OUTER HOUSE, COURT OF SESSION

2020 CSOH 71

P1259/18

OPINION OF LORD TYRE

in the petition of

WILLIAM FREDERICK IAN BEGGS

for

Judicial review of a decision of the Scottish Legal Aid Board dated 19 September 2018 to refuse an application made by him for legal aid to appeal to the Supreme Court

Petitioner

Petitioner: Dean of Faculty, Crabb; Drummond Miller LLP
First Respondent: Crawford QC; Scottish Legal Aid Board Legal Services Department
Second Respondent: Welsh; Anderson Strathern LLP

14 July 2020

Introduction

[1] The petitioner was convicted of murder in 2001 and is serving a sentence of life imprisonment. He has maintained and continues to maintain that he did not commit the offence of which he was convicted. He has submitted freedom of information ("FOI") requests to Strathclyde Police and, subsequently, Police Scotland for information that he believes would support his claim that a miscarriage of justice occurred. Those requests have been refused by the police on the ground that the material requested was exempt from disclosure. In 2011 the petitioner applied to the second respondent ("the Commissioner")

for a decision on the police's refusal to disclose certain information. The Commissioner upheld the decision to withhold the information. An appeal against the Commissioner's decision was refused by the Inner House in 2014. Since 2014 the petitioner has applied three times for legal aid to appeal to the UK Supreme Court against the Inner House's decision. Each application has been refused by the first respondent ("the Board"), and each refusal has been followed by an application by the petitioner for judicial review of the Board's decision. This opinion is concerned with the latest of those applications.

Chronology

[2] In order to explain the context of the present application, it is necessary to set out the chronology in more detail than the brief summary above. The petitioner submitted his first FOI request on 7 July 2010, seeking *inter alia* information on steps taken to investigate the veracity of certain evidence or to eliminate a named person from the inquiry. The request was refused on the ground that the information sought was exempt from disclosure. On 8 October 2010 the petitioner submitted an application under section 47 of the Freedom of Information (Scotland) Act 2002 ("the 2002 Act") to the Commissioner for a decision in relation to the refusal of his request. The Commissioner ordered the police to carry out a review. Following that review, the police undertook to disclose all of the information sought except the items noted above. The petitioner applied to the Commissioner for a further decision. The Commissioner found that the police had failed to conduct a review in accordance with the 2002 Act and ordered them to carry out a further review. Having carried out that review, the police confirmed their refusal of the request, so far as the above items were concerned, on 27 June 2011.

[3] On 5 July 2011 the petitioner applied to the Commissioner for a decision in relation to the second refusal. In a decision dated 16 December 2011, the Commissioner determined that the police had been entitled to withhold the information sought on the ground that it was exempt from disclosure, and that they had accordingly complied with the provisions of the 2002 Act.

[4] The petitioner appealed to the Court of Session under section 56 of the 2002 Act against the Commissioner's determination. On 21 January 2014, an Extra Division of the Inner House refused the appeal: see *Beggs* v *Scottish Information Commissioner* [2014] CSIH 10. In the course of delivering the opinion of the court, Lord Menzies observed (paragraph 16):

> "…Section 34 of the Act clearly provides that information is exempt information if it falls into the categories listed therein. There is no dispute that in the present case the information which the appellant has sought falls within the categories of information contained within section 34(1). The general entitlement of an applicant to be given information under section 1 of the Act applies only to the extent that, in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption."

[5] The petitioner applied for legal aid to appeal to the Supreme Court against the Inner House's decision. On 4 November 2015, the Board refused the request. The petitioner applied to the court for judicial review of the refusal of legal aid. On 5 May 2016, the Lord Ordinary (Lady Wise) refused to grant permission to proceed: see *Beggs* v *Scottish Legal Aid Board* [2016] CSOH 90.

[6] The petitioner made a second application to the Board for legal aid. That application was refused on 7 September 2016, and on 16 December 2016 an application to review the decision was also refused. On 8 March 2017, the petitioner applied for judicial review of the 2016 refusal of legal aid. That application proceeded to a substantive hearing before the Lord Ordinary (Lord Woolman), who held that the Board had been entitled to reach the

decision that it did, and dismissed the petition: see *Beggs* v *Scottish Legal Aid Board* [2018] CSOH 13.

