EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 3
XA75/16

Lord Menzies
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD MENZIES

in the hearing on Note of Objections to the Auditor's Report by Mungo Bovey, QC, senior counsel for the applicant

in the application of

AMIR BEROGHANI

for leave to appeal against a decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 17 May 2016

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Noter: Dean of Faculty, Whyte; Balfour & Manson LLP
Respondent (Scottish Legal Aid Board): Massaro; Scottish Legal Aid Board

21 January 2021

Introduction

[1] The issue in this case is the proper interpretation of the Civil Legal Aid (Scotland) (Fees) Regulations 1989, schedule 4, and in particular how these should be applied to the fees of senior counsel for preparation and attendance at a hearing in the Inner House of the Court of Session on an application for permission to appeal to the Court of Session from the Upper Tribunal (Immigration and Asylum Chamber) in terms of section 13(4) of the Tribunals, Courts and Enforcement Act 2007.

[2] By way of background, in 2016 the Noter was instructed as senior counsel for the applicant in an application for permission to appeal to the Inner House against a decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 17 May 2016. Legal Aid was granted for the purpose of the application. The application was drafted and presented, and a hearing was appointed as to whether or not permission should be granted under section 13(4) of the 2007 Act. That hearing called before a procedural judge in the Inner House.

[3] The Noter prepared for and conducted the permission hearing. He spent in excess of 14 hours in preparation for the hearing, which itself lasted 3 hours. There was no dispute as to the time expended by senior counsel, nor was it suggested that the work described was not actually, or not reasonably, done.

[4] The Noter submitted a fee to the Scottish Legal Aid Board ("SLAB") seeking payment of £2,500 plus VAT, namely £1,500 plus VAT for the hearing and £1,000 plus VAT for preparation therefor. This approximated to an overall rate of £147 per hour.

[5] SLAB disputed the Noter's entitlement to be paid for preparation, and also the fee charged for the hearing itself. The matter was accordingly referred to the Auditor of the Court of Session in terms of Regulation 12 of the 1989 Regulations.

[6] By Report dated 4 March 2020 the Auditor ruled that (i) the Noter was not entitled to be paid for preparation for the hearing, and (ii) the fee for the hearing itself should be abated to the sum of £487.50 plus VAT. This equates to an overall rate of less than £29 per hour.

[7] The Dean of Faculty explained that the matter raised questions of importance to the Faculty, and for access to justice in general, and that SLAB also accepted the general importance of the point. Permissions hearings in both Outer and Inner House were

becoming more frequent, and it was argued that the Civil Legal Aid Regulations had failed to keep pace with current developments.

The relevant provisions of the 1989 Regulations applicable at the time

[8] The following passages of the Civil Legal Aid (Scotland) (Fees) Regulations 1989/1490 are of relevance.

[9] Regulation 9:

> "Subject to the provisions of Regulation 8 regarding the submission of accounts, and the provisions of regulation 10 regarding the calculation of fees, the fees allowable to counsel shall be fees for such work as shall be determined by the Board to have been actually and reasonably done, due regard being had to economy."

Regulation 10(1) provides:

> "Counsel's fees in relation to proceedings in the Court of Session … shall be calculated in accordance with Schedule 4."

Schedule 4 includes the following provisions:

> "1 Subject to the following provisions of this Schedule, the fees of counsel shall be calculated by the Board, or in the event of dispute by the auditor, in accordance with the fees prescribed in the Tables of Fees set out after paragraph 17 to this Schedule …
>
> 3 Where the Tables of Fees in this Schedule do not prescribe a fee for any class of proceedings or any item of work, the Board, or as the case may be, the auditor, shall allow such fee as appears to be appropriate to provide reasonable remuneration for the work with regard to all the circumstances, including the general levels of fees in the Tables of Fees.
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> 4 Subject to paragraphs 5 to 7, the fees prescribed in the Tables of Fees in this Schedule include all associated preparation work.
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> 5 Subject to paragraph 6, an additional fee for preparation shall only be allowed if it relates to a proof, debate or like hearing and the hearing –
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> (a) does not proceed (a date or dates having been assigned for the hearing);
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> (b) does not exceed a day in duration;
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> (c) does not exceed four days in duration, and the Board is satisfied that the case is abnormal in magnitude, difficulty or any other respect; or

> (d) exceeds four days in duration, and the Board is satisfied that the case is abnormal in magnitude, difficulty or any other respect, and also that counsel required to consider an abnormally large quantity of documentation."

