**OUTER HOUSE, COURT OF SESSION**

**[2022] CSOH 81**

**P395/22**

OPINION OF LADY DRUMMOND

in the petition of

JOHN HALLEY

Petitioner

for

Judicial Review of decisions of the Scottish Ministers

**Petitioner: O'Neill KC Campbell Smith LLP**
**Respondents: McIlvride KC; P Reid The Scottish Ministers**

9 November 2022

**Background**

[1] The petitioner challenges funding decisions made by the Scottish Ministers: (i) to refuse to continue to fund his legal representation before a Tribunal reporting on his fitness to practice as a part-time Sheriff and (ii) to refuse to fund his legal expenses for judicial review proceedings in which he seeks to review the Tribunal's decision at a preliminary hearing.

[2] The petitioner is an advocate and part-time Sheriff. On 25 July 2019 the Lord President of the Court of Session wrote to the petitioner explaining that it had come to his attention that the petitioner had made public comments that were highly critical and on the face of it defamatory of another member of the judiciary in breach of the standards of

conduct expected of the judiciary. He suspended the petitioner from the office of part-time Sheriff in exercise of powers conferred on him by section 34(1) of the Judiciary and Courts (Scotland) Act 2008.

[3] On 29 August 2019 the Lord President requested that the First Minister convene a Tribunal under section 21 of the Courts Reform (Scotland) Act 2014 to investigate whether the petitioner was unfit to hold the office of part-time Sheriff. The First Minister appointed four people as members of the Tribunal under section 21(4): the Lord Justice Clerk (as Chair), Sheriff Alistair Duff, Gerry Moynihan KC and Karen Watt, Chief Executive of the Scottish Funding Council. Lord Bracadale was appointed as the Investigating Officer.

[4] By letter dated 26 April 2021 the Tribunal advised the petitioner that, following receipt of the recommendations and statement of reasons from Lord Bracadale and correspondence from the petitioner, the Tribunal had decided to proceed to a hearing and had appointed a Presenting Officer. The letter also stated:

> "Rule 8(5) provides that you may be represented by an advocate or solicitor, or any other person authorised by the Tribunal. **The Tribunal will meet the cost of such representation, and would approve payment for senior counsel, should it be your wish to nominate senior counsel as your representative.** The Tribunal would urge you to nominate a representative so that appropriate submissions may be made on your behalf as to subsequent procedure. I would be grateful if you could please let me know your choice of representative by 7 May 2021. If the Tribunal does not hear from you by that date, the Tribunal will ask the Dean of Faculty to nominate senior counsel on your behalf." (my emphasis)

On or about 1 December 2021 Sheriff Duff retired from judicial office. The First Minister appointed Sheriff Tait to the Tribunal in place of Sheriff Duff with effect from 12 January 2022.

[5] On 18 January 2022 the Tribunal held a preliminary hearing when it heard submissions from the petitioner's senior counsel which included a challenge to the constitution of the Tribunal. The petitioner argued that Tribunal membership could not be

changed once the initial appointments had been made. Objection was taken to the non-permanent, non-judicial and lay membership of the Tribunal selected by the government with no requirement to take a judicial oath. In an undated decision emailed to the petitioner's agents on 8 February 2022, the Tribunal rejected the petitioner's submissions.

[6] The petitioner lodged a petition for judicial review of the Tribunal's decision contending that the Tribunal misdirected itself on all of the preliminary points ("the substantive petition"). The petitioner's agents wrote to the respondents seeking confirmation that the respondents would meet the petitioner's expenses in the substantive petition and continuing expenses before the Tribunal in terms of their obligations under section 23(6) of the 2014 Act, EU retained law and the European Convention on Human Rights. The respondents by letters dated 6 April 2022 and 5 May 2022 refused to meet those expenses. Those are the decisions that are challenged in this petition.

[7] In their letter of 6 April 2022, the respondents stated that in summary their position was:

> "1. The agreement was to pay the expenses in respect of the preliminary hearing to facilitate the attendance of your client in respect of his (medical) fitness to go through proceedings, as the Tribunal requested that the expenses of legal representation for your client were met to allow it to decide that point.
>
> 2. There has been no agreement to pay beyond that, and not for the expenses of a judicial review challenge to the process such as you have outlined.
>
> 3. The obligation under section 23(6) of the courts Reform (Scotland) Act 2014 ("the 2014 Act") to pay such expenses as Ministers consider are reasonably required to enable the Tribunal to carry out its functions is in respect of your client's legal costs to date, to ensure your client was legally represented during the preliminary proceedings.
>
> 4. A judicial review as outlined to challenge the process cannot be said to fall within the scope of the preliminary hearing for which there was agreement to pay your client's legal expenses. Section 23(6) relates to carrying out the functions of a fitness for office Tribunal. It is not considered that paying the expenses of judicial review of the process is reasonably required to enable the Tribunal to carry out its functions.

> 5. All costs incurred to date in respect of legal advice or representation (or associated outlays) that do not relate to the matter at issue in the preliminary proceedings of the Tribunal fall outwith the scope of the agreed expenses of the Tribunal."

[8] The respondents confirmed those decisions in the letter of 5 May 2021. The respondents understood the Tribunal had agreed to meet the petitioner's expenses up to the preliminary hearing on the basis that the petitioner was not physically well enough to participate. When the respondents took these decisions the Tribunal had not provided them with the letter dated 26 April 2021. Nor was any reference made to that letter in any pre-litigation correspondence between the parties. Instead the petitioner's agents referred to correspondence from the Tribunal advising that the petitioner's legal representation would only be paid in relation to preparation for and appearance at the first preliminary hearing before the Tribunal with matters to be reviewed thereafter.

**The respondents' minute of amendment**

[9] On the morning of the hearing, the respondents moved to allow a minute of amendment to be received and for the amendments to be allowed. In the proposed amendments the respondents aver that they have, in light of the letter dated 26 April 2021, determined that in accordance with considerations of fairness, payment of the petitioner's legal expenses before the Tribunal is reasonably required to enable the Tribunal to carry out its functions. Thereafter the amendments set out the terms of an offer made by the respondents to the petitioner to meet his expenses before the Tribunal and the petitioner's counter offer with proposals to include a London solicitor and interest which were not accepted by the respondents. The respondents aver that their offer is a fair and reasonable one and satisfies any obligation incumbent upon them under section 23(6). Senior counsel in

oral submission explained that the minute was not complete but should be allowed to be received and parties could address whether the new decision made by the respondents to pay expenses on the basis set out in their offer (rejecting those set out in the petitioner's counter offer) fulfilled the respondents' obligation under section 23(6).

