EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 9
P395/22

Lord Malcolm
Lord Matthews
Lord Tyre

OPINION OF THE COURT

delivered by LORD MALCOLM

in the petition

by

JOHN HALLEY

Petitioner and Reclaimer

against

THE SCOTTISH MINISTERS

Respondents

Petitioner and Reclaimer: O'Neill, K.C.; Campbell Smith LLP
Respondents: McIlvride, K.C.; Scottish Government Legal Directorate

10 February 2023

[1] As the court observed in *Newton Mearns Residents Flood Prevention Group for Cheviot Drive* v *East Renfrewshire Council* [2013] CSIH 70, protective expenses orders ("PEOs") are aimed at cases where public interest rights, as opposed to someone's private rights, require the protection of the court and persons are prepared to bring them, albeit so long as they will not face the possibility of liability in substantial costs. The court said:

> "the principal focus is on the protection of litigants, who reasonably bring public law proceedings in the public interest (referred to as 'public interest challenges'), from

> the liability to costs that falls on an unsuccessful party, by the court making a pre-emptive order determining the incidence of costs prior to their being incurred." (paragraph 24)

In this application for judicial review the petitioner seeks orders which will have the effect of requiring the Scottish Ministers ("the respondents") (i) to fund his legal representation before a tribunal reporting on his fitness to continue as a part-time sheriff and (ii) to cover all his legal expenses in separate proceedings in which he challenges a decision made by the tribunal after a preliminary hearing. The respondents have agreed to the former, thus only the second matter was a live issue for the Lord Ordinary.

[2] In an opinion dated 9 November 2022 ([2022] CSOH 81]) the Lord Ordinary concluded that the respondents were under no duty to finance the challenge to the tribunal's decision. The petitioner has lodged a motion for review of that decision in the Inner House, and now asks for an order limiting his potential liability in expenses to nil. He also seeks exemption from court fees. A PEO was granted by the Lord Ordinary in respect of the proceedings in the Outer House restricting the petitioner's expenses if unsuccessful to £5,000. She also remitted his liability for court fees.

[3] The application is made at common law. The court requires to address the "Corner House principles", derived from *R(Corner House Research)* v *Secretary of State for Trade and Industry* [2005] 1 WLR 2600; [2005] EWCA Civ 192. If a case has a real prospect of success a PEO may be made on such conditions as thought fit if (i) issues of general public importance require to be resolved (ii) the applicant has no private interest in the outcome (iii) having regard to the likely costs and the financial resources of the parties it is fair and just that a PEO be made, and (iv) absent a PEO the applicant will probably discontinue the proceedings and will be acting reasonably in so doing. The merits of an application will be enhanced if the representatives are acting on a *pro bono* basis. It is for the court, in its

discretion, to decide whether it is fair and just to make a PEO, and if so, the terms of the order will depend on what is appropriate and fair. It has been held that an element of private interest is not necessarily a bar, and likewise if the applicant fails the "probably discontinue" test.

[4] The opposed application has been determined "on the papers", which include full written submissions on behalf of both parties, the Lord Ordinary's reasons for granting the earlier PEO application and her decision on the substantive matter.

[5] A substantial portion of the petitioner's submissions focus on the perceived merits of the challenge to the tribunal's preliminary ruling. While that challenge is part of the overall context, this is not an application for a PEO in those proceedings (which are presently sisted awaiting the outcome of this petition). On any view in both matters the petitioner has a strong private interest. While such is not an automatic disqualification, in *Newton Mearns Residents Flood Protection Group* the court required there to be a public interest challenge (paragraph 32). It observed that there must always be consideration whether the case is:

> "predominantly altruistic in its objectives or (as will be the case with the majority of applications for judicial review) a means of promoting or protecting a private interest by means of recourse to the supervisory jurisdiction." (paragraph 33)

[6] In our view the present petition is not predominantly altruistic in its motives. It is primarily aimed at allowing the petitioner to pursue his challenge to the tribunal's preliminary decision without any risk of liability for his own or anyone else's legal costs. There is of course nothing wrong in asking the court to so order, but it is a powerful factor pointing away from entitlement to protection against the normal consequences regarding expenses should the petition fail. No doubt the subject matter of the substantive petition has a wider public interest beyond that of the immediate parties, although that is true of many, perhaps most applications for the review of the decisions of public bodies. The same cannot

be said of the present satellite petition which is concerned only with the petitioner's potential personal liability for the expenses of the substantive petition.

[7] In *Eweida* v *British Airways plc* [2009] EWCA Civ 1025 it was observed that the equivalent order to a PEO south of the border "is available in public law litigation, where the claimant has no (or virtually no) private interest in the matter at issue --- " (paragraph 7). The view was taken that the claimant's private interest was too significant to make it appropriate to treat the case as within the Corner House principles (paragraph 39). We take a similar view here.

[8] Turning to other factors, we agree with the respondents' submission that it would not be reasonable for the petitioner to discontinue the proceedings simply because he has failed in this application. Even if he loses legal representation, he can present the appeal himself. He has been an advocate since 1997, has served as an advocate depute, and was appointed a part-time sheriff in 2010. He has the material prepared by senior counsel for the Outer House, namely a detailed note of argument and a 56 page speaking note which dealt with the merits of the petition and cited numerous authorities. A substantial part of the submissions lodged in support of the present application covers similar territory.

[9] The petitioner's lawyers have stated that his means disentitle him from civil legal aid and that they are acting on a speculative basis. The application does not attract the enhanced support afforded by *pro bono* representation.

[10] The above considerations satisfy us that it would not be fair and just to grant a PEO. It is therefore not necessary to decide whether there are real prospects of success nor address the parties' respective financial resources.

[11] If we had awarded a PEO we would have favoured the usual practice of a cap on the petitioner's potential liability and a larger cap on that of the respondents, with the latter set

at an amount commensurate with the representation envisaged by the court in *R(Corner House Research)* at paragraph 76.

[12] We have taken a different view from the Lord Ordinary on various matters when she granted a PEO for the Outer House proceedings. We note that since then the petitioner's liability for expenses in the tribunal proceedings has ceased to be a live issue. In any event different considerations can arise if and when an unsuccessful litigant asks for a PEO for an appeal against an adverse decision. A different discretionary decision may well be appropriate when the applicant has been afforded a judicial determination of the point at issue in a process covered by a PEO.

[13] The court not being prepared to grant a PEO, there can be no question of exemption from court fees. The respondents argued that such is not competent in that the relevant legislation and statutory instrument lay down a self-contained exemption scheme, and that various Outer House decisions to the contrary were wrongly decided. While the factual