Part (II) of the Table of Fees of counsel for proceedings in the Court of Session makes provision for senior counsel appearing in Family Actions, Petitions (including Judicial Review, Abduction and Adoption) and Ordinary Actions. Paragraph 6 of this Part provides as follows:

> "6 Day in court
>
> (a) Inner House (including appeal under section 163, 164 or 165 of the [Children's Hearings (Scotland) Act] 2011 Act) - £1,500 [from 26 April 2019 now £1,545.00]
>
> (b) Outer House - £1,350 [from 26 April 2019 now £1,390.50]".

The Report of the Auditor of the Court of Session dated 4 March 2020

[10] As we have explained, following a diet of taxation on 5 February 2020 at which the Auditor heard representations from the Noter and SLAB, the Auditor taxed the total fees at £487.50, to which VAT and the Auditor's fee fell to be added. In a short note appended to the Report the Auditor concluded that on a proper reading of the 1989 Regulations the analysis of them presented to him on behalf of SLAB was correct. In reaching his decision he had particular regard to paragraphs 1 to 6 of the email to him dated 31 January 2020 from SLAB, and to paragraphs 10 to 19 of the Points of Objection lodged and intimated on behalf of SLAB in advance of the diet of taxation. For these reasons he abated the fee of £1,000 for preparation for the permission hearing, and restricted the fee of £1,500 for further preparation and attendance at the permission hearing to £487.50.

[11] The email of 31 January 2020 contained the following submissions:

> "1 Schedule 4 of the 2011 Regulations introduced a largely standard fee based system of payment for counsel who are content to accept instructions in a legally aided funded case. In addition, the schedule introduced detailed provisions which

underpin the Table of Fees and set out the basis of payment. The terms of Schedule 4, paragraph 4 of the Civil Fees Regulations, are unambiguous and make it clear that '*subject to paragraphs 5 to 7, the fees prescribed in the Tables of Fees in this Schedule include all associated preparation work*'.

2 It is recognised that Schedule 4, paragraph 5 makes provision for an additional fee for preparation but it '*shall only be allowed if it relates to a proof, debate or like hearing and the hearing*' (*the terms of the paragraph set out above are here repeated*).

3 The inference, and indeed intention, of the regulations was that these provisions for preparation can only be engaged in relation to the substantive hearing in the proceedings which will routinely be set down by the court for a day or more. The fee levels for all such substantive hearings are set at a level that reflects a standard per day or daily fee payable to counsel rather than by reference to the actual duration of the hearing. All other preparation is incorporated into the prescribed fees by dint of Schedule 4, paragraph 4, as part of the 'swings and roundabouts' nature in which the fee tables have been structured.

4 Schedule 4, Table of Fees A, Part 1, Chapter 6, paragraph11(a) is explicit and prescribes a fee for a hearing on the Single Bills. A fee for such a hearing is a standard fee clearly provided for within the Table and one which may be subject to increase but only where the actual time engaged at that hearing exceeds 30 minutes. Accordingly, it is respectfully submitted that neither the Board nor the Auditor, has any statutory authority to fix a separate preparation fee in such circumstances standing the terms of Schedule 4, paragraph 4.

5 It is respectfully submitted that a Single Bill's hearing seeking leave to appeal does not satisfy the '*proof, debate or like hearing*' test under Schedule 4, paragraph 5, which would allow SLAB to make payment of a preparation fee.