[10] The respondents had only become aware of the letter of 26 April showing that the Tribunal had offered to pay the petitioner's legal representation before the Tribunal without further qualification when they saw the petitioner's adjustments on 18 July 2022. The respondents maintain, as a matter of generality, they are not required to pay the expenses of legal representation incurred by a judicial office holder before a Tribunal constituted under section 21. However, where such an assurance as is contained in the letter of 26 April had been given by the Tribunal, as a matter of fairness, they accept they are required to do so. It was submitted that the proposed amendment was necessary to focus the real issue between the parties. The respondents did not accept that the averments setting out the content of the respondents' offer and the petitioner's counter-offer were inadmissible as argued by the petitioner. The authorities showed that clear and unequivocal admissions of fact could be referred to in subsequent proceedings (*Daks Simpson Group plc* v *Kuiper* 1994 SLT 689; *Richardson* v *Quercus Ltd* 1999 SC 278).

[11] The petitioner opposed receipt of the minute of amendment in a 56 page paper apart. The motion, enrolled the day before the hearing, did not seek to dispense with the normal period of intimation and did not allow the petitioner any time to answer. Such a late amendment made without adequate explanation for the delay should be refused (*Cork* v. *Great Glasgow Health Board*, 1997 SLT 404). The respondents were under a positive public law duty of inquiry to ascertain the relevant facts before making their decision to discontinue funding before the Tribunal. *R (Balajigari)* v *Secretary of State for the Home*

*Department* [2019] EWCA Civ 673; [2019] 1 WLR 4647 at paragraph 70 and *Secretary of State for Education and Science* v *Tameside MBC* [1977] AC 1014 Lord Diplock at p1065A-B). Had they made the necessary investigations or inquiries they would have known about the letter sooner.

[12] Whilst the petitioner had understood negotiations were ongoing, the respondents had not intimated any new decision to him. The first the petitioner became aware of a new decision was when the minute of amendment was intimated. The proposed amendment is a radical change to the respondents' case. If allowed, the hearing would require to be discharged, the petitioner given time to answer and further case management orders made. It would result in consequent delay, expense and procedural complexity.

[13] If the minute was to be received, the petitioner objected to averments about what was contained in legally privileged negotiations between the parties. In the absence of the consent of all parties, settlement negotiations are inadmissible as evidence and could not be referred to and relied upon in open court. (*Bell* v *Lothiansure Ltd.*, 1990 SLT 58; *Oceanbulk Shipping* v *TMT Asia Ltd.* [2010] UKSC 44 [2011] 1 AC 662).

[14] I refused to allow the minute to be received. The amendments do not add further specification of the respondents' case. The respondents currently aver that there is no obligation to continue to pay the petitioner's legal representation before the Tribunal under section 23(6). In the amendments they concede that these expenses are required to be paid in fulfilment of that obligation. But the proposed averments are not simply a concession. They narrate the terms of an offer made to the petitioner's agents and counter offer from the petitioner. They include the averment that:

> "The proposal made by the respondents to the petitioner is a fair and reasonable one and satisfies any obligation which may be incumbent upon the respondents in terms of section 23(6) of the 2014 Act."

On the face of it the respondents seek to have the court review their offer to pay certain expenses only and decide whether that is a reasonable offer in fulfilment of their obligation under section 23(6). No new decision on these terms has been intimated to the petitioner other than by way of proposed amendment to the pleadings. It requires the petitioner to respond to a new decision and to effectively start again as regards what is a significant branch of the petition.

[15] The amendments come at a very late stage on the morning of the hearing without satisfactory explanation for the delay. The respondents have known about the terms of the letter for over 7 weeks. They have had more than enough time to amend. The respondents indicated to the Court they were ready to proceed at a stage when they knew of the existence of the letter. They have not provided a satisfactory explanation as to why the letter was not discovered by them before July 2022. To allow the minute would result in the discharge of the hearing to allow time for the petitioner to answer with consequent delay and further expense. Amendments of this nature at such a late stage are incompatible with the efficient and speedy resolution of judicial review. The respondents are free to make any concession they think fit in relation to the decisions that are challenged in this judicial review.

[16] Had I allowed the minute to be received, I would have excluded the averments disclosing the terms of settlement negotiations between the parties which are inadmissible as a general rule. (*Bell* v *Lothiansure Ltd.*, supra *Oceanbulk Shipping* v *TMT Asia Ltd.* (supra). I did not accept the respondents' submission that the correspondence discloses an unequivocal admission of fact. The correspondence sets out the terms of an offer and counter offer, the terms of which are properly understood as forming part of parties'

settlement negotiations and are inadmissible.

**The petitioner's submissions**

[17] The petitioner submitted that it is a fundamental requirement of EU law that decisions taken by national tribunals specifically tasked with enforcing the disciplinary regime against judges can be challenged by legal proceedings before a court of full jurisdiction. The requirement that a judicial office holder be protected in office from removal forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which are important guarantees that individuals' rights will be protected and that judicial independence and the rule of law is safeguarded. The disciplinary regime must provide the necessary guarantees to prevent any risk of it being used as a system of external control of duly appointed judges (*Asociatia "Forumul Judecatorilor Din Romania" v Inspectia Judiciara* [2021] 3 CMLR 27 at paragraphs 198 and 212).

[18] The Tribunal itself in its decision on the preliminary issues, in deciding the Tribunal was "established by law" in accordance with EU law relied on the fact the petitioner was entitled to be represented by an advocate of his choosing and that the decision of the Tribunal was subject to judicial review (paragraphs 31-32 of its decision). There is therefore an enforceable legitimate expectation that funding will continue to be provided to the petitioner by the respondents to allow the lawfulness of the Tribunal's decision to be authoritatively determined on judicial review before the Court of Session, as a court of full jurisdiction.

[19] The petitioner has a right at common law to effective access to the court, which access should not be impeded, whether by the imposition of excessive court fees or by the uncertainty as to the level of costs to which the litigant might be exposed in coming to the

court, or by being exposed to court proceedings which, looked at objectively, are prohibitively expensive (*R (UNISON)* v *Lord Chancellor* [2020] AC 869 per Lord Reed at paragraphs 87-89, 93, 95, 98 and 119). By refusing to make funding available for the judicial review proceedings, the respondents have denied the petitioner real and effective, as opposed to theoretical and illusory, access to the court.

