EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 24
P1259/18

Lord Malcolm
Lord Doherty
Lord Matthews

OPINION OF THE COURT

delivered by LORD MALCOLM

in the reclaiming motion

by

WILLIAM FREDERICK IAN BEGGS

Petitioner and Reclaimer

against

THE SCOTTISH LEGAL AID BOARD

and

THE SCOTTISH INFORMATION COMMISSIONER

Respondents

Petitioner and Reclaimer: Party
First Respondent: Crawford QC; Scottish Legal Aid Board Legal Services Department
Second Respondent: Welsh; Anderson Strathern LLP

10 May 2022

[1] The main issue raised in this reclaiming motion (appeal) is whether an application for civil legal aid engages the rights afforded by article 6 of the European Convention on Human Rights ("ECHR") and in particular the right of access to a court.

The background circumstances and the decision under challenge

[2] The full circumstances are set out in the judgment under challenge, see [2020] CSOH 71. In brief, the petitioner, who is serving a life sentence for the murder of Barry Wallace, has applied for civil legal aid to appeal to the UK Supreme Court against a decision of an Extra Division of the Inner House, see *Beggs* v *Scottish Information Commissioner* [2014] CSIH 10. The Extra Division refused to interfere with a determination of the Commissioner dated 16 December 2011, which was to the effect that the police had been entitled to withhold certain information requested by the petitioner because in terms of the Freedom of Information (Scotland) Act 2002 ("the 2002 Act") it was exempt from disclosure.

[3] The petitioner sought civil legal aid to appeal to the UK Supreme Court ("UKSC"). The Scottish Legal Aid Board ("the Board") refused the application. A petition for judicial review was raised against that decision. Lady Wise refused permission to proceed, see *Beggs* v *Scottish Legal Aid Board* [2016] CSOH 90. A second application for legal aid for the same purpose was lodged with the Board. Its refusal was the subject of a second judicial review. After a substantive hearing it was dismissed by Lord Woolman, see [2018] CSOH 13. His Lordship reviewed the relevant case law and observed that the Board was granted a very wide discretion when considering whether it was satisfied that it would be reasonable to grant legal aid. Any challenge to such a decision would have to pass an "exacting" test.

[4] On 28 February 2018 the petitioner submitted a second freedom of information ("FOI") request in revised terms. In the meantime he had lodged a third application for

legal aid to pursue a challenge to the decision of the Extra Division in the UKSC. It was refused by the Board on 19 September 2018. That is the decision which the petitioner challenges in these proceedings.

[5] At the time of the refusal of the third application the second FOI request had been rejected by the police as being vexatious, and that issue was before the Commissioner for his decision. (Subsequently he ruled that it was not vexatious.) The Board noted that should the Commissioner decide that the request was not vexatious the police would have 42 days in which to provide a substantive response. If it was a refusal the matter could return to the Commissioner. The new request was more detailed than the earlier one and it would be speculative to suggest it would fail before both the police and the Commissioner.

[6] The reasons for refusal of legal aid were that it was

> "considered that a privately funded individual of moderate means having taken the step of a fresh request, applying for a review of a decision to refuse it and then referring the matter to the Office of the Scottish Information Commissioner would at least await a final decision on the matter before embarking on risky and expensive litigation before the [UKSC]. It is therefore not shown that it is reasonable to grant legal aid as an alternative available remedy has not been fully exhausted."

[7] That decision has to be assessed by reference to the circumstances at the time, but it can be recorded that in due course the second request was refused on its merits by the police. That outcome was upheld by the Commissioner whose decision is now the subject of a fresh appeal to this court brought with the benefit of legal aid. That appeal has been sisted (put on hold) pending the outcome of this appeal.

The decision of the Lord Ordinary

[8] The Lord Ordinary rejected the contention that the Board's decision of 19 September 2018 was irrational or unlawful (paragraphs 24/26). All relevant factors were taken into account. His Lordship held that

> "it was clearly within the scope of the Board's discretion to conclude that a privately funded individual of moderate means would at least await a final decision by the Commissioner on his or her application before embarking on risky and expensive litigation in the Supreme Court."

[9] The petitioner referred to Lord Reed's observation in *R(Unison)* v *Lord Chancellor* [2017] 3 WLR 409 at paragraph 109 that the impact of restrictions on access to the courts must be considered "in the real world". In the view of the Lord Ordinary this added very little to what had gone before (paragraph 27). Under reference to *Steel and Morris* v *United Kingdom* (2005) 41 EHRR 403 at paragraph 62 he noted that there was no absolute right to legal aid. A "real world" assessment would recognise that resources are limited. The petitioner did not represent the interests of wider society. Section 14(1)(b) of the Legal Aid (Scotland) Act 1986 ("the 1986 Act") provides that an application can be refused if it would not be reasonable to grant it. If properly applied this is a proportionate restriction which pursues a legitimate aim. Refusal of the application was not a breach of any right of access to the courts.