6 In terms of Schedule 4, paragraph 17 'in any taxation of counsel's fees in terms of Regulation 12, the auditor shall have regard to information not previously made available to the Board only if the information was not available to be provided to the Board at the time it made the offer to counsel which is the subject of taxation, or on cause shown.' That being so, even in the event that the Auditor was so minded to allow any preparation fee it is further submitted that counsel has failed to adequately support the claim which is being made with particular reference to Schedule 4, paragraph 6(d) '*counsel shall provide the Board with a detailed summary of the work undertaken and the documentation perused at each stage of the process and shall, if required by the Board, provide details of authorities referred to, the time engaged, dates and locations as to when and where the work was undertaken, and any contemporaneous records or notes made in the course of preparation*'. "

[12] Points 10 to 19 of the Points of Objection for SLAB set out the detailed submissions for SLAB in support of their approach to the assessment of senior counsels' fees. We do not consider that it is necessary to set these out at length in this opinion.

Submissions for the Noter

[13] Central to the Dean of Faculty's submission was the point that the Regulations make provision for both prescribed fees and assessed fees. Schedule 4 paragraph 1 provides that: "Subject to the following provisions of this Schedule the fees of counsel shall be calculated … in accordance with the fees prescribed in the Tables of Fees …". The Tables of Fees make detailed and specific provision for prescribed fees in relation to the items of work and the types of procedures set out therein. However, the Tables of Fees do not prescribe a fee for every class of proceedings and every item of work. Where the Tables of Fees in the Schedule do not prescribe a fee for any class of proceedings or any item of work, paragraph 3 of Schedule 4 applies, and such fee shall be allowed as appears to be appropriate to provide reasonable remuneration for the work with regard to all the circumstances, including the general levels of fees in the Tables of Fees. So, provision is made for prescribed fees and assessed fees.

[14] The Dean of Faculty began by adopting his written submissions. These included three grounds of challenge, as set out in paragraph 10 of the Note of Objections for the Noter. These may be summarised as follows:

> (1) The Noter's fee of £1,500 for attendance at the hearing itself was a prescribed fee; the figure set for senior counsel in respect of a day in court in the Inner House was £1,500, and the Auditor erred in not allowing this.
>
> (2) So far as a fee for preparation is concerned, the Auditor erred in accepting SLAB's argument that the hearing for permission was not 'a proof, debate or like hearing' in terms of paragraph 5 of Schedule 4. A 3 hour hearing, for which Notes of Argument were ordered by the court and exchanged in advance, before an Inner House judge, is plainly 'like' a debate. A preparation fee was accordingly payable.
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> (3) In any event, the refusal of a preparation fee was erroneous because paragraph 5 of Schedule 4 requires to be read in light of paragraph 4, which provides that 'subject to paragraphs 5 to 7, the fees prescribed in the Tables of Fees in this Schedule include all associated preparation work'. If the Tables of Fees did not prescribe a fee for this work, paragraph 4 was not engaged and a separate fee for

> preparation should have been allowed, on the basis set out by Regulation 9, namely 'fees for such work … actually and reasonably done, due regard being had to economy'.

[15] However, in the course of discussions with the court, the Dean of Faculty indicated that he no longer insisted on the first of the above grounds of challenge. His position came to be that the Noter's Note of Fee related to work which was not covered by the Tables of Fees in Schedule 4, and accordingly it was an assessed fee and required to be dealt with in terms of paragraph 3 of Schedule 4. He maintained that the Auditor had fallen into error in two respects –

> (1) By failing to take account of preparation work, and by applying paragraph 5 of Schedule 4 as if this were a prescribed fee, which it was not; and
>
> (2) *Esto* the first point was wrong, and paragraph 5 of Schedule 4 did indeed apply, this fee related to a 'proof, debate or like hearing', and the Auditor erred in deciding otherwise.

