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Funding public law cases: problems and developments

Introduction

The starting point for this paper is that access to justice is important not just for the vindication of individual rights, but also for the general rule of law. The more controversial question is which cases, particularly those raising wider public interest questions, should be entitled to public funding. This paper argues that funding of public law issues is more patchy in Scotland than elsewhere in the UK and contributes to the lower levels of public law litigation. The issue of standing cannot be reformed in isolation. Unless some thought is given to reform of funding, litigants will find that the right to come court remains theoretical as the costs of doing so are too high.

The paper will cover four areas broadly connected with the issue of funding public law cases starting with legal aid rules and policy relevant to public law cases; then two cases challenging legal aid policy before moving onto the development of Protective Expenses Orders and last recent developments in England on costs.

Legal aid: rules on public funding

Assuming financial eligibility, the general rules for any application for legal aid must show that the cases has probable cause and that it is reasonable that legal aid is granted.

Probable cause is established by showing that the application has (1) a sound legal basis for the proposed action (2) that the case has jurisdiction and title and interest to raise the proceedings. With the exception of title and interest, generally this aspect of the test causes less difficulty than the application of the reasonableness test.

Reasonableness involves the application of a subjective test by the Scottish Legal Aid Board (SLAB). SLAB's guidance on civil applications (sometimes referred to as the legal

aid handbook) gives details of a range of further considerations that can be applied to the application.

SLAB can deem an application “objectively unreasonable”. The guidance gives specific examples of what would be considered unreasonable. Examples include that the action is premature, frivolous or vexatious, that a reasonable offer has been made to settle the action, that there has been a delay in raising the proceedings or the application is a ‘shadow application’.

In public law cases, an added difficulty can arise under Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002. The regulation states:

“If there is a joint interest with another body or person, even if proceedings have not been raised by that body or person, legal aid is not granted unless

(1) there would be serious prejudice in that person’s own right if legal aid not granted; and

(2) it would not be reasonable and proper for the other people to pay the expenses that would otherwise be raised by SLAB”

The handbook makes some concessions on the scope of Regulation 15. Damages claims are deemed to be excluded from the scope of Regulation 15. The handbook gives some examples of what is meant by joint interest, such as “the closure of cultural or leisure facilities”.

The basis on which SLAB have excluded damages claims is unclear. It is not based on the wording of the Regulation itself. It raises the issue as to what the true definition is of a joint interest. Does it mean a interest that can only be pursued jointly, i.e. with more than one pursuer or petitioner? Or does it mean an interest that arises in conjunction with others, and that others have a substantial stake in the outcome of? If so, there seems to be no good reasons why damages actions arising out of a common calamity do not raise a joint interest, although it may be that the tests in Regulation 15 (1) and (2) are satisfied - i.e. that the individual claimant can show serious prejudice. The lack of consistency in SLAB’s approach raises a question as to the proper scope of Regulation 15.

On a comparative basis, it might be thought that the Scottish approach is somewhat simplistic. In England for example, it is permitted to grant legal aid to one individual on the basis that the Legal Services Commission pay part of the costs and a group or other individuals pay the remainder. This flexibility has been relied upon by the UK government as a practical example of how access to justice in environmental matters is delivered. By contrast, a Freedom of Information request to SLAB confirmed that a cost 'sharing' arrangement has never happened under the Scottish system. Effectively legal aid in Scotland acts as an all or nothing approach. If others should pay, no-one can get legal aid.

The guidance is also contradictory. It suggests a wider public interest can be shown if the case will have wider significance. If so, the guidance indicates that this wider significance can be taken into account when determining an application even if the claim is for a small amount. It is unclear in what respect this might apply. It might cover circumstances such as a benefits appeal over relatively small amount of money, which clarifies issue thus benefiting other potential claimants. SLAB do not keep separate records for cases where the wider ramifications of an application has been used to tip the balance in favour of a grant of legal aid. However, given that the guidance specifically states that a public interest is not shown the matter raised in an application "is, in fact a private interest", it is difficult to envisage circumstances where the guidance could properly apply. It seems unlikely that the wider public interest is often used to the benefit of applicants.

Recent challenges to legal aid system

There have been two main challenges in over the last year: to the rules on legal aid in defamation cases and also a challenge to the absence of state funded legal representation for parents in Children's Hearing.

The rules on legal aid for defamation arose after the European Court of Human Rights ruled in *Steele and Morris v UK* (2005) 43 ECHRR 22, otherwise known as the MacLibel case.

SLAB was given powers to grant legal aid for defamation actions under section 71 of the Legal Profession and Legal Aid (Scotland) Act 2007. The Scottish Ministers then issued Directions to SLAB as to how this power was to be exercised (the Civil Legal Aid for

Defamation or Verbal Injury Proceedings (Scotland) Direction 2007, subsequently replaced with minor amendments by the 2008 Directions).

