FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 70
P506/20

Lord Pentland

OPINION OF THE COURT

delivered by LORD PENTLAND

in the Petition for Judicial Review

by

DAVID BOOTH and HOLLY PHILP

Petitioners and Reclaimers

against

THE HIGHLAND COUNCIL

Respondents

Petitioners and Reclaimers: Party; assisted by Mr Brian Philp as lay representative
Respondents: T Young; Harper Macleod LLP

25 November 2020

[1] In this petition for judicial review the petitioners seek to challenge the validity, purpose, conduct and decisions of the Non Domestic Rates Appeal Committee ("the Committee") of the Highland Council. The petitioners aver that on 19 December 2019 the Committee made a decision which had adverse financial consequences for them. The petitioners contend that the respondents acted unlawfully in convening the Committee, that the Committee was neither independent nor impartial, that it was susceptible to abuse and

that it is a danger to the public. The petitioners seek various orders and damages of £100,000. In their answers to the petition the respondents explain that on 19 December 2019 the Committee heard an appeal by the petitioners under section 238 of the Local Government (Scotland) Act 1947. They observe that section 238(1) of the 1947 Act expressly provides that any appeal against liability for rates is to be heard by the rating authority or a committee thereof. The respondents maintain that the committee was properly established and that it acted lawfully. The respondents also aver in their answers that the petition is time-barred, having been commenced outwith the 3-month period specified in section 27A of the Court of Session Act 1988 ("the 1988 Act").

[2] On 4 September 2020 a Lord Ordinary considered the petition and answers. She refused permission to proceed on the grounds that the petition was time-barred and, in any event, had no real prospect of success.

[3] As they were entitled to do under section 27C(2) of the 1988 Act, the petitioners requested a review at an oral hearing of the refusal of permission to proceed. The request was considered, as is required, by a different Lord Ordinary. On 18 September 2020 he refused the request for review. He agreed that the petition was time-barred and that it did not have a real prospect of success.

[4] Neither of the Lords Ordinary who considered the petition and answers held an oral hearing. They made their respective decisions on the basis of considering the papers in the case.

[5] Thereafter the petitioners enrolled a reclaiming motion in which they seek to bring under review by the Inner House the interlocutor pronounced by the Lord Ordinary on 18 September 2020.

[6] When the reclaiming motion was enrolled its competency was questioned by court staff. This led to consideration of the question of competency by the Deputy Principal Clerk of Session under and in terms of the procedure set out in RCS 38.12. The Deputy Principal Clerk considered that the reclaiming motion might be incompetent and she referred the question of competency to me as a procedural judge in the Inner House. The grounds on which the Deputy Principal Clerk considered that an issue of competency arose were intimated to parties. A hearing was then appointed so that the question of competency could be considered by the court. Before the hearing the respondents lodged a note of objection to the competency of the reclaiming motion raising essentially the same competency issue as had been identified by the Deputy Principal Clerk.

[7] At the hearing I was addressed by Mr Brian Philp, whom I had authorised to represent the petitioners for the purposes of the hearing as a lay representative. I heard submissions also from Mr Young, who appeared on behalf of the respondents.

[8] Mr Philp submitted that as a matter of fairness the reclaiming motion should be allowed to proceed. He argued that it was competent having regard to certain observations of the Lord President (Carloway) in *Prior* v *Scottish Ministers* [2020] CSIH 36. He also submitted that the court should exercise its dispensing power contained in RCS 2.1(1) because the petitioners had mistakenly omitted to set out in their request for a review the full reasons behind it and the nature and extent of the errors made by the first Lord Ordinary. The mistake was said to be due to a misunderstanding on the petitioners' part.

[9] Mr Young submitted that the effect of section 27C(6) of the Court of Session Act 1988 is to render the reclaiming motion incompetent.

[10] The competency of the reclaiming motion must be determined by reference to the statutory scheme governing applications to the supervisory jurisdiction of the Court of Session; the scheme was introduced by section 89 of the Courts Reform (Scotland) Act 2014. Section 89 inserted a new series of provisions after section 27 of the 1988 Act. The main effects of the new provisions, set out in sections 27A to 27D, are to introduce a 3 month time limit for bringing an application for judicial review and to add a requirement for permission to be obtained from the court before a petition for judicial review is allowed to proceed. Permission to proceed is only to be granted where the petition has a real prospect of success. Where permission to proceed is refused (or granted only on certain grounds) the petitioner has a right to apply for review of the refusal at an oral hearing. Such a request will be considered by a different Lord Ordinary from the one who initially refused permission. As I have explained, in the present case the petitioners, having been refused permission to proceed, made an application for review. Their application was refused. The petitioners now wish to reclaim against the refusal.