[16] It was clear from a reading of the Tables of Fees applicable to senior counsel that these proceedings were not covered. This was a hearing for permission to appeal in terms of section 13(4) of the Tribunals, Courts and Enforcement Act 2007. This was a necessary step in a statutory appeal procedure. It did not fall within the classes of action to which the Tables of Fees applied. Moreover, the procedural step was not mentioned in the relevant Tables of Fees (although it was of some relevance that the prescribed fee for senior counsel for a day in court in the Inner House was £1,500). This was therefore a fee for a class of proceedings, and separately an item of work, where the Tables of Fees did not prescribe a fee. It was therefore an assessed fee, to which the provisions of paragraph 3 of Schedule 4 applied. SLAB, or the Auditor, should accordingly allow such fee as appeared to be appropriate to provide reasonable remuneration for the work with regard to all the

circumstances, including the general levels of fees in the Tables of Fees. Because it was not a prescribed fee, paragraph 5 of Schedule 4 did not apply. That related to the allowance of "an additional fee for preparation" and read together with paragraph 4, it was clear that this was a fee in addition to the fees prescribed in the Tables of Fees. Those fees do not apply in this case; properly construed, paragraphs 4 to 7 of Schedule 4 applied only to prescribed fees, and not to assessed fees. In relation to assessed fees, Regulation 9 and paragraph 3 of Schedule 4 applied. In the present case, there was no dispute that the work had been actually and reasonably done, so the Board (and the Auditor) required to assess what was reasonable remuneration for this work. The work included preparation, and the Auditor was in error in excluding this.

[17] In any event, even if paragraph 5 of Schedule 4 does apply to an assessed fee, a permission hearing in a statutory appeal ought properly to be categorised as a "debate or like hearing". It inevitably requires preparation. It will inevitably be opposed. It will usually involve citation of authority. In this, and in many other cases, the court required the preparation and lodging of a Note of Argument before the hearing. Moreover, like a debate, it is potentially dispositive of the entire case (as it was in the present case, in which permission was refused). These features are generally absent from hearings such as by order hearings, procedural hearings or single bill hearings. Indeed, a permission hearing may last for significantly longer, and take significantly more effort and preparation, than a debate – some debates last for less than 1 hour, while some permission hearings last 2 or 3 days. The hearing in the present case lasted about 3 hours. The Auditor was wrong to hold that it was not a hearing like a debate.

[18] When asked by the court how SLAB or the Auditor should treat a fee for written submissions prior to a permission hearing, the Dean of Faculty submitted that there would

be no double counting – if this were indeed a prescribed fee, this would be taken into account by virtue of paragraph 6(d) of Schedule 4. The fact that counsel receives payment for drafting a Note of Argument or written submissions is a matter of arithmetic – it does not mean that counsel would not receive payment for preparation. Moreover, on the basis that both parties are agreed that this is properly an assessed fee, there would be no discrepancy between the reasonable remuneration of junior counsel and the reasonable remuneration of senior counsel.

[19] Turning to the authorities, the Dean of Faculty accepted that his submissions regarding whether a permission hearing was a "like hearing" to a debate were not supported by the unreported decision of Lord Arthurson in *Haddow, Noter (W* v *The Secretary of State for the Home Department)* dated 6 July 2018. He submitted that the Lord Ordinary in that case was wrong. The Lord Ordinary correctly identified (at paragraph [6] of his opinion) the various factors which indicated that a permission hearing was a "like hearing" to a debate. The Lord Ordinary concluded that a permission hearing in an action for judicial review was not a "like hearing", but he did not set out in detail his reasons for reaching this conclusion.