[20] Given that the respondents accept they are required to continue to fund the proceedings before the Tribunal, it necessarily follows that funding should be provided to allow an authoritative decision on the lawfulness of the Tribunal's decision to be made by an independent court with full jurisdiction. Such an authoritative determination, particularly on whether the Tribunal had any lawful jurisdiction, is a necessary prerequisite before the Tribunal can carry out its functions. A Convention compliant and EU law fundamental rights compatible reading of section 23(6)(a) supports the proposition that there is an obligation on the respondents to fund the petitioner's judicial review, because only then will the Tribunal be enabled to carry out its functions properly and in accordance with law.

[21] The relevant national provisions which govern the right of access to the Court must be disapplied by the Court if and insofar as these national provisions "make it in practice impossible or excessively difficult to exercise rights conferred by European Union law". That is the EU law principle of effectiveness. The principle applies in all cases in which EU law based rights and obligations are prayed in aid against the national State authorities. In *DEB Deutsch Energiehandels-Und Beratungesellschaft mbH v Bundesrepublik Deutschland* [2011] 2 CMLR 21 the CJEU held that the domestic court had to lift any domestic prohibition against legal persons applying for legal aid as a result of the EU law effective judicial protection test (at paragraph 59).

[22] The principle was applied by the First Division in *Anwar* v *Secretary of State for*

*Business, Energy and Industrial Strategy* [2019] CSIH 43, 2020 SC 95 per Lord President (Carloway) at paragraph 9 and Lord Drummond Young at paragraph 52. Article 19 TEU and Article 47 of the Charter of Fundamental Rights requires the national authorities to ensure that this EU Charter right to an "effective remedy" is duly observed and respected.

[23] The European Court of Human Rights has established unequivocally that disciplinary proceedings taken by the State against judicial office holders engage Article 6 as a determination of civil rights and obligation. The protections of Article 6 include the need for equality of arms in such judicial disciplinary procedures and the need for judicial review (*Olujic* v *Croatia* (2011) 52 EHRR 26 and *Żurek* v *Poland* [2022] ECtHR 39650/18 (First Section, 16 June 2022)).

[24] In *Ramos Nunes de Carvalho e Sá* v *Portugal* [2018] ECtHR 55391/13, 57728/13 and 74041/13 (Grand Chamber, 6 November 2018), it was accepted that in the context of disciplinary proceedings against a judge, the presence on the disciplinary body of non-judicial members, albeit in a minority, meant that it is classified under the Convention as a non-judicial tribunal. The Court found that where the initial judicial disciplinary decisions are taken by a non-judicial tribunal, the procedures will only be found to be Convention compatible if the decision of the non-judicial tribunal can be appealed on both fact and law, and not simply limited to a general judicial review of their lawfulness. It follows that the Tribunal constituted under section 21 is also a non-judicial body as it too is made up on non-judicial members, and it too therefore requires a review on fact and law.

[25] In *Gumenyuk* v *Ukraine* [2021] ECtHR 11423/19 (Fifth Section, 22 July 2021) at paragraph 71, the Court recognised that the protection of judicial independence requires the national authorities to put in place specific protections to ensure that judicial office holders, such as the petitioner, who are subject to disciplinary procedure before a non-judicial

tribunal, have direct access to an independent and impartial court in respect of their allegations of unlawful prevention from exercising their judicial functions. Such direct access can only be ensured in the present case by the respondents providing the required funding.

[26] In *Grosam* v *Czech Republic* [2022] ECtHR 19750/13 (First Section, 23 June 2022) the Court held that there were insufficient procedural guarantees in the appointment procedure for lay members of the disciplinary chamber in proceedings against a court enforcement officer. The institutional failure in independence and impartiality was not remedied by appeal to the domestic courts which could not conduct a full rehearing and remedy the shortcomings of the disciplinary chamber. The petitioner submitted that similarly the Tribunal constituted under section 21 does not comply with the objective requirements of impartiality and independence given the lack of transparency in appointment of its lay member and such failure cannot be remedied by the Court's limited powers on judicial review.

[27] When considering the respondents' refusal to provide legal funding, the Court should apply the same tests as have been summarised by the CJEU in Case C-156/12 *GREP GmbH* v *Freistaat Bayern* [2015] I.L.Pr. 29 at paragraphs 35-47. The court should consider whether the refusal constitutes a limitation on the right of access to the courts which undermines the very core of that right, whether it pursues a legitimate aim, whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim. The Court must take into account the subject matter of the litigation, whether the petitioner has a reasonable prospect of success, what is at stake for the petitioner, the complexity of the applicable law and procedure, and the petitioner's ability to represent himself effectively. The Court may also take into account the amount of the costs of the

proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts (paragraphs 60-61).

[28] The petitioner submitted that the case law relied upon showed that the prospects of the Tribunal's decision being overturned on judicial review were very high and that it was unsustainable to suggest otherwise. The case is important not just to the petitioner as an individual but, as the case law confirms, to society at large which has an interest in the issue of when, how, by whom and for what disciplinary proceedings may properly be instituted against judges. The law in this area is undoubtedly complex and in a high stage and degree of development at a European level. The petitioner is not in a position to present the case himself. The Strasbourg Grand Chamber has stated that an individual who is legally qualified may almost be the worst person properly to defend himself in person before a judicial Tribunal (*Correia de Matos* v *Portugal* (2018) 44 BHRC 319).

[29] The Court had already been provided, within the context of the protective expenses order (PEO) application, with an estimate of the expenses involved in the judicial review. The petitioner prays in aid the ECHR jurisprudence in relation to access to the court not being rendered prohibitively expensive by the costs of litigation including court dues and the lack of availability of legal aid which the petitioner is not eligible for. The test of whether the costs might represent an insurmountable obstacle to access to the courts is not a purely subjective one but also an objective assessment (*Gibson* v *Scottish Minister* 2016 SLT 675). As has been previously submitted during the PEO application, there is nothing at common law to prevent the Court from relieving the petitioner of liability for Court fees which form part of the expenses of the proceedings. Such an order is within the Court's inherent discretion at common law (*McArthur* v *Lord Advocate* 2006 SLT 170).

