Board of any material change in circumstances.

## Fairness

[19] GCC seeks to quash the review decision. It contends that the Board infringed various connected principles, including natural justice, procedural impropriety, unlawfulness, unreasonableness and legitimate expectation. The filament of unfairness runs through the wire of all its submissions. In essence, GCC argues that it could not properly engage in the application procedure, because it did not have the relevant information.

[20] The principle of procedural fairness is embedded in our law. Over a century ago, Lord Chancellor Loreburn stated that decision-making bodies "... must act in good faith and fairly listen to both sides, for that is the duty lying upon everyone who decides anything.": *Board of Education v Rice* [1911] AC 179, 182. Lord President Hope expressed a similar view in *Errington v Wilson* 1995 SC 550, at 554F-G:

"The principles of natural justice may be invoked in all cases where there is an issue to be decided which affects the rights of the person who is entitled to be heard by the decision maker".

[21] Lord Mustill formulated six propositions in *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, 560D:

"(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer."

## **Is the Application Procedure Fair?**

[22] The aim of the application procedure is to identify deserving candidates for legal aid. Plainly the Board does not wish to support hopeless causes. Applicants and opponents (if they engage in the procedure) are usually adversaries. One wishes to secure the grant of legal aid, the other to prevent it.

[23] The legal aid scheme is carefully calibrated to take account of their respective interests. Under the scheme the Board acts as a form of information portal. The parties supply it with the necessary intelligence to enable it to apply the tripartite test. In the absence of consent, however, it cannot share the information it receives from one party with the other. In my view, there are three key aspects to the disclosure regime: (1) confidentiality of the applicant's information, (2) recognition of the interests of the opponent, and (3) the key role played by the statutory statement. I shall deal with each in turn.

### *Confidentiality*

[24] Applicants would be naturally cautious about what they told the Board if they thought it would automatically relay that information to opponents. The Act protects the confidentiality of their communications with the Board. That has another benefit. Applicants are more likely to set out all the details of their case, including any weakness, if they are sure of the integrity of their exchanges.

[25] The wording of the relevant provision in the 1986 Act is unequivocal:

#### **“Confidentiality of information”**

34.(1) Subject to subsection (2) below, no information furnished for the purposes of this Act to the Board or to any person acting on its behalf shall be disclosed—

(a) in the case of such information furnished by, or by any person acting for, a person seeking or receiving legal aid or advice and assistance, without the consent of the person seeking or receiving legal aid or advice and assistance;

...

and any person who, in contravention of this subsection, discloses any information obtained by him when employed by, or acting on behalf of, the Board shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale."

[26] To try and circumvent that clear wording, GCC advances an argument based upon section 34(2), which provides:

"(2) Subsection (1) above shall not apply to the disclosure of information—

(a) for the purpose of the proper performance or facilitating the proper performance by the Secretary of State, the Board, any court or tribunal or by any other person or body of duties or functions under this Act ..."

[27] The argument proceeds as follows. (1) The Board has a duty of fairness to opponents. (2) In order to discharge that obligation, it requires to disclose relevant information to GCC. (3) Disclosure facilitates the proper performance of that task.

[28] I reject GCC's proposed construction. It overrides the clear wording of section 34(1). Further, it would give rise to great uncertainty. Board employees would be placed in a dilemma. They could not know whether passing information to an opponent might lead to a criminal charge. Accordingly, the Board was entitled to refuse to supply the information sought by GCC.

#### *The interests of the opponent*

[29] GCC had a clear interest in the application process. Despite being successful at first instance, it has incurred significant expenses. It will not recoup those monies. Whether it

recovers any of its expenses if the judgment is upheld is uncertain. It is a matter for the court's discretion.

[30] Put more broadly, a legal aid certificate is "a very valuable weapon in civil proceedings": *R v Legal Aid Board* [1998] PIQR 116, 121 per Scott Baker J. The other party has to take that into account in determining its strategy in the litigation. GCC, for example, would much prefer to allocate its resources to the provision of services, not to litigation.

[31] Giving GCC a voice in the procedure is not just a matter of fairness. It also has a utilitarian aspect. In *R (King) v Justice Secretary* [2016] AC 384, Lord Reed referred to the: "instrumental value of enabling persons to participate in decision-making when they may be able to contribute relevant information or to test other information before the decision-maker, and the ethical value of allowing persons to participate in decision-making which concerns them and is liable to have a significant effect on their rights or interests, when they may have something to say which is relevant to the decision to be taken." (para 97)

[32] An opponent's representations may greatly assist the Board in determining probable cause and reasonableness.

#### *The Statutory Statement*

[33] The *Handbook* (para 1.10) declares that the statutory statement has a twofold purpose: (a) to focus the Board's attention "clearly on what exactly legal aid is sought for"; and (b) to give sufficient notice to the opponent. It continues that:

"Another important aspect of the statutory statement is to allow an opportunity for the possibility of extra-judicial resolution notwithstanding the application for legal aid. The application process will continue as normal, but if intimation of the statutory statement has the effect of causing the opponent to take steps to resolve the matter, that may have an impact on the application, or the need for legal aid, or if already granted, the continuance of legal aid."