[20] The Dean of Faculty argued that the construction for which he argued was consistent with the intention of the legislature, which was to set counsel's fees at a reasonable level. He referred to *O'Neill QC, Noter* 2011 SCLR 143 at paragraphs [44/45]. He also drew our attention to a Note issued by Lady Carmichael in the petition of *MEJ for judicial review* (unreported, 17 March 2020), in which the court considered the situation in which counsel instructed for a permission hearing in judicial review proceedings was unable to attend the hearing having tested positive for COVID-19. In that case the court observed:

> "Counsel who accept instructions without previous involvement in a case in these types of circumstances are assisting the court in the efficient disposal of the business, and should receive reasonable remuneration for their work. Permission hearings in judicial review should not be delayed for significant periods. Those matters may be relevant to any future consideration of the arrangements for remuneration of counsel for permission hearings."

[21] For all these reasons, the Dean of Faculty submitted that the Auditor had erred in his approach to the construction of the Regulations, as set out in the second and third ground of challenge for the Noter. The court should therefore sustain the Note of Objections and remit the matter to the Auditor to consider the Noter's claim of new. Parties were agreed that no expenses should be found due to or by either side.

Submissions for SLAB

[22] Counsel for SLAB accepted the distinction between prescribed fees and assessed fees, but submitted that the Regulations required to be interpreted in their entirety, and there should not be a substantial disparity between prescribed and assessed fees. The fact that a Note of Fee falls to be treated as an assessed fee does not entitle counsel to charge a greater fee. In the present case SLAB determined that the Noter's fee was an assessed fee. It noted that in Part I of the Table of Fees at Chapter 6 there is a prescribed fee for an appearance in the single bills arising out of an ordinary action by junior counsel. At the time the prescribed fee was £75 for the first 30 minutes and £50 for each 30 minutes thereafter. The Noter's fee recorded that the hearing lasted 3 hours. A junior counsel would therefore have been entitled to a fee of £325 in a single bills hearing arising out of an ordinary action. This was the fee that was paid to junior counsel in the present case. There is no equivalent prescribed fee for a Single Bills hearing in Part II of the Table of Fees. SLAB generally considers a fee of roughly 150% of the fee for junior counsel, to be the fee a senior counsel is

entitled to, based on previous decisions from the Auditor. 150% of £325 is £487.50. That was how the Noter's fee was assessed by SLAB. The Auditor agreed with SLAB's analysis as set out in the email dated 31 January 2020. In the present case counsel submitted that both junior counsel's fee and senior counsel's fee should be an assessed fee, because (a) there is no prescribed fee for statutory appeals, and (b) there is no prescribed fee for senior counsel's attendance at a single bill hearing or a permission hearing in the Inner House. In assessing the Noter's fee, SLAB proceeded on the basis that it should broadly be in line with the prescribed fee.

[23] With regard to the second ground of challenge, Lord Arthurson's conclusion in *Haddow, Noter (W* v *The Secretary of State for the Home Department, supra*) was correct. Full argument is not required at a permission hearing. This factor distinguishes such a hearing from a debate or proof. A fee for preparation is therefore not allowable.

[24] With regard to the third ground of challenge, the submission for the Noter that paragraph 5 requires to be read in light of paragraph 4 has no basis. Paragraph 4 is expressly subject to paragraph 5, and paragraph 5 is expressly subject to paragraph 6. If paragraph 5 was subject to paragraph 4 it would have said so. There is therefore no reason to limit the application of paragraph 5 to prescribed fees and not to assessed fees. The starting point for considering what is appropriate as an assessed fee is to look at what it might be if it were a prescribed fee. Otherwise, there would be a huge disparity between the level of assessed and prescribed fees.

[25] The circumstances of the present case were quite different from those in *O'Neill*, which was decided on the basis of the Regulations as they were framed at that time. The Regulations as they applied in the present case were quite different. The differences were explained by Lord Carloway in *McCall* v *Scottish Ministers* 2006 SC 266.

[26] In answer to questions from the court, counsel accepted that paragraph 4 of the email from SLAB dated 31 January 2020 was wrong, and the email should not have stated this. Counsel accepted that the Auditor should have applied paragraph 3 of Schedule 4 in assessing the fee in the present case, but submitted that this is what the Auditor did in fact do. He was not however able to point to any material which showed that the Auditor applied paragraph 3.