**The respondents' submissions**

[30] The respondents moved the court to sustain their pleas-in-law, repel the petitioner's pleas-in-law and to refuse the petition. The Tribunal correctly recognised that to ensure compliance with the Convention and retained EU law it is necessary that judicial office holders have the possibility of challenging decisions by a Tribunal constituted under section 21 by way of judicial review. It does not follow that any decision made by the Tribunal is valid and effective only if sustained by the Court in a subsequent petition for judicial review. On the contrary, decisions made by the Tribunal in exercise of the powers under section 21 are valid unless or until reduced by a court of law. The fact that the Tribunal recognised that its decisions may be challenged in a petition for judicial review was not an acceptance that judicial office holders are compelled or required to challenge the decisions of the Tribunal by judicial review as some integral part of the process before the Tribunal. An extraneous challenge of that kind, especially if unfounded, is clearly not an integral part of the process before the Tribunal.

[31] Section 23(6)(a) confers a discretion on the respondents to pay such expenses as they alone consider are reasonably required to be incurred to enable the Tribunal to carry out its functions. The jurisprudence of the Strasbourg court, as adopted by the EU institutions, indicates that the right of access to the Court must be real and effective but that it is not absolute. Accordingly, it may be acceptable to impose conditions on the grant of legal aid based *inter alia* on the financial situation of the litigant. It is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-a- vis* the adversary (*Steel and Morris* v *UK (*2005) 41 EHRR 22; *Del Sol* v

*France* (2002) 35 EHRR 38). That may often mean, as in the present case, that an individual whose financial resources are too great to entitle him to receive legal aid nevertheless must be viewed as having real and effective access to the Court where his personal circumstances indicate that he is capable of presenting his own case effectively to the court.

[32] The relevant test was applied in *McVicar* v *UK (*[2002) 35 EHRR 22 and *Sutherland–Fisher* v *Law Society of Scotland* 2003 SC 562 where the court stated that the appropriate test is that of legal indispensability. It is for the petitioner to demonstrate that at the hearing the provision of legal representation on his behalf would be indispensable. The petitioner is an experienced advocate and part-time Sheriff who would be able to present his case without the assistance of a lawyer. He has had the advice of senior counsel with specialist knowledge in the relevant field of law. He has already presented a petition for judicial review to the Court. Senior counsel prepared a note of detailed submissions for the Tribunal hearing addressing the Tribunal's jurisdiction.

[33] The petitioner's position is not enhanced by reference to retained EU law. Article 47(3) does not require the respondents to fund the petitioner's judicial review. In relation to the provision of legal aid the CJEU has stated that it is for national courts to strike a fair balance in order to ensure applicants relying on EU law have access to the courts but without favouring such applicants over others: *DEB Deutsch Energiehandels-Und Beratungesellschaft mbH v Bundesrepublik Deutschland* (at paragraph 56).

[34] The petitioner has the right, which he has exercised, to challenge decisions of the Tribunal by way of judicial review on grounds which may or may not be well-founded. He has had, and has, access to the Court. In doing so he has no absolute entitlement to have his legal expenses funded by the respondents. The Court is entitled to take into account that Scotland has an ECHR and EU law compliant legal aid scheme in terms of which those who

lack the financial resources to pay for litigation are entitled to legal aid for petitions for judicial review. It appears the petitioner's income and assets take him outwith an entitlement to that assistance. There is no legitimate reason for favouring the petitioner over all other litigants whose financial resources exclude them from legal aid.

[35] In assessing whether the petitioner retains the core right of access to the Court, and whether that access is materially impeded or prevented by a lack of funding from the public purse, the Court is entitled to have regard to the fact that the petitioner has alienated substantial assets in favour of his wife and other family members. The petitioner has been an advocate since 1997 and a part-time Sheriff since 2010. He is well equipped to deal personally with any issues relating to his fitness to hold judicial office which might arise before the Tribunal. Should his petition be held to be unfounded, he has no entitlement to have any adverse award of expenses made against him met by the respondents. No authority has been cited by the petitioner which would require the Court to excuse the petitioner from the normal consequences in expenses of insisting in a petition which is ultimately held to be ill-founded. Nor is there any requirement in terms of ECHR or EU law for the respondents to assume such a responsibility.

[36] The fact that the respondents have agreed, as a matter of fairness, to meet the petitioner's Tribunal expenses does not lead to a conclusion that they must fund his expenses for the judicial review. It does not give rise to any legitimate expectation to that effect as the respondents made it clear the only reason they agreed to pay the Tribunal expenses is that they consider it fair and reasonable in light of the letter of 26 April. That does not apply to the petitioner's proceedings for judicial review.

[37] The petitioner's second and fourth craves are unnecessary since the respondents have agreed to meet the petitioner's reasonable expenses before the Tribunal.

[38] The respondents contended that it is not competent for the Court to make an order for specific performance as third craved requiring the respondents to cover the petitioner's liability for Court fees. Liability for Court fees under the 2014 Act is to the Court and not to another party. Section 107 of the 2014 Act and the relevant Fees Order provide the statutory scheme for imposition of and exemption from Court fees. Express statutory provision for exemption from Court fees excludes the possibility of exemption in other circumstances. The inherent jurisdiction of the Court to make orders in respect of expenses does not extend to modification of liability for Court fees (*Moore* v *Scottish Daily Record and Sunday Mail Ltd* 2009 SC 178). Unreported Outer House decisions to the opposite effect have been wrongly decided. Accordingly, the petitioner will be liable for Court fees in the petition. If the Court is persuaded to make an order regulating expenses, that can include funding to cover Court fees incurred by the petitioner.

**Decision**

***The obligation to pay the costs of representation before the Tribunal***

[39] I deal first with the respondents' decision to cease to fund the petitioner's legal representation before the Tribunal because the respondents have now determined that those expenses will be paid. The respondents' position is that although as a matter of generality they are not obliged under section 23(6)(a) to meet a judicial office holder's expenses before the Tribunal, they concede that given the terms of the letter of 26 April, as a matter of fairness, they are obliged to do so for the petitioner. That provides the petitioner with the remedies he seeks in statement 4(2) and (4) of the petition, namely payment of his expenses before the Tribunal. The respondents made an oral submission that, for the purposes of any order, the obligation to meet those expenses only arose once the respondents had sight of the

letter of 26 April 2021. I do not consider that is consistent with the concession made by the respondents. The respondents accept that the obligation arose as a matter of fairness, because the Tribunal wrote to the petitioner on 26 April 2021 advising him his expenses would be paid. Any such obligation must therefore have arisen once the letter was intimated to the petitioner. That is when the petitioner understood payment was to be made and any question of fairness arose. The respondents could have discovered what the Tribunal had undertaken had they made enquiry of the Tribunal about that before they made a decision to refuse to pay expenses beyond the preliminary hearing. I also reject the respondents' submission that it is unnecessary for the Court to make any order since they accept they are under an obligation to pay the petitioner's expenses before the Tribunal. The matter was contested until the morning of the hearing. It is appropriate to provide the petitioner with certainty of the respondents' position by making an order reflecting the concession made. I will put the case out by order for parties to advise on the precise terms of that order.