#### **Did PQ comply with the Scheme**

[34] PQ did not comply with that guidance. He did not give fair notice of the case to

GCC. To do so would have presented no difficulty. He had to inform the Board about the proposed grounds of appeal. Otherwise it could not have decided the application. He should have given the same information to GCC. That would not have involved any breach of confidentiality. If the relevant information was contained in a legal opinion that also contained views about the prospects, PQ could have excerpted the relevant parts or redacted the confidential parts.

[35] I wish to emphasise that fairness also applies at the review stage. That is because the specific duties imposed on a decision-maker by legislation may be minimum requirements: *Pairc Crofters Ltd v The Scottish Ministers* 2013 SLT 308, at paragraph 42 per Lord President Gill. If new information comes to light, the decision-maker may have to notify the affected party and give him an opportunity to make representations (at para 45). In my view that applies here.

[36] Applicants who provide no detail of their case in the statutory statement and who also decline to consent to the Board disclosing the relevant information to the opponent, subvert the scheme. They make the application procedure opaque, instead of transparent. They prevent opponents from active participation. That is unfair.

[37] I conclude that the Board should have told PQ that it was not prepared to consider his application until he provided sufficient notice of the case to GCC. The Board has a general power to do anything which it considers necessary or expedient for securing the provision of legal aid: section 2 of the Act. It can specify the form of initial and review applications: Regulations 5 and 20.

[38] The Board relied on *Fife Regional Council v Scottish Legal Aid Board* 1994 SLT 96, where Lord Cameron of Lochbroom held that the statutory statement:

“... contained sufficient information in the case of an application for legal aid for an appeal to enable the petitioners to identify the nature of the case and the interest of

the applicant therein. It was clear on its face that the purpose of seeking grant of legal aid was to enable the applicant to challenge the sheriff's judgment on appeal in relation to the action originally raised by the applicant and heard by him. The petitioners were in possession of the sheriff's judgment. They had knowledge of its terms and its conclusions on those facts and law. They were fully apprised of the history of the case. There is no requirement in the provisions of reg 5 that the statement itself should contain specific and detailed grounds of appeal." (page 99)

[39] I distinguish that case on the ground that GCC did not know all the issues in controversy. Further, it could not have inferred them, even by applying a "mosaic" approach to the items of information that it did know. If I am wrong and *Fife Regional Council* cannot be distinguished, I respectfully consider that it is no longer good law. It is out of kilter with the trend toward greater transparency.

### **The Board's Concerns**

[40] The Board is rightly concerned to avoid its procedures becoming more legalistic. In particular it is anxious about: (a) having to allocate more of its limited resources to administration, (b) adjudicating upon any disputed issues of fact and law, and (c) becoming entangled in "satellite litigation".

[41] I have carefully considered these concerns, but believe that they are more apparent than real. The Board must decide the issues of probable cause and reasonableness in every case. How it goes about its task will largely be a matter for it to determine. It can decide what inquiries to carry out, what factors to take into account and what reasons to give. In other words, there is a margin of tolerance.

### **Reasons**

[42] A public body has no general duty to give reasons for its decisions, although it is now more common: Lord Mustill in *Doody* at 564H. I agree that "the prudent course is to

give such reasons" as it can: *R v Legal Aid Board* [1998] PIQR P116 at P125. Given the Board's duty of confidentiality, it may be limited in what it can say in an individual case. As Lord Clyde said in *Stefan v GMC* [1999] 1 WLR 1293, 1304A-B:

"the extent and substance of the reasons must depend upon the circumstances. They need not be elaborate nor lengthy, but they should be such as to tell the parties in broad terms why the decision was reached."

## **ECHR**

[43] GCC stated that if the court accepted its common law submissions, there was no need to consider ECHR. Standing my decision, I shall only dwell on it briefly.

[44] GCC focussed on section 3(1) of the Human Rights Act 1998, which states:

"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights."

[45] GCC is not itself a victim within the meaning of ECHR Article 34, as it is not a "person, non-governmental organisation or group of individuals". Accordingly, it does not have Convention rights. It argues, however, that other opponents will have Article 1, Protocol 1 rights and the legal aid legislation should receive a consistent interpretation.

[46] I reject the ECHR argument for three reasons. First, I am not persuaded that the grant of legal aid constitutes an interference with an individual's possessions, contrary to A1P1. The risk of irrecoverable expenses applies in all litigation. Second, if I am wrong on that point, then I hold that any such interference is in accordance with law, justified, proportionate and in the public interest. It is a matter of key importance that legal aid should be made available to deserving persons. Third, short of a declaration of incompatibility (which is not sought), I do not see how reference to ECHR produces a different interpretation of the relevant legislation.

**The Name on the Certificate**

[47] GCC contends that the Board should have granted legal aid to PQ (not to his mother), as she lacks capacity. I disagree. He is using the power of attorney to conduct the litigation on her behalf and in her interests. It seems unduly formalistic to require the Board to endorse the legal aid certificate to note his interest as her representative.

**Conclusion**

[48] I shall grant paragraph 4.1 of the prayer of the petition and reduce the decisions to grant legal aid.