[27] Even if, contrary to his primary submission, paragraph 5 did not apply directly to assessed fees, counsel submitted that it was relevant to take this into account in applying the wide discretion conferred on SLAB and on the Auditor. The Auditor was entitled to consider the circumstances in which an additional preparation fee would have been paid had the fee been a prescribed fee, and if those circumstances are not met, to assess the fee taking into account similar prescribed fees which would include the relevant preparation. The amount of the fee is a matter which was within the Auditor's discretion, and the court should not interfere with this.

Reply on behalf of the Noter

[28] The Dean of Faculty observed that the Auditor expressly accepted the analysis of the Regulations presented to him on behalf of SLAB, and had particular regard to paragraphs 1 to 6 of the email dated 31 January 2020. Paragraph 4 of that email was wrong in law, and was now accepted as such on behalf of SLAB. The stipulation that counsel does not get paid a fee for preparation is restricted to prescribed fees. There must be a differentiation between paragraphs 1 and 3 of Schedule 4 – if not, the structure of the Schedule made no sense. Paragraph 4 of Schedule 4 would be deprived of meaning if the proper construction was that counsel was not entitled to a fee for preparation in any circumstances, even in assessed fees.

The argument advanced on behalf of SLAB took no account of the words in paragraph 5 of Schedule 4 "an additional fee for preparation" – this must be additional to the fee referred to in the previous paragraph, and so to prescribed fees.

Discussion and decision

[29] Parties are now agreed that this fee is an assessed fee, and not a prescribed fee. That is in our view clearly correct. There is nothing in the Tables of Fees which corresponds with, or even approximates to, this class of proceedings or this item of work. Table of Fees A for senior counsel for proceedings in the Court of Session applies to Family Actions, Petitions (including Judicial Review, Abduction and Adoption) and Ordinary Actions. Statutory appeals in terms of section 13(4) of the Tribunals, Courts & Enforcement Act 2007 are not covered. Table of Fees B for senior counsel relates to proceedings in Tribunals and lower courts and has no application to the Inner House of the Court of Session. Moreover, the fee relates to preparation for and attendance at a permission hearing – again, not an item of work which appears in the Tables of Fees.

[30] That being so, the task for SLAB (and for the Auditor if required) is to proceed under paragraph 3 of Schedule 4, and to allow such fee as appears to be appropriate to provide reasonable remuneration for the work with regard to all the circumstances, including the general level of fees in the Tables of Fees. These last words do not mean that SLAB or the Auditor should treat the fee as if it were a prescribed fee. Paragraph 1 of Schedule 4 provides limited scope for the exercise of discretion in the calculation of prescribed fees – they are subject to the constraints contained in the Tables of Fees. Paragraph 3 of Schedule 4 requires a more flexible and wider approach, having regard to all the circumstances. One of these circumstances is the general levels of fees in the Tables of Fees, but it is not the only

one. The overriding aim of the exercise in paragraph 3 is to provide reasonable remuneration for the work. This reflects the provisions of Regulations 9 and 10 – in particular, that the fees allowable to counsel shall be fees for such work as shall be determined by the Board to have been actually and reasonably done, due regard being had to economy.

[31] In the present case, it has never been suggested that the work for which the Noter seeks payment was not actually done, or that it was not reasonable for it to be done. Where an element of that work relates to preparation, and there is no dispute that preparation was carried out and was reasonably required, we consider that this will normally fall to be included in the assessment exercise under paragraph 3 of Schedule 4.