[11] Section 27C of the 1988 Act provides as follows:

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

[12] Section 28 of the 1988 Act provides as follows:

"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."

[13] In *Prior* v *Scottish Ministers (supra)* the Lord President, in delivering the opinion of the court (at para [46]), drew attention to Practice Note No 3 of 2017 paragraph 12 where it is stated that if the Lord Ordinary is considering refusing permission to proceed, an oral hearing should "ordinarily" be appointed. In the present case neither of the Lords Ordinary who refused permission to proceed appointed an oral hearing to be held.

[14] In *Prior* the Lord President explained (at para [47]) that where a Lord Ordinary refuses an application for judicial review after an oral hearing, the petitioner has a right of "appeal" to the Inner House (1988 Act, section 27D(1) and (2)).

[15] The Lord President continued (at para [49]) by saying this:

> "If a decision to refuse permission to proceed occurs after an oral hearing… an appeal is available (1988 Act, ss 27D(1) and (2)) ... If the request for a review at an oral hearing is refused, there is no right of appeal or scope for a reclaiming motion (ibid s 28 excluded by s 27C(6)). That refusal brings an end to the application for permission process."

[16] As I have explained, in the present case the petitioners were refused permission to proceed with their petition for judicial review on 4 September 2020. As they were entitled to do, the petitioners sought review of that decision by a different Lord Ordinary at an oral hearing. The second Lord Ordinary refused the petitioners' request on 18 September 2020. The petitioners now seek to reclaim against that refusal. They have no right to do so because of the terms of section 27C(6)(b). Once the first Lord Ordinary refuses permission to proceed without an oral hearing, a request for an oral hearing may then be made; this request must be considered by a different Lord Ordinary. The different Lord Ordinary may or may not grant the request; if he or she does not do so then no oral hearing will be held. An "appeal" (which takes place by way of a reclaiming motion) is only available where there has been an oral hearing (section 27D), not otherwise. Section 27C(6)(b) of the Act expressly excludes reclaiming motions being taken where what is sought to be reviewed (or appealed against) is the refusal to grant the request for an oral hearing.

[17] With the benefit of hindsight it might have been preferable for there to have been an oral hearing in the Outer House given that both Lords Ordinary were minded to (and did) refuse permission to proceed. An oral hearing would have allowed the court's concerns about the petitioners' prospects of success to have been addressed in public and would have been in accordance with the normal expectation set out in the Practice Note No 3 of 2017.

[18] Be that as it may, there is no doubt that it was open to the Lords Ordinary to have proceeded in the way that they elected to do. The statutory scheme permitted them to refuse permission without holding an oral hearing.

[19] As I have explained, one effect of the statutory provisions is that the absence of an oral hearing in the Outer House precludes the petitioners from exercising a right of appeal against the refusal of permission. In *PA* v *Secretary of State for the Home Department* [2020] CSIH 34, this court held that the right of appeal under section 27D of the 1988 Act gives rise to a rehearing by the Inner House of the application for permission to proceed. The court observed that an appeal of that nature provides an additional safeguard for a petitioner, bearing in mind that the question of whether permission to proceed should be granted is one that falls to be decided as a preliminary issue (para [33]). These are considerations which reinforce the desirability of having an oral hearing in the Outer House where the Lord Ordinary is considering refusing permission.

[20] Nonetheless the duty of this court is to give effect to the statutory provisions which the legislature has enacted. The provisions are clear and unambiguous. They do not allow for an appeal or reclaiming motion in the circumstances that have arisen in the present case.

[21] I would add, in answer to the petitioners' request that the court should exercise its dispensing power under RCS 2.1(1), that this would not be appropriate. The dispensing power exists to enable the court to relieve, in certain circumstances, a party from the consequences of a failure to comply with a provision in the rules of court. There is no failure to comply with the rules of court in the present case. It follows that RCS 2.1(1) is not engaged.

[22] The reclaiming motion is incompetent and must be refused.