The Directions set out a high test to obtain legal aid - in addition to showing probable cause, reasonableness would only be shown if *either* there is a wider public interest *or* the case was of overwhelming importance to the person. In addition, there has to be something exceptional either about the person or the case that would make it 'practically impossible' to bring or defend proceedings, leading to an obvious unfairness. The Directions require SLAB to be satisfied that there is the same degree of exceptionality found in *Steele & Morris*. The Directions clearly set a high test.

The Directions were challenged in the case of *DW v The Scottish Ministers*. An individual had it noted in his social work notes that he had been convicted of murder. DW and his partner applied for IVF treatment and the Health Board, in the usual way, asked the social work department for a background report. The social work department advised of their belief of the murder conviction. As a result, an offer of IVF treatment was withdrawn, leading the Petitioner and his partner travelled abroad for treatment at their own expense.

DW applied for legal aid to sue Edinburgh City Council for defamation. He was granted emergency legal aid and a Petition was lodged. However, the grant of emergency legal aid was limited for the purpose of raising the action only, and his full legal aid application was refused. SLAB applied the Scottish Ministers' Directions to their consideration of the application. The Petitioner appealed against the refusal to grant him legal aid. That appeal was refused by the Sheriff Principal of Lothian and the Borders. The Sheriff Principal concluded that the case had no probable cause, but in any event the application did not meet the type of exceptionality envisaged by the Directions.

The Petitioner then raised a judicial review, not against SLAB in respect of the refusal of his legal aid, but rather against the Scottish Ministers' in respect of the issuing of the Directions. The Petitioner sought a declarator that the Directions were ultra vires and contrary to his human rights. He also sought damages. Lord Wheatley considered the case on a narrower remit - that the action did not raise a live issue & not all other remedies had been invoked (such as seeking compensation against the Council or the NHS). It is understood that this decision is being reclaimed.

Lord Wheatley's approach was to take the Petition against the Scottish Ministers as part and parcel of pursuing the same issue: that of compensation. Lord Wheatley considered alternative remedies that the Petitioner did, or ought to, have pursued. In particular he considered that Scottish Public Services Ombudsman (SPSO) was an alternative remedy to judicial review, and that action could be taken against the Health Board or the Edinburgh City Council. It is not clear from the judgement whether Lord Wheatley was envisaging different action from that for which legal aid had been refused. The judgement also assumes that the SPSO can provide an effective remedy. It seems that the Petition is raising questions about the ability of individuals such as DW to obtain access to the courts for defamation and it is not clear that the Lord Wheatley's judgement in respect of alternative remedies answers this point. However, ultimately whether the Petitioner will succeed in challenging the Directions is likely to depend on convincing the court that the Directions set a higher test than what the ECtHR envisaged in *Steel & Morris*.

SK v Paterson [2009] CSIH 76 was a challenge to the absence of state funded legal representation for parents appearing before Children's Hearings. It was a decision of the Inner House following a reference from the Sheriff Court of two questions framed in a devolution minute.

The background was that a woman with learning disabilities challenged the absence of a scheme of state funded legal representation for representation before Children's Hearings. Following the agreed reference, but prior to the Inner House hearing the case, the Scottish Ministers introduced a scheme of state funded representation. SK still sought a declarator that her rights had been breached.

The case raised similar issues to *S v Miller* (children appearing before Children's Hearings where their liberty is at stake) and the scheme of representation introduced is the same procedure as that involving children. Representatives are appointed from a list maintained by the local authority. Solicitors from that list are now appointed for parents if a parent will be unable to effectively participate before a Hearing.

The scheme was introduced by way of emergency legislation and the Scottish Parliament considered using its powers to annul legislation. The Education and Lifelong Learning Committee passed such a resolution, and from the text of the debate both in the Committee and in the main Chamber, it is clear that the measures were extremely

controversial. Many MPS were unhappy at the potential 'legalisation' of the Hearings system and questioned the Ministers closely as to the numbers of parents would be caught by the scheme.

The legislation also raised difficulties from the other side of equation. Many parents with learning difficulties are likely to have their own solicitor, who may not be on the list of solicitors that could be appointed to appear at the panel with them. The scheme also works on a fixed fee basis, and there is some evidence for the appointment of legal representatives for children that the fee structure acts as disincentives to meet clients beforehand. The list system also creates difficulties with a lack of continuity of legal advice which is likely to give rise to both practical problems and fairness issues.

Development of Protective Expenses Orders & Gill Review

For the first time a protective expenses order has been granted. Protective cost orders are relatively well developed in England, and are used by small non-governmental organisations and community groups to widen access to the courts. The leading case in England is *Corner House* [full citation] although some of the principles have been - to a degree - departed from in subsequent caselaw.

A protective cost order is designed to remove the fear for liability for unlimited expenses in the event of losing a case. The order can be variable in type and degree but the usual practice is for it to be granted at a relatively early stage in the litigation. The order can take the form of a no expenses due to or by, whereby neither party can recover expenses from the other, or more usually, an order capping liability for expenses for those bringing the action. This effectively means that the Respondents, in the event of successfully resisting the Petition, will only be able to recover up to a fixed sum in expenses. In return, those bringing the action are often limited to the expenses that they can recover, such as in the event of success recovery of expenses for Junior Counsel only.