[32] Although the court in *O'Neill QC, Noter* was considering an earlier version of the 1989 Regulations with a significantly different Table of Fees in Schedule 4 to the Tables of Fees presently before the court, at paragraphs [43] to [45] Lord Tyre gave consideration to the issue of whether there is a legislative intention underlying the Regulations of providing reasonable remuneration to counsel. He adopted the observations of Lord Prosser in *Geddes* v *Lothian Health Board* (17 February 1993, unreported), and went on to observe:

> "Were the 1989 Regulations to be interpreted in a manner which provided for payment of fees to counsel at an uneconomic level (but which was nevertheless deemed to be 'reasonable remuneration'), then it seems to me that the statutory rights conferred by section 31 [of the Legal Aid (Scotland) Act 1986] could not be effective. It was not suggested on behalf of the board that Parliament must have intended that counsel should be required to carry out work in the Court of Session (as opposed to other courts and tribunals) at uneconomic rates. Without an undertaking to provide a proper or reasonable fee, counsel would not be bound to accept instructions, thereby depriving legally aided parties of the right to counsel of their choice and of the usual rights of a client to engage counsel in accordance with the cab rank rule. … I prefer to found my interpretation in the historical context which seems to me to make clear that one of the principal purposes of the legislative scheme has been and continues to be to make access to justice available to legally aided litigants through the counsel of their choice (unrestricted by the willingness or

> otherwise of counsel to be included in a list), on the normal basis of instruction, in consideration of the payment of a reasonable fee to counsel by the fund."

[33] We agree with these observations (and with the remarks of Lady Carmichael in *MEJ*). It is in our view an important element of the access to justice afforded to legally aided litigants that counsel of their choice should receive payment of a reasonable fee by SLAB. It is that end to which the assessment under paragraph 3 of Schedule 4 is aimed.

[34] It is for the Auditor, not this court, to determine what constitutes reasonable remuneration for the work done by the Noter. However, we observe that, in a case in which it is not disputed that the work was actually done nor that it was reasonably required, the fee allowed to senior counsel by the Auditor equated to a total (for preparation and the hearing itself) of less than £29 per hour, which seems to us to be surprising.

[35] The Auditor stated in his Report that he accepted the analysis of the 1989 Regulations presented to him by SLAB, and that he had particular regard to paragraphs 1-6 of the email dated 31 January 2020 and paragraphs 10-19 of SLAB's Points of Objection. There are two points which arise from this. (1) Counsel for SLAB now accepts that paragraph 4 of the email of 31 January 2020 is erroneous, and that the email should not have contained this submission. It was accepted by the Auditor, and he states that he paid particular regard to it. On this ground alone, the Auditor's decision cannot stand. (2) Paragraph 13 of SLAB's Points of Objection sets out how SLAB calculated the Noter's fee at £487.50 (as summarised at paragraph [22] above). The Auditor accepted this methodology, and restricted the fee on this basis. We see no justification for this methodology. It is based on a prescribed fee for junior counsel for a different item of work in proceedings not covered by the Tables of Fees, and SLAB have then applied a ratio of a two-thirds increase to reach a fee for senior counsel. This excludes any fee for preparation, it appears to proceed on the basis that this is a

prescribed free, and it ignores the fact that neither the item of work nor the class of proceedings is covered by the Tables of Fees.

[36] We agree with the Dean of Faculty's submission on behalf of the Noter that paragraph 5 of Schedule 4 does not apply to the assessment of fees in terms of paragraph 3. The scheme of Schedule 4 appears to us tolerably clear. Paragraph 1 provides that, subject to the following provisions of the Schedule, fees of counsel shall be calculated in accordance with the fees prescribed in the Tables of Fees. Paragraph 2 deals with the situation where the Tables of Fees prescribe a range of fees. Paragraph 3 provides for the situation in which the Tables of Fees do not prescribe a fee for any class of proceedings or any item of work. Paragraph 4, which is expressly subject to paragraphs 5 to 7, provides that the fees prescribed in the Tables of Fees include all associated preparation work. Paragraphs 5 to 7 make provisions for additional fees for preparation, and the subsequent paragraphs make detailed provisions for other circumstances such as drafting and commitment fees. We consider that paragraphs 4 to 7 of Schedule 4 provide a suite of provisions which deal with how fees for preparation work should be approached in the context of the Tables of Fees. The general rule is to be found in paragraph 4, namely that prescribed fees include all associated preparation work. This is subject to paragraphs 5 to 7, which provide for exceptions and explanations to this general rule. Paragraph 5 begins with a reference to "an additional fee for preparation", which must relate to a fee for preparation which is additional to the fees prescribed in the Tables of Fees, referred to in paragraph 4. On a proper construction of the Regulations as a whole, we are satisfied that the provisions of paragraph 5 apply only to prescribed fees, and have no application to assessed fees calculated in terms of paragraph 3. There is nothing in Schedule 4 to support the view that fees assessed in terms of paragraph 3 cannot extend to any necessary preparation work.