[7] On 28 February 2018, the petitioner submitted a second FOI request, in revised terms, to the police. The police refused to comply with the request on the ground that it was vexatious. The petitioner sought a further decision from the Commissioner, who determined on 12 December 2018 that the request was not vexatious and required the police to carry out a review.

[8] In the meantime the petitioner submitted a third application for legal aid to appeal to the Supreme Court against the decision of the Inner House. That application was refused on 11 June 2018, on the ground that the petitioner had not exhausted the review procedure before the Commissioner. The petitioner sought a review of that decision, with the support of an opinion of senior counsel. On 19 September 2018, the Board again refused the application. That is the decision with which this petition is concerned. Its terms are set out below.

[9] On 25 January 2019 the police refused the second FOI request on the ground that the information was exempt from disclosure. The petitioner did not immediately seek a determination by the Commissioner in relation to this refusal. On 29 January 2019, he wrote to his solicitor, stating:

> "At this juncture I do not see any advantage in seeking a further decision from the Commissioner. It seems to me that the Commissioner is likely to rely on the previous Inner House decision for which his predecessor contended. A fresh decision would be predicated on the same approach as was applied previously and would result in the same decision."

He subsequently changed his mind and on 16 July 2019 made an application to the Commissioner for a determination in relation to the 25 January 2019 refusal. That application has not yet been determined.

The Board's decision

[10] The reasons for refusal of the petitioner's application for legal aid were stated in the letter of 19 September 2018 as follows:

> "It is noted that the police have refused to deal with the latest freedom of information request on the basis that they consider the request to be vexatious on the grounds that it has the effect of harassing the police service. They have maintained that position on review and the Commissioner is presently considering whether the police have correctly treated the request as vexatious or not. The terms of the applicant's letter to his solicitor dated 16 July 2018 indicate that he has discussed further procedure with the Commissioner's Office and has been told that if the Commissioner finds in his favour that the police should not have treated the request as vexatious, the police will then be given a further 42 days in which to provide a substantive response to his freedom of information request. A substantive refusal would then be subject to a further four month period of investigation by the Commissioner prior to a decision being issued. The letter which is produced from the Commissioner dated 13 July 2018 indicates that the Commissioner was about to contact the police and give them an opportunity to comment on the application to the Commissioner and the applicant will then be allowed to comment further. Once the Commissioner has all the submissions the office may again contact the applicant to explore whether it is possible to resolve the application without the need for a formal decision notice. It therefore remains to be seen what finding the Commissioner will make about the police decision to treat the request as vexatious. If the Commissioner considers that the request should not have been treated as vexatious then the police response to the substantive request needs to be seen. It also remains to be seen what finding the Commissioner will make in relation to any alternative reasons for refusing the request which the police may in due course advance. It is noted that senior counsel predicts that the outcome will ultimately be unfavourable for the applicant but until all the review procedures are exhausted, this is conjecture. It is not a foregone conclusion that if required to consider the substantive request, the police will again refuse it, particularly where the applicant appears to have taken on board earlier criticism of his previous request and where counsel describes his new letter dated 28 February 2018 as setting out at some length the rationale for the request as well as the description sought. The new request is different and it would appear, more detailed so it is speculative to suggest that this new and different request will automatically be rejected out of hand by both the police and the Commissioner. In light of this it is still considered that a privately

> funded individual of moderate means having taken the step of making 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 [Supreme Court]. It is therefore not shown that it is reasonable to grant legal aid as an alternative available remedy has not been fully exhausted."

Orders sought by the petitioner

[11] The petitioner seeks (i) reduction of the Board's decision refusing legal aid; and (ii) declarator that the Board's refusal to grant legal aid for an appeal to the Supreme Court was unreasonable and separately unlawful at common law and under section 6 of the Human Rights Act 1998.