[10] At paragraph 28 the Lord Ordinary rejected the contention that an application for legal aid engaged a civil right in terms of article 6(1). The discretion given to the board contradicted that proposition. Reference was made to *Masson and Van Zon* v *Netherlands* (1996) 22 EHRR 491 at paragraph 51. A submission that the refusal deprived the petitioner of a fair trial on the murder charge was "somewhat far-fetched".

The grounds of appeal and the submissions for the petitioner

[11] The grounds of appeal to this court as now maintained by the petitioner raise three issues:

1 Does an application for civil legal aid engage a civil right in terms of article 6 of ECHR?

2 Does the petitioner represent the interests of wider society?

3 Did the refusal to grant legal aid breach his right to a fair trial?

[12] It was submitted that properly interpreted the decision in *Masson and Van Zon* supports the first ground. The duty to provide legal aid if and when the statutory criteria are met is part of the right of access to a court inherent in article 6. Reliance was placed on *Airey* v *Ireland* (1979) 2 EHRR 305 at paragraph 26 for the proposition that there can be cases where legal aid for representation is essential if there is to be effective access to the court. The complexity here makes this such a case. While the Board exercises a discretion, this does not necessarily exclude a civil right. The Board cannot act in an arbitrary manner.

[13] With regard to the second ground, the Lord Ordinary should have viewed matters in the context of the constitutional importance of FOI requests and the balancing exercise involved in applying the 2002 Act. The proposed appeal to the UK Supreme Court would raise a matter of general public importance.

[14] On the fair trial issue, the right to disclosure of exculpatory material survives the completion of the trial. Article 6 rights are engaged when disclosure may support a challenge to a conviction. Reference was made to a number of cases including *Jespers* v *Belgium* (1981) 27 DR 61, (1983) 5 EHRR CD305 and *R(on the application of Nunn)* v *Chief Constable of Suffolk Constabulary and Another* [2014] 3 WLR 77.

[15] The note of argument was drafted by counsel. At the hearing the petitioner represented himself. He spoke in some detail as to the nature, and the importance as he saw it, of the requested material. He lives with this on a daily basis. The initial FOI request was made in 2010 after years of trying to recover information. He disagreed with the suggestion that all of this is remote from the trial. Under the 2002 Act there is a general entitlement to information, and the onus is on the holder to make out an exemption. Here this arises in the context of the public importance of fairness in criminal prosecutions.

[16] Given that general entitlement and the gravity of the matter, his legal aid application engaged a civil right. If the statutory criteria are met section 14 of the 1986 Act provides that legal aid "shall" be made available. *Masson and Van Zon* is of no assistance to the respondents. Issues of proportionality arise in respect of convention rights. This is a different standard of review from unreasonableness. The Board should apply a proportionality test and ensure that its decisions comply with convention rights.

The submissions for the Board

[17] The 1986 Act affords the Board a wide discretion in respect of whether it is reasonable to grant legal aid. Here the discretion was exercised properly and lawfully. An application for legal aid does not engage a "civil right" within the meaning of article 6. The starting point is the domestic law. It has not granted applicants a right to legal aid. The state is not obliged to ensure total equality of arms. The context of the case is relevant, namely a request for legal aid to appeal to the UK Supreme Court in respect of a decision of the Inner House in which legal aid had been made available to the petitioner.

[18] None of the cases cited on behalf of the petitioner demonstrate that a legal aid application engages a "civil right". *Airey* v *Ireland* addressed a system where there was no ability to seek civil legal aid. While that was unsatisfactory, it was made clear that article 6(1) does not guarantee a right to legal aid in all cases, see paragraph 26. A state can impose conditions on the grant.

[19] With regard to ground 2, the Lord Ordinary did not err in saying that the petitioner does not represent the interests of wider society. He dealt with the argument about a "real world" assessment. Not all FOI requests are of constitutional or general public importance. If the point had been made to the Board, it would have been but one of a number of factors.

[20] As to the final ground, the refusal of legal aid did not breach the article 6 right to a fair trial. The FOI requests and the resultant satellite litigation are far removed from the trial. The latter have received the benefit of legal aid in the Court of Session. All the cases which the petitioner cited in support of this ground concern the disclosure of documents in criminal proceedings.

[21] In oral submissions senior counsel stressed that each application is decided on its own merits by reference to the statutory criteria. Article 6 does not create a civil right which does not exist in the domestic law. The Board does not determine a civil right, nor does it decide a dispute.

The submissions for the Scottish Information Commissioner

[22] The appeal amounts to no more than a disagreement with a decision which was rational and free of any error in law. The petitioner has no right to civil legal aid thus

article 6 cannot be engaged - see *Masson and Van Zon* at paragraph 49 and *Roche* v *UK* (2006) 42 EHRR 30 at paragraph 124.