Proper preparation by counsel is an essential ingredient of effective representation for a legally assisted party, and serves the public interest. The Auditor accordingly fell into error of law in applying the provisions of paragraph 5 to the present case.

[37] Moreover, even if paragraph 5 were applicable to the circumstances of an assessed fee (and it might be argued that they had an indirect relevance standing the last phrase of paragraph 3), we consider that the Auditor was in error in accepting SLAB's submission that a permission hearing does not satisfy the "proof, debate or like hearing" test under paragraph 5 of Schedule 4. A permission hearing will frequently have several features which render it similar to a debate. It inevitably requires preparation. It will (almost) inevitably be opposed. It will usually involve citation of authority. It is potentially dispositive of the entire case (as it was in this case). Moreover, in the present case the hearing was held before a quorum of the Inner House, and the court required parties to lodge Notes of Argument before the hearing. These are all features of similarity with debates. Moreover, there are occasions on which a debate will last for a relatively short time – an hour or less – although of course many debates last longer than this. The present case is concerned with a permission hearing which lasted for about 3 hours, even with the prior submission of written Notes of Argument. Other permission hearings have lasted longer than this – eg *Wightman and Others* v *Advocate General* 20 March 2018.

[38] We do not suggest that every permission hearing will inevitably satisfy the "proof, debate or like hearing" test under paragraph 5 of Schedule 4. It is perhaps conceivable that in a particular case a short permission hearing might not meet that test. However, it is for the Auditor to assess whether that test has been met in all the circumstances. He did not do this in the present case. He was faced with a submission (in paragraph 5 of SLAB's email of 31 January 2020) that a permission hearing cannot satisfy the test. The submission was not

that, in the particular circumstances of this case, this permission hearing did not satisfy the test, but rather that "… a Single Bills hearing seeking leave to appeal does not satisfy…" the test. The Auditor accepted this submission, without giving consideration to the circumstances of this case. We consider that this was an error of law such that, even if (contrary to the view we have expressed above) paragraph 5 has any relevance to the exercise of assessing fees under paragraph 3, the Auditor's decision cannot stand.

[39] It is not clear from the Lord Ordinary's opinion dated 6 July 2018 in the Note of Objections by *Haddow, Noter (W* v *The Secretary of State for the Home Department, supra*) whether his decision was based on the particular circumstances of that case (which was a judicial review permission hearing in which counsel were invited by the court to make submissions of brevity) or whether he was expressing the view that, on a proper construction of the Regulations, any permission hearing (or at least any judicial review permission hearing) is not a "like hearing" to a proof or debate. If the latter, we do not agree. There are some permission hearings which may well satisfy the "like hearing" test. Whether they do or not will depend on all the circumstances of the case. This is not consistent with SLAB's submission to the Auditor, nor with the Auditor's conclusion, namely that a permission hearing will not, whatever the circumstances, satisfy the test.

[40] For these reasons we consider that the Auditor has indeed fallen into error of law. We shall sustain the Note of Objections by the Noter in respect of grounds of challenge two and three (set out at paragraphs 10.2 and 10.3 of the Note of Objections for the Noter), and we shall remit the matter to the Auditor to consider the Noter's claim of new.