The *Corner House* tests are that:

- the case should raise issues of general public importance
- the public interest requires those issues to be resolved

- that the applicant has no private interest in the outcome of the case
- that having regard to the financial resources of both parties and the amount of costs likely to be involved, it is fair and just to make the order
- that if the order is not made, the applicant will probably discontinue the proceedings and be acting reasonably in doing so.

The Corner House principles also set out that it is in the court's discretion as to whether the order should be granted taking into account all circumstances arising. Further, if the solicitors and Counsel for the applicants are acting pro bono then this will heighten the prospects of obtaining such an order.

The pro bono part of the test has caused some disquiet, and it seems that this weighting, is not a matter which appears to play a large part in the exercise of the court's discretion. However, the area that has caused most difficulty in England is the application of the private interest part of the test. How is the private interest to be defined or quantified? Does an indirect private interest count?

Two previous attempts to obtain such orders in Scotland failed (*McArthur v Lord Advocate* 2006 SLT 170 and *Friends of the Earth Scotland v Scottish Ministers* (unreported)). The *McArthur* judgement ruled that such orders were competent but Lord Glennie declined to grant such an order.

No further attempts to obtain an order appear to have been made until the judgement of *McGinty v Scottish Ministers* [2010] CSOH 5. This is a judicial review brought by an individual in relation to the inclusion of a proposal within the National Planning Framework 2 for Scotland on the basis of strategic environmental assessment procedures.

The court granted the protective expenses order, although setting the liability cap at a £30,000. This was despite the information before the court that the Petitioner was unemployed with little assets. However, the court had been advised that a certain amount of funding had been provided from groups and other interested parties.

Despite the level of the cap, the McGinty decision is helpful. Lady Dorrian reserved the position on whether a private interest would discount a Petitioner (although she noted that Mr McGinty had no such private interest), and the judgement is also silent on the desirability or otherwise of the pro bono weighting.

The origins for protective expenses orders - as a mechanism for opening the door to ngos and interests groups with no particular private interest in the outcome of the case - is not well suited to litigation by individuals. Protective expenses orders can provide some relief from the fear of unlimited costs. However, they do not assist with the funding of the case from the Petitioner's perspective. Protective costs orders provide an important but limited scope for access to the courts.

The Gill Review has recommended that a test be formulated for the use of protective costs orders in Scotland. It suggested two different types of wording although it is noticeable that both tests involve an element of wider public interest. Although the Gill Review has recommended that the requirement of title and interest be relaxed by the introduction of a test of sufficient interest, there is an inherent tension between showing a private interest such as is required to satisfy the current test and obtaining a protective expenses order. The role for such orders in Scotland is therefore likely to be limited, at least whilst a narrow approach to title and interest remains. It is understood that the Rules Council is currently considering options for the introduction of a rule on protective expenses order in Scotland.

Developments elsewhere

The Jackson Review of costs in England illustrates the contrast in thinking north and south of the border on access to the courts. However, it should be remembered that there are two issues in England that don't apply in Scotland, and can confuse any direct comparisons. Firstly, legal aid is available in England for public interest litigation, although there have been some recent changes to limit its scope. Secondly, and often the source of much satellite litigation on protective expenses orders, many judicial reviews (particularly raising environmental issues) are carried out under a conditional fee agreement. Effectively this means that the defenders, if found liable for expenses, might also bear the cost of a success fee. The debate in England on expenses therefore involves not just the recovery of expenses but also the recovery in some circumstances of the success fee.

The Jackson review has been widely reported as recommending one way cost shifting - effectively the Petitioner can recover expenses but would be immune from costs being awarded against her or him. However, although this might be the intention, the specific recommendation was that the costs in judicial review cases “shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all of the circumstances including (a) the financial resources of all of the parties to the proceedings and (b) their conduct.”

If the recommendation is followed, it may not be the clear-cut presumption of no expenses against unsuccessful litigants. The test seems to give rise to a likelihood of arguments on what is meant by reasonable in the test. Further, could conduct be deemed to include proceeding with a weaker case?

The Jackson review accepted that Protective Costs Orders had a limited role to play in the facilitating of public interest litigation and this should be borne in mind for the legal aid context in Scotland.

Last points

The final point to make is that there is a more basic current issue of access to justice within Scotland. It would be odd to discuss access to justice without mentioning the current dispute between the Faculty and SLAB. It is clear that there is a reluctance amongst some members of the Bar to take legally aided work. Whilst this might be understandable given the differential between legal aid rates and private/commercial rates, it does raise issues as to whether the cab rank rule operates satisfactorily at present.

There is no doubt that some of the most important public law cases have been legally aided cases. It is vital that there is a fair system of payment which allows for those at all levels within the Faculty to take work funded by legal aid. That includes the most senior and experienced members of the Bar, without a feeling that accepting such instructions is acting on a charitable basis. It is a fundamental requirement not just for the individual litigants to have representation at the highest level, but also for the development of public law itself.