***The obligation to pay the expenses of the judicial review proceedings***

[40] Section 23(6)(a) provides:

> "(6) The Scottish Ministers—
>
> (a) must pay such expenses as they consider are reasonably required to be incurred to enable a Tribunal constituted under section 21 to carry out its functions,"

[41] Whilst there is an obligation to pay expenses, there is also a discretion conferred on the respondents to pay only those expenses which they consider to be reasonably required to enable the Tribunal to carry out its functions. The Tribunal's functions are to investigate and report on whether a judicial office holder is unfit to hold office. The petitioner's

challenge by judicial review is not part of any proceedings before the Tribunal. It is extraneous and separate from the Tribunal proceedings. Until such times as a court of law declares otherwise, the Tribunal's decisions are valid and it remains free to perform its functions. Any argument in any petition for judicial review to the contrary are of no effect unless upheld by a court of law. The fact that the Tribunal recognised that its decisions may be challenged in a petition for judicial review was not an acceptance that such a challenge is part of the Tribunal proceedings or requires to be made to enable it to carry out its functions. The costs of those proceedings are not, on a plain reading of section 23(6), expenses reasonably required to be incurred to enable the Tribunal to carry out its functions.

[42] The fact that the respondents have agreed, as a matter of fairness, to meet the petitioner's Tribunal expenses does not give rise to any legitimate expectation that the respondents must pay the expenses of the judicial review. The respondents made it clear that they only made that concession in relation to the Tribunal expenses as a matter of fairness in light of the terms of the letter of 26 April. That letter related only to expenses before the Tribunal and not to the substantive petition.

[43] The petitioner argues that section 23(6)(a) should be read down in a manner compliant with EU retained law and the Convention to impose an obligation on the respondents to fund the substantive petition. The parties did not dispute much of the relevant legal framework. They agreed that this Court is obliged under the terms of the European Union (Withdrawal) Act 2018 to ensure that domestic legislation continues to be applied and interpreted compatibly with the requirements of retained EU law or disapplied if and insofar as incompatible with (directly effective) EU law rights. It was accepted that the respondents and the Tribunal must act in a manner compliant with EU retained law and the Convention. It was also accepted that the petitioner is entitled to an effective remedy at

common law as well as under the EU principle of effectiveness (*Anwar* v *Secretary of State for Business, Energy and Industrial Strategy* paragraphs 9 and 52).

[44] The parties also agreed much about the application of Article 47 of the EU Charter of Fundamental Rights. Article 47 provides:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.
>
> Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

[45] Under Article 47 legal aid must be provided in so far as necessary to ensure effective access to justice. As the parties agreed, that right is not absolute. It is for national authorities, under the supervision of the national courts, to determine the conditions, consistent with proportionality, under which legal aid may be available in a particular case. In *DEB Deutsch Energiehandels-Und Beratungesellschaft mbH v Bundesrepublik Deutschland*, the Court referring to the ECHR case law mentioned below, held that the principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, *inter alia*, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer. It further held:

> "60. In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.

> 61. In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts."

[46] Accordingly, the CJEU has recognised that fundamental rights enshrined in Article 47 do not constitute unfettered prerogatives and may be subject to restrictions. Such restrictions must correspond to the objectives of public interest pursued by the measure in question and must not constitute, with regard to the aim pursued, a manifest or disproportionate breach of the rights thus guaranteed. In considering the proportionality of the measure, the Court must take into account the various criteria referred to in paragraph 61 above. The Court reiterated the same criteria in its most recent jurisprudence (*GREP GmbH* v *Freistaat Bayern*).

[47] The parties also agreed Article 6(1), under its civil head, applies to disciplinary proceedings against judges. That is so notwithstanding that some of the sanctions imposed may be close to criminal penalties (*Olujic* v *Croatia* (2011) 52 EHRR 26). Article 6(1) provides:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ……"

[48] Article 6(1) leaves states with a free choice as to the means to be used to guarantee the rights protected. The test for deciding whether funding for legal representation requires to be provided in order to fulfil the requirements of a fair hearing under Article 6(1), has been described by the European Court of Human Rights and the domestic courts as a test of "indispensability". In *McVicar* v *UK [2002] 35 EHRR 22* the Court held that Article 6(1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance

proves indispensable for effective access to court, either because legal representation is rendered compulsory or by reason of the complexity of the procedure or of the case. The question whether or not that Article requires the provision of legal representation will depend upon the specific circumstances of the case and, in particular, upon whether the individual would be able to present his case properly and satisfactorily without the assistance of a lawyer (paragraphs 47- 48). The same test was applied in *Sutherland – Fisher* v *Law Society of Scotland 2003 SC 562* at paragraph 20 per Lord Kirkwood.

[49] In *Steel and Morris* v *UK (2005) 41 EHRR 221* the Court held that whether the provision of legal aid was necessary for a fair hearing would depend, amongst other things, on the importance of what was at stake for the applicant, the complexity of the law and procedure, and the ability of the applicant to represent him or herself effectively [paragraph 61]. It was acceptable to impose conditions on the grant of legal aid based, amongst other things, on the financial situation of the litigant or the prospects of success. The State did not have to use public funds in order to ensure total equality of arms, as long as each side was afforded a reasonable opportunity to present its case under conditions which did not place it at a substantial disadvantage *vis-à-vis* the adversary [paragraph 62].

