SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 13
P152/19

Lady Dorrian
Lord Doherty
Lord Tyre

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Application

For permission to appeal to the United Kingdom Supreme Court

by

CHARLES O'NEILL and WILLIAM LAUCHLAN

Petitioners and Applicants

against

THE SCOTTISH MINISTERS

Respondents

Petitioners and Applicants: O'Neill QC; Drummond Miller LLP
Respondents: Reid; Scottish Government Legal Directorate

9 March 2022

[1] The applicants seek leave to appeal to the UKSC against a determination refusing their reclaiming motion against the dismissal of their petition for judicial review of a decision by prison authorities to prohibit them from making inter-prison telephone calls to each other.

[2] The petition was dismissed on the basis that it was out of time and that there was no equitable basis for allowing the case to proceed. That decision was upheld in the Inner House. It is worth noting the following:

1. The petition averred that "the date on which the grounds giving rise to the petition first arose was 15th November, 2018."

2. There is a plea-in-law as follows:

> "The Petition having been raised within the time limit set out in Section 27A(1)(a) of the Court of Session Act 1988 should be permitted to proceed."

3. It averred, in answer to the respondents' time bar averments, that:

> "*Esto* the facts and circumstances giving rise to this Petition arose more than three months before its presentation it is equitable to permit it to proceed".

This is a clear reference to section 27A(1)(b) of the Court of Session Act 1988. There was no plea-in-law in relation to this.

[3] In the hearing before the Lord Ordinary the petitioners submitted that as long as the current state of affairs persisted there was a continuing breach of the petitioners' rights and thus no time-bar date could arise. The Lord Ordinary rejected that argument and held that the relevant date was 17 August 2018. A further argument was that the issue of time-bar did not arise during a period when one of the petitioners was pursuing a complaint to the Scottish Prison Services Ombudsman. The final argument was the equitable one.

[4] In the reclaiming motion the grounds of appeal were that the Lord Ordinary should have concluded that the proceedings were not time-barred under section 27A; that the time-bar did not commence until the SPSO complaint was disposed of; and that it was equitable under section 27A(1)(b) to allow the petition to proceed. Moreover, counsel made it clear that he was not seeking to introduce without notice or leave anything in the nature of a devolution issue or a compatibility issue.

[5] It is more than a little surprising therefore to find in the application for leave (which is remarkable for its prolixity) proposed grounds of appeal which are not only entirely new but which contradict the position hitherto maintained by the petitioners.

[6] The first proposed ground is that the time-bar under section 27A had no application, and that the relevant time-bar was the period of 1 year provided for in section 100(3A) and (3B) of the Scotland Act 1998. The core of this submission is that although section 100(3B) provides that the time-bar specified therein is "subject to any rule imposing a stricter time limit in relation to the procedure in question", section 27A is not such a rule. This is because (section 100(3E)) "rule" for this purpose has the same meaning as in section 7(5) of the Human Rights Act 1998. It was contended that the definition of "rules" in section 7(9) of that Act defines the word "rule" where it occurs in section 7(5). It followed that "rule" in section 7(5) means only a rule made by the Secretary of State for Scotland, and not any other rule.

[7] Despite submissions to the contrary for the reclaimers, this ground of appeal effectively proposes a root and branch challenge to the reach of section 27A in relation to any matter which is claimed to fall within the Scotland Act 1998, section 100(3A). It is too late to raise such a fundamental question when the application proceeded at first instance and on appeal expressly on the basis that the question of time-bar was governed by section 27A. It is not appropriate for such a question to be addressed for the first time at Supreme Court level.

[8] In any event, we do not consider that the ground is arguable. In our opinion, on a proper construction of section 7 of the Human Rights Act 1998 the term "rules" in section 7(9) is a reference to the use of that term in section 7(2). It concerns the making of rules to determine the appropriate court or tribunal for the purposes of section 7(1)(a). The

definition of "rules" in section 7(9) does not define the meaning of "rule" in section 7(5). The word "rule" in section 7(5) has its ordinary meaning. It is not limited to rules made by the Secretary of State. The word "rule" in section 100(3B) of the Scotland Act 1998 has the same ordinary meaning as the word "rule" in section 7(5) of the Human Rights Act 1998 (section 100(3E) of the Scotland Act 1998). That meaning is wide enough to include the judicial review time limits contained within section 27A of the Court of Session Act 1988.

[9] Even if we had considered the ground to be arguable, we would have refused permission on the basis that, given the manner in which the point has been introduced and the resultant lack of any opportunity for the Lord Ordinary or the Inner House to examine it and provide their considered views, it is not a point which requires to be considered at this time by the UK Supreme Court.

[10] The second proposed ground is an *esto* submission based on the invalid proposition that there are two separate and competing time-bar regimes. No arguable case has been made out that there is a conflict between section 100(3B) and section 27A. For the reasons already stated, no question of *vires* arises because section 27A does not bear to amend the Scotland Act 1998. Nor is there a conflict which requires section 27A to be "read down" to exclude matters falling within sections 100(3A) and 100(3B) from its scope. The ground is not arguable.

[11] The third proposed ground is a somewhat confused submission which seems to be a repetition of ground 1, allied to an argument that the time-bar cannot apply where there was a continuing act (which is in fact ground 4) and an "effective rights of access" argument which has no arguable foundation. This aspect of the application ignores the inconvenient fact that the court held that there was no continuing act. None of this ground is arguable.

[12] The final ground is that the court erred in rejecting the submission that the time-bar did not commence until the complaint to the SPSO had been disposed of, despite the averment in the petition that the relevant date was 15 November 2018. This ground has already been determined by the court which rejected the arguments, which relate only to one of the appellants. This is not an arguable point, and in any event it raises no point of general public importance.

[13] The test for leave to appeal to the UKSC is that "the appeal raises an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time." The primary issue which arose in this case was a simple question of statutory interpretation. The main arguments which the reclaimers now wish to advance were not only not advanced previously, they contradict the clear position which they previously advanced, and are not in any event arguable. It is not appropriate to grant leave to appeal to the UKSC on such a basis. Moreover, the court decided that there was no continuing act, so the premise of the third ground simply does not exist. Otherwise the matters raised simply disagree with the outcome of the case. We are not satisfied that there is any arguable point of law which requires consideration at this time by the UKSC.