Argument for the petitioner

[12] On behalf of the petitioner it was submitted, firstly, that the Board's decision was unreasonable and unlawful. It was accepted that unreasonableness was a high test, but the test was met here. The decision failed to give proper or any weight to the background of the petitioner's dealings with the Commissioner. There had been a history of delay in determining the petitioner's applications. The Board failed to take account of how a hypothetical litigant would view that delay when weighed against the favourable advice of senior counsel as to prospects of a successful appeal, the importance of the information, and the urgency of the request. It was unreasonable to expect the petitioner to resign himself to wait for the decision of the Commissioner which, given the known position of the police, would inevitably result in further delay for a second appeal to the Inner House.

[13] In his oral submissions on this point, the Dean of Faculty focused on two matters. Firstly, the information sought was extremely important to the petitioner. If it was the case that in reaching its decision the Inner House had inverted the presumption in favour of

disclosure of information and thereby erred in law, it was a matter of public interest, as well as importance to the petitioner, to have that issue considered by the Supreme Court. Only then could further requests by the petitioner be addressed by the Commissioner in the proper legal context. Secondly, although the Board exercised a discretion in relation to the award of civil legal aid, that discretion was not unlimited. It had to be exercised reasonably. Having regard to the very lengthy history of the petitioner's attempts to obtain information, throughout which he had of course been in custody, it was not reasonable to expect him to wait in the hope that the police would disclose information that they had consistently withheld.

[14] It was further submitted that the Board's decision constituted a breach of the petitioner's right of access to justice and his rights under section 6 of the Human Rights Act 1998. The impact of any limitation on a right of access to the courts had to be considered in the "real world": *R (Unison)* v *Lord Chancellor* [2017] 3 WLR 409. A "real world" assessment by the Board would have confirmed the importance of the appeal to wider society, the importance to the petitioner, and the prior history between the petitioner, the Commissioner and the police showing a consistent pattern of delay with no prospect of resolution for the petitioner. The proposed appeal affected the petitioner's civil rights and engaged his rights under article 6 of the European Convention on Human Rights.

[15] In his oral submission the Dean of Faculty put the article 6 point somewhat differently, perhaps in recognition of the argument presented by the respondents that because the award of legal aid was discretionary, the petitioner had no relevant civil right capable of being breached by the refusal of legal aid. It was submitted rather that the application should be seen in the context of the article 6 right to a fair trial, and that it was

inappropriate to detach it from the circumstances that had given rise to the alleged miscarriage of justice.

Argument for the Board

[16] The argument for the Board was based upon the summary by Lord Woolman in *Beggs* v *Scottish Legal Aid Board* (above), at paragraph 12, of the relevant Scottish authorities, namely *K* v *Scottish Legal Aid Board* 1989 SC 21, *Venter* v *Scottish Legal Aid Board* 1993 SLT 147 and *McTear* v *Scottish Legal Aid Board* 1997 SLT 108:

- reasonableness was a matter for the Board;
- it had a very wide discretion in carrying out that exercise;
- it could decide what weight to attach to each factor in the case;
- it had to form its own view on the question of the prospects of success;
- it could take into account what a private litigant would do; and
- any challenge made on the basis of unreasonableness had to pass an "exacting" test.

[17] The petitioner had identified no irrationality or error of law in the Board's decision. The challenge amounted to no more than disagreement with the weight attached by the Board in its decision to various material factors. The Board was well aware of the petitioner's reasons for seeking information from the police and had taken this into account. It had taken full account of the history of the petitioner's dealings with the Commissioner, and was entitled to conclude that the Commissioner would consider any appeal against the police's decision according to law and having regard to the merits of the request. The application for legal aid had not been refused on the ground of absence of *probabilis causa*; it had been refused because it was not considered reasonable to grant legal aid. The Board

had been entitled to conclude, notwithstanding senior counsel's opinion, that an appeal to the Supreme Court would be risky. At the time of the application for legal aid the Commissioner's decision was awaited. There was no rational basis for the view that the Commissioner would simply take the same view as his predecessor, in relation to an application in different terms. A privately funded individual of modest means would await the final decision of the Commissioner rather than pursue risky and expensive litigation in the Supreme Court.

[18] The petitioner had not been deprived of a common law right of access to justice. There was no absolute right to legal aid, whether at first instance or on appeal. The provisions of the Legal Aid (Scotland) Act 1986 ("the 1986 Act") were a lawful and proportionate response by the state to facilitate access to the courts. Legal aid required to be administered in a way that made best use of a finite resource. That was the "real world" in which the right of access to the courts had to be addressed. The Board had taken into account the circumstances relied upon by the petitioner, including senior counsel's arguments and the prior history. It was entitled to decide that the appeal to the Supreme Court was, in effect, premature, and to have regard to what a privately funded individual of moderate means would do pending determination of the second freedom of information request. The petitioner was not a campaign body advocating a wider public interest, and had not raised such an issue in his application for legal aid.

[19] As regards the petitioner's argument based upon section 6 of the Human Rights Act 1998, his application for legal aid did not engage a civil right within the meaning of article 6 of the Convention: *Masson v Netherlands* (1996) 22 EHRR 491 at paragraphs 48-52; *Roche* v *United Kingdom* (2006) 42 EHRR 30 at paragraphs 123-126. The Board was not determining any civil right of the petitioner; it was exercising the statutory discretion

afforded to it by Parliament. In any event, article 6 did not require legal aid to be made available for every dispute relating to a legal right. The question was whether the petitioner had had a fair hearing. He had not been denied a fair hearing by refusal of legal aid. His second FOI request was pending before the second respondent. His "right" to the information sought would be determined in accordance with the 2002 Act. The present application was not about the petitioner's right to a fair criminal trial.

[20] In any event the court could not competently grant declarator in the terms sought, which would have the effect of depriving the Board of its statutory discretion.

Argument for the Commissioner

[21] Counsel for the Commissioner adopted the submissions made on behalf of the Board. A detailed written note of argument that had been submitted on the Commissioner's behalf was, in essence, to the same effect as the arguments on behalf of the Board that I have narrated above.

[22] Counsel also provided an explanation of why a determination of the petitioner's application dated 16 July 2019 had yet to be made. There had been a lengthy period of correspondence during which comments had been sought by the Commissioner from the police and from the petitioner. Observations had continued to be submitted until 12 February 2020. There had then been delay due to the serious illness of the Commissioner, who was dealing with the application personally. Further delay had resulted from the Commissioner's office being closed during the Covid-19 outbreak. As matters stood, the Commissioner still had a large number of documents held by Police Scotland to examine. It was anticipated that this process would be carried out during the next few weeks.

Decision

[23] It is common ground that the applicable law in relation to the exercise of the Board's discretion to grant or refuse legal aid is as stated by the court in *K* v *Scottish Legal Aid Board*, *Venter* v *Scottish Legal Aid Board* and *McTear* v *Scottish Legal Aid Board*, and as summarised by Lord Woolman in *Beggs v Scottish Legal Aid Board* (above). I need not therefore set out the law at any greater length. Applying those authorities to the circumstances of the present case, I begin by recalling the circumstances that subsisted in September 2018, at the time of the Board's decision to refuse legal aid. The petitioner had submitted his second FOI request in February 2018, in terms that were different from the first request. The request had been refused by the police as vexatious. The petitioner had sought a determination from the Commissioner. That determination was awaited.

[24] Against that legal and factual background, the petitioner has, in my opinion, failed to make out a case that the decision to refuse legal aid was irrational or unlawful. It is readily apparent from the terms of the decision that there is no substance to the petitioner's assertion that the Board failed to give any weight to the history of the petitioner's dealings with the Commissioner. The Board noted in particular that the new request was different from and more detailed than the previous one, so that it was speculative to suggest that it would be rejected out of hand by the police and by the Commissioner. The Board was entitled to proceed, as it did, on the assumptions (i) that it was not a foregone conclusion that if the request was determined not to be vexatious, the police would again refuse to disclose the information sought, and (ii) that in the event of a refusal by the police, the Commissioner would determine a fresh application by the petitioner on its merits in accordance with the provisions of the 2002 Act. The latter assumption in particular can hardly be regarded as having been unreasonable when one recalls that on two occasions in

relation to the petitioner's first FOI application, the Commissioner had required the police to carry out reviews of decisions to withhold information sought.

[25] The Board also took into account, in my view reasonably, what could happen if the Commissioner were to decide (as in fact occurred) that the request was not vexatious. It noted in particular that it remained to be seen what finding the Commissioner might make in relation to any alternative reasons for refusing the request which the police might in due course advance. In my opinion 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 before the Supreme Court.

[26] In so far as it is asserted that the Board failed to give adequate weight to the opinion of senior counsel, the question of weight was for the Board to assess, and there is no basis in law for the court to interfere with that assessment. Although the petitioner's submissions referred to "considerable delay on the part of" the Commissioner, I was not referred to any period in which delay was asserted to have occurred through the fault of the Commissioner. There is accordingly no basis upon which the court could hold that the Board acted irrationally in failing to take such delay into account.

[27] The petitioner's argument based upon a right of access to the courts adds very little to what has gone before. The argument was founded upon the observation of Lord Reed, delivering the judgment of the Supreme Court in the *Unison* case (above) at paragraph 109 that the impact of restrictions on access to the courts must be considered "in the real world". The petitioner submitted that the "real world" impact of the Board's decision was to deprive him of access to the courts and to justice. There is, however, no absolute right to legal aid:

see eg *Steel and Morris* v *United Kingdom* (2005) 42 EHRR 403, in which the Court observed (paragraph 62):

> "The right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate. It may therefore be acceptable to impose conditions on the grant of legal aid based, *inter alia*, on the financial situation of the litigant or his or her prospects of success in the proceedings…"

A "real world" assessment must take account of the fact that resources for funding legal aid are finite. That being so, I am satisfied that the discretion accorded to the Board by section 14(1)(a) of the 1986 Act to refuse legal aid if it is not satisfied that it is reasonable in the particular circumstances of the case to grant it is, if properly exercised, a proportionate restriction that pursues a legitimate aim. The circumstances founded upon by the petitioner in the present case were the importance of the point to wider society, the importance to the petitioner and the prior history showing no prospect of resolution. These are the same arguments as have already been addressed. The petitioner does not represent the interests of wider society. Although the matter is undoubtedly of great importance to the petitioner himself, the Board was entitled to conclude that it was not reasonable to grant legal aid while his second FOI application to the Commissioner remained to be determined. Refusal of leave to take an appeal to the Supreme Court in relation to his first, and effectively superseded, FOI application did not in these circumstances constitute a breach of any right of access to the courts or to justice.

[28] As regards the petitioner's argument based upon section 6 of the Human Rights Act 1998, I accept the Board's submission that an application for legal aid does not engage a civil right within the meaning of article 6 of the Convention. As the Court observed in *Masson* v *Netherlands* (above) at paragraph 51, in the context of the facts of that case:

> "The grant to a public authority of such a measure of discretion indicates that no actual right is recognised in law."

In my opinion that observation is equally applicable to the facts of this case, in which a discretion is conferred upon the Board to refuse legal aid if not satisfied in all the circumstances that it is reasonable to grant it. Nor am I persuaded by the alternative submission advanced during oral argument that the refusal constituted a breach of the petitioner's article 6 right to a fair trial. I was not referred to any authority in support of the proposition that a court challenge to a refusal by the Commissioner to order disclosure of information should properly be regarded as a continuation of a previous criminal trial, and for my part I regard the proposition as somewhat far-fetched. In any event, even if it were appropriate to regard proceedings as far removed as these from the criminal trial as engaging the petitioner's right to a fair trial, I would not regard that right as having been breached by the Board's refusal of legal aid. If the outcome of the petitioner's application to the Commissioner in relation to his second FOI request were to be that an order was made for disclosure by the police of information, and that information suggested that there might have been a miscarriage of justice, the petitioner could apply for a review to the Scottish Criminal Cases Review Commission.

[29] Finally, I accept the Board's submission that if I had been minded to grant orders in the petitioner's favour, it would not have been competent to grant declarator in the terms sought, because a declarator in those terms would amount to a finding that the only reasonable course of action open to the Board was to grant legal aid. It is not for the court to require the Board to grant legal aid; any declarator would have had to be specific to the decision under challenge, with the effect of requiring the Board to re-make the decision.

Disposal

[30] For these reasons, I shall repel the petitioner's first and second pleas in law, sustain the third plea in law for the Board and the fifth plea in law for the Commissioner, and refuse the prayer of the petition. Questions of expenses are reserved.