[50] The case law illustrates how fact specific the requirements of Article 6(1) are. *Sutherland – Fisher* v *Law Society of Scotland* involved allegations of professional misconduct before the Scottish Solicitors Disciplinary Tribunal which were of the utmost seriousness and could have affected the petitioner's right to practice as a solicitor. The petitioner had no experience in the practice of the Tribunal and would be materially disadvantaged without legal representation. Nonetheless, the Court found that provision of legal representation was not indispensable: the petitioner was a lawyer with personal knowledge of the matters

before the Tribunal, had the services of an accountant who had prepared a report and the subject matter was not particularly complex.

[51] In *Airey* v *Ireland* 2 EHRR 305 the Court upheld Mrs Airey's claim that she had been denied an effective right of access to the court by the refusal of legal aid to raise proceedings for separation from her husband. The procedure and law was complex, the proceedings involved proof of fact and the possible tendering of expert evidence and examination of witnesses. Marital disputes involved an emotional involvement that was scarcely compatible with the degree of objectivity required by advocacy in court. Mrs Airey was not a lawyer and it was most improbable that she could effectively present her own case.

[52] In *McVicar* v *UK*, the applicant was a defendant in a libel action brought against him by a wealthy and famous individual. The proceedings had attracted media and press interest. The applicant had to prove the allegations were true, examine and cross examine witnesses and expert evidence. The Court recognised he had no formal legal training and that the libel trial must have taken significantly greater physical and emotional toll on him than would be the case an experienced legal advocate. Despite all of these factors, the Court held that the applicant was a well-educated and experienced journalist who would have been capable of formulating cogent argument. The law of defamation was not sufficiently complex to require a person in the applicant's position to have legal assistance. The Court took into account that the applicant was previously represented by a defamation specialist. The applicant's emotional involvement was not incompatible with the degree of objectivity required by advocacy in court, notwithstanding there was an emotional toll (paragraphs 50 to 55, 60 and 61). It followed that there had been no violation of Article 6(1).

[53] By contrast in *Steel and Morris* v *UK* the Court held there had been a breach of Article 6(1) notwithstanding the applicants were, like Mr McVicar, denied legal aid as

defendants in a libel action. The Court took into account that the applicants had not chosen to commence the action themselves. The proceedings were not straightforward: the trial had lasted 313 court days and the appeal hearing 23 days. Significant damages had been awarded against the applicants. They had to prove a highly complex factual case involving 130 witnesses and many scientific questions. Over 100 days were devoted to legal argument resulting in 38 separate written judgments. Although the applicants had received some legal assistance and a certain amount of latitude from the courts, the Court held that in an action of that complexity, however, there was no substitute for competent and sustained representation by an experienced lawyer familiar with the case and the law of libel. The disparity between the respective levels of legal assistance enjoyed by the parties was of such a degree that it could not have failed, in what was an exceptionally demanding case, to have given rise to unfairness [paragraphs 63 - 69].

[54] The petitioner relied on *Zustovic* v *Croatia (2022) 74 ECHR* which concerned the applicant's inability to obtain reimbursement of the costs of judicial review proceedings against the state notwithstanding that she was successful in her application for judicial review. The Court found a violation of her right to a fair hearing under Article 6(1) and a restriction on her right of access to the court. The Court found that where the state makes an error that requires to be corrected through litigation, the domestic court cannot transfer the costs of bringing that litigation to the applicant. It did not make any finding that the applicant is entitled to have all her costs met in any application for judicial review irrespective of its merits and the outcome. I did not find it of assistance.

**Application to the facts and circumstances**

[55] Does the denial of funding for legal representation for the judicial review constitute a limitation on the petitioner's right of access to the Court which undermines the very core of that right and makes it impossible or extremely difficult for him to have access to the court? Does it pursue a legitimate aim and is there a reasonable relationship of proportionality between the means employed and the aim that is sought to be achieved? Is legal representation indispensable in the sense that the petitioner would not receive a fair trial without it?

[56] As is evident from the above case law, there is much overlap between the various criteria considered to be relevant under common law, the EU law and the Convention. Whether there is an obligation on the state to provide funding for legal representation in any one case is highly fact dependent.

[57] The context is significant, particularly the nature of the proceedings and what is at stake for the petitioner. The substantive petition raises questions about the constitution of the Tribunal investigating the petitioner's fitness for judicial office. It includes an argument that the Tribunal is not established in accordance with law. The proceedings are important to the petitioner since they concern an investigation into an office he holds and his professional livelihood. They are also of public importance given the importance of having a judicial disciplinary scheme that is in accordance with law and protects the independence of the judiciary and the rule of law. Nonetheless the substantive petition is a challenge to the Tribunal's legal decisions at a preliminary hearing. It does not challenge any assessment of evidence by the Tribunal nor the appropriateness of any penalty that it has imposed such as removal from office. What is at stake for the petitioner in a decision on whether this particular Tribunal can as a matter of law investigate his fitness for office.

[58] The respondents in oral submission suggested that I should not make any assessment of the merits of the substantive petition because the petitioner has not made any averments about that in the pleadings. It seems clear to me from the ECHR and CJEU case law mentioned above, particularly *DEB Deutsch Energiehandels-Und Beratungesellschaft mbH v Bundesrepublik Deutschland* which the respondents themselves cited, that the Court should take into account the prospects of success when considering whether the restriction on legal aid is justified. I have therefore considered such an assessment to be relevant.

[59] In oral submission senior counsel described the prospects of the substantive judicial review as "very high" and submitted that it as "unsustainable" to suggest otherwise. He understandably emphasised the need for rigorous scrutiny of judicial disciplinary schemes. He relied on a series of cases illustrating the failures of some disciplinary schemes to provide the necessary protections. The complaints in these cases are however far removed from the petitioner's.

[60] In *Olujic* v *Croatia* the applicant was a judge removed as President of the Supreme Court following disciplinary proceedings. The applicant's request for a public hearing was refused and he was unable to lead a defence witness. Three members of the disciplinary body made public statements showing bias against the applicant, including a statement by one member that he was opposed to the applicant's appointment as a judge. The Court found a violation of Article 6(1) on account of the lack of objective impartiality of the members, the unjustified exclusion of the public from the proceedings, the lack of equality of arms and the excessive length of proceedings.

[61] In *Gumenyuk* v *Ukraine* the Court found a breach of Article 6(1) where judges were deprived of judicial office through the operation of legislation with no right to appeal against their removal.

[62] In *Ramos Nunes de Carvalho e Sá* v *Portugal*, the applicant was a judge made subject to three sets of disciplinary proceedings and a financial penalty. She complained about a lack of an oral hearing as well as a lack of sufficient review of the disciplinary body's findings. Ultimately the Court found there was a breach of Article 6(1) as a result of the combination of both these factors: the absence of an oral hearing and the lack of a review on facts and law.

[63] In *Grosam* v *Czech Republic* the complaints were as to the lack of transparency and impartiality of lay assessors who were enforcement officers in disciplinary proceedings against an enforcement officer. The remuneration of the lay members depended directly on the Ministry of Justice whose head was also the disciplinary petitioner in the case. The Court found that where the Minister of Justice brought disciplinary proceedings against an enforcement officer, it created a risk that at least two of the lay members (the enforcement officers) or three (if a public prosecutor is appointed) may not be wholly impartial toward the enforcement officer being disciplined. This lack of independence and impartiality was increased by the lack of procedural guarantees concerning how the lists of the lay assessors were put together and also, a lack of guarantees against outside pressure once appointed to sit on a concrete case (paragraphs 136 -139).

[64] These are all examples where the Court held that the necessary guarantees and protections for a fair hearing before an independent and impartial tribunal were not present. But none of these are analogous to the petitioner's complaints. The petitioner does not complain about legislation removing judges without appeal, nor has he made allegations of

public statements showing bias nor of a lack of an oral hearing whether as part of the tribunal proceedings or the judicial review.

[65] Whilst *Grosam* v *Czech Republic* held that there was a lack of transparency and impartiality in the appointment of lay members, it does not support the proposition that having a lay member on a Tribunal investigating a judicial office holder without the availability of a review of the body's decisions on fact and law necessarily breaches Article 6(1). The problems there included the degree of connection between the Ministry of Justice and the enforcement officers as lay members of the disciplinary body investigating another enforcement officer, a lack of transparency in the pre-selection process as well as a lack of protection of members from outside influence. The makeup of the Tribunal investigating the petitioner is prescribed by section 21 of the 2014 Act. Appointments are made by the First Minister but only with the agreement of the Lord President. The link between the lay member and the First Minister is very limited. Whilst it is not known whether the appointment of the lay member is from a list of names or otherwise it is not suggested in *Grosam* v *Czech Republic* that such lack of transparency in itself establishes a breach of Article 6(1).

[66] As the Court recognised in *Ramos Nunes de Carvalho e Sa .* v *Portugal* at paragraphs 176-178 the requirement that a court or tribunal should have "full jurisdiction" will be satisfied where it is found that the judicial body in question has exercised "sufficient jurisdiction" or provided "sufficient review" in the proceedings before it. It is not the role of Article 6, in principle, to guarantee access to a court which can substitute its own assessment or opinion for that of the administrative authorities. Whether the review is sufficient will depend on the argument that the petitioner wishes to make. In the substantive judicial review, the petitioner complains about a decision of law made by the Tribunal. The

petitioner has the means by judicial review of having that decision fully reviewed and authoritatively determined by the Court. The Court can quash or reduce the Tribunal's decision. That is sufficient review in the case before it.

[67] It is plain that the case law does not prescribe any one disciplinary scheme. Whether the Tribunal fulfils the requirements of law requires an assessment of the disciplinary scheme as a whole, taking into account amongst other things, the make-up of the body, its method of appointment, the procedural guarantees in place and the sufficiency of review of its decisions, particularly in light of the matter that the applicant wishes to challenge. The Tribunal set out the position fully in its preliminary decision:

> "[27] It is clear from the cases cited to us that they do not prescribe any single model as setting the parameters for a valid judicial disciplinary scheme. The critical issues are whether, both in form and substance, the regime guarantees the independence of those called to adjudicate on disciplinary matters, respects the rights of the defence, and applies rules which enable it to function effectively and impartially, without being open to undue influence, directly or indirectly, especially (but not only) in respect of influence from the legislature or executive. Whether a disciplinary regime meets these safeguards is not to be determined by isolating specific components – for example its *ad hoc* nature or absence of oath-taking- but must be looked at in the round, having regard to *inter alia*, the nature and method of appointment, qualifications, powers, and procedures of the tribunal.
>
> [28] As noted above, factors which require to be taken into account will include the method of appointment of the panel, its competencies, the rules under which it carries out its task, and the degree of autonomy granted to it. The presence of judicial officers on the disciplinary panel is an important consideration. It has, for example, been held that where at least half of the membership of a tribunal is composed of judges, including the chairman with a casting vote, this will lead to a strong indicator of impartiality" (*Le Compte, Van Leuven and De Meyere* v *Belgium* (1983) 5 EHRR 183, § 583; *Volkov* v *Ukraine* (2013) 57 EHRR 1, para 109).
>
> [29] Having regard to these general principles the Scottish disciplinary regime is in our view consistent with retained EU law. The scheme is a statutory one. The statutory requirement is for 50% of the panel to be judicial office holders, with the chairing member as one such having a casting vote. The powers of the First Minister, in relation to the creation of a tribunal or appointment of its members, are very restricted. If the Lord President asks her to constitute a tribunal, she has no option but to do so. The qualifications of those who may be selected to sit are specified in the legislation. In selecting appropriately qualified persons to sit on the panel, the

First Minister must not merely consult the Lord President but must obtain his agreement to the appointment of the relevant individuals. The tribunal is vested with the greatest degree of autonomy in conducting its proceedings. The tribunal will require to be guided by authorities such as *In re Chief Justice of Gibraltar* [2009] UKPC 43 and *Stewart* v *Secretary of State for Scotland* 1996 SC 271 & 1998 SC (HL) 81, which confirm that the tests for misbehaviour and unfitness are high ones.

[30] As the Presenting Officer submitted, there are numerous other safeguards: rules regulating the procedure of the panel provide for the appointment of an independent Investigating Officer, who must produce a written report, and state whether in his view further procedure is required; all documents relied upon, including the Investigating Officer's report and Statement of Reasons, must be provided to the judicial office holder; a Presenting Officer independent of the Investigating Officer and of the panel will be appointed; the Presenting Officer has power to instruct the Investigating Officer to carry out further investigation; both Investigating Officer and Presenting Officer are under obligations of disclosure towards the judicial office holder, including disclosure of material which may undermine the case against the judicial office holder; the Presenting Officer must keep this under review throughout the proceedings; at any stage of the proceedings the tribunal is entitled to determine that it cannot be established that the judicial office holder is unfit to hold office, either on its own motion, or on the basis of representations by the Investigating Officer, Presenting Officer, or judicial office holder; the Presenting Officer is obliged to recommend in writing and with reasons that no further proceedings should follow, if at any time he considers that it cannot be established that the judicial office holder is unfit for office; there is no burden of proof on the judicial office holder; and a judicial office holder may only be removed from office if the tribunal has reported that the individual is unfit for office. The judicial office holder has the right – but is not obliged – to submit a written response to the Investigating Officer's report or to request further specification of the reasons; may indicate any issues of law which he wishes to raise; and is entitled to be represented by an advocate or solicitor of his choosing, or another person authorised by the tribunal; and may call witnesses at a hearing, or lodge productions."

[68] Nothing in the case law relied upon by the petitioner undermines the reasoning of the Tribunal. When all aspects of the scheme are considered, it is difficult to argue that the Tribunal with all the safeguards identified in its reasoning is not properly constituted. The prospects of success in the substantive petition are poor.

[69] Although the petitioner has relied on some very recent and developing European case law as mentioned above, the subject matter of the judicial review and the procedure is not overly complex. The substantive judicial review could be expected to be dealt with

following a procedural and substantive hearing. There has been no indication that it would involve the leading of evidence, examination of witnesses or questioning of experts.

[70] The petitioner has already had significant assistance with the substantive petition. He has the benefit of full submissions drafted by senior counsel with specialist knowledge of this area of law which have already been presented to the Tribunal. He has the reasoning of the Tribunal on his arguments. He has the pleadings in this petition supported by a 20 page note of argument and a 57 page speaking note, the latter setting out the EU and ECHR case law in some detail on questions that arise in the substantive petition. The substantive petition is not an excessively demanding case as the Court described in *Steel and Morris* v *UK*. The proceedings involve a self-contained legal argument which has already been fully explored and rehearsed before the Tribunal and to some degree before this Court too.

[71] The petitioner is an experienced advocate who called to the Bar over 25 years ago. His experience suggests that he would be well able to effectively present the legal arguments himself. I recognise from his affidavit that he has suffered ill health in the last 5 years which took him almost two years to recover from. He has not returned to practice since. Although reference is made to other health conditions, no submission was made that he would be medically unable to present the petition to the Court. Nor was there any discussion about whether measures could be taken to assist him with that. Senior counsel emphasised that an individual who is legally qualified may almost be the worst person properly to defend himself in person before a judicial tribunal (*Correia de Matos* v *Portugal).* However that was a case where the applicant was defending himself against a criminal charge. It is the petitioner himself who has chosen to raise the substantive petition where he is not defending a charge but challenging a legal decision. The petitioner is an experienced lawyer with personal knowledge of the matters before the Tribunal. The questions raised in the petition

do not touch upon the merits of the investigation into him as a judicial office holder but are distinct legal questions on the constitution of the Tribunal.

[72] The costs of the proceedings if the petitioner is to pay for legal representation are significant and estimated to be in the region of £90,000. He has significant equity of over £300,000 in a jointly owned matrimonial home and of £180,000 in an Edinburgh property, although he has chosen to agree with his wife that she is entitled to all the equity in these properties. The petitioner accepts he rents out the Edinburgh property at below market rates. He has significant equity available to him which could fund proceedings, particularly the Edinburgh property which is not the main family home.

[73] Considering all these factors, particularly what is at stake for the petitioner, the low prospects of success, the lack of overly complex law and the relatively straightforward procedure, the petitioner's legal experience and qualifications, the professional assistance already provided to him by senior counsel with expertise in this area of law, and the significant resources available to him, I conclude that the petitioner has a reasonable opportunity to present his case to the Court without funding for legal representation being provided by the respondents. The costs of the substantive petition are not prohibitively expensive and it is not unreasonable for the petitioner to proceed with the judicial review without funding from the respondents. The respondents' refusal to spend limited public funds on meeting the costs of the substantive petition is in all the circumstances proportionate. The petitioner has not established that it is indispensable that the respondents fund the judicial review for him to be secured effective access to the Court and an effective remedy. The denial of funding for legal representation for the substantive petition does not constitute a limitation on the petitioner's right of access to the Court which undermines the very core of that right and makes it practically impossible or excessively

difficult for him to exercise his rights. Accordingly, there is no obligation for the respondents to provide funding for his judicial review on a reading down of section 23(6) in accordance with EU law, the Convention or otherwise.

[74] Since I have concluded the respondents have no obligation to pay the petitioner's expenses in the substantive petition, the competency of ordering the respondents to provide funding to cover the petitioner's Court fees does not arise. Had I required to decide the point, I would have held that such an order is competent. Liability for and exemption from Court fees arise under section 107 of the 2014 Act and the Court of Session etc. Fees Order 2022 (as from 1 July 2022). Court fees are payable to the Court and not to another party. As was held by a by the full bench in *Moore v Scottish Daily Record and Sunday Mail Ltd* 2009 SC 178 the Court has no residual power to charge fees beyond the statutory scheme. In that case the Court purported to impose Court fees on one party as a penalty for late settlement when these were not otherwise due. But in this case the petitioner does not ask the Court to make such an order. He accepts that he is liable for the Court fees under the statutory scheme but asks the Court in exercise of its wide discretion to regulate the expenses of litigation, to order that the respondents pay the petitioner's legal expenses including payment of the petitioner's Court fees.

[75] Whilst there is no power for the Court itself to charge Court fees beyond the statutory scheme, the legislative scheme does not preclude the common law power of the Court in its discretion to make an order regulating the costs of litigation. In *McArthur* v *Lord Advocate* 2006 SLT 170 Lord Glennie, at paragraph 9, described the discretion as a wide one. Under reference to earlier case law, he observed that it has been doubted that the wide discretion has ever been, or ever will be, imprisoned within rigid and unalterable rules and that it is undesirable that it should be.

[76] If a Court was to conclude that the respondents are under an obligation to pay the petitioner's expenses in the substantive petition in compliance with EU, Convention or common law, I can see no reason in principle why such an order could not also extend to the payment of the petitioner's Court fees for the substantive petition.

[77] Accordingly, I shall repel the respondents' pleas - in - law and the petitioner's first plea –in – law. I shall sustain the petitioner's second plea in law and put the case out by order for parties to advise on the terms of the order. It was agreed at the hearing that parties would address expenses at a subsequent hearing too.