[23] The second ground of appeal strays into the merits of the proposed appeal to the UKSC. The Board accepted that there was probable cause. It was for the Board to weigh the competing considerations in deciding whether it would be reasonable to grant legal aid.

[24] As for ground three, the refusal of legal aid for the proposed appeal is several steps removed from the criminal trial. The Board took the entirely reasonable view that a privately-funded litigant would await the outcome of the second FOI request. That has no impact on the trial. In any event there are no extant criminal proceedings.

The court's view of the grounds of appeal

[25] The financial conditions were met and the Board was satisfied as to probable cause. Thus in terms of section 14(1)(b) of the 1986 Act the Board could have granted civil legal aid if in the particular circumstances of the case it was satisfied that it would be reasonable to do so. For the reasons mentioned earlier, the Board was not so satisfied. It therefore refused the application. In this respect the Board enjoyed a wide discretion and was entitled to form its own view on the weight to be attached to the relevant considerations. The court has no jurisdiction to substitute any views of its own. We are content that the Board approached its task in the proper manner and reached a decision which, in all the circumstances, was open to it.

[26] It is far from clear on what basis it is asserted that the court can or should interfere with the Board's decision. In so far as the petitioner's note of argument asserts a right to civil legal aid, that proposition is misconceived both under the domestic legislation and the

convention jurisprudence. By way of example reference can be made to *Airey* v *Ireland* at paragraph 26 and *Steel and Morris* v *UK* at paragraph 62. Properly interpreted, the judgment in *Masson and Van Zon* is of no assistance to the petitioner. It indicates that the wide measure of discretion afforded to the Board in respect of the reasonableness of granting legal aid demonstrates that no actual right is recognised in law (paragraph 51).

[27] In any event article 6 pre-supposes a dispute which is directly decisive for a private right said on arguable grounds to be recognised by the domestic law (*Boulois* v *Luxembourg* (2012) 55 EHRR 32, paragraph 90). None of this applies in respect of the petitioner's application for legal aid. There is an underlying dispute relating to the outcome of the first FOI request, but the Board's decision is not directly determinative of it.

[28] The petitioner seeks a human rights proportionality style review of the Board's decision with a view to achieving a more interventionist and open-ended scrutiny of the Board's decision by the court. As is recognised in the authorities, for example in *Airey* v *Ireland* at paragraph 26 and *Steel and Morris* at paragraph 61, there can be circumstances where, notwithstanding the absence of an absolute right to civil legal aid, its refusal would be an unjustifiable interference with the right of access to the court. However this is not such a case. Nothing of that nature was suggested to the Board. Even if it had been raised, it is difficult to imagine that it would have made a difference to the outcome. The Board's decision was based on the unremarkable proposition that, having made a second and more refined FOI request, it would not be reasonable to expect assistance from public funds to pursue an appeal against the 2014 decision of the Inner House before the second request was resolved one way or the other. Plainly, the petitioner disagrees but the court can see no good reason to interfere. It is also relevant to bear in mind that the petitioner had legal aid

in the Extra Division and that, even in cases concerning fundamental human rights, article 6 does not afford an unqualified right to obtain legal aid to pursue a claim as far as the litigant wishes; see the judgment of the Fourth Chamber of the European Court of Human Rights in *NJDB* v *UK* 2015 Fam LR 150 at paragraph 74.

[29] Furthermore, as has been borne out by events, it could have been predicted that the petitioner would again challenge in the courts any adverse outcome in respect of the second FOI request. His contentions on the proper approach to the 2002 Act can be pursued in his most recent appeal (which is legally aided). In any event, whatever might be said with regard to the complexity or otherwise of the issues, at the hearing of this appeal the petitioner demonstrated that he is more than capable of representing himself.

[30] In short, article 6 did not mandate that the 2018 legal aid application be granted. It cannot be said that the petitioner has been or is being wrongly denied access to a fair hearing before the courts in respect of his complaints about the outcome of his attempts to obtain information from the authorities.

[31] Regarding ground of appeal 2, we agree with the respondents' submissions. The Board would have been well aware of the importance of both the objectives of the 2002 Act and the proper implementation of the duties placed on those subject to its terms. The petitioner does not represent wider society. In so far as the proposed appeal raised an arguable point of law, the Board accepted that there was probable cause. That did not elide the reasonableness test, and in particular the relevance of the outstanding second FOI request. As the Lord Ordinary observed, it effectively superseded the first request.

[32] As to the third ground, again we accept the respondents' submissions. Any post-conviction rights to recover information did not require that, notwithstanding the

outstanding second FOI request, public funds be allocated to the proposed appeal to the UKSC. Many of the factors already mentioned apply.

Decision

[33] For the above reasons, which are essentially the same as those explained by the Lord Ordinary, the reclaiming motion is refused. The court adheres to his interlocutor refusing the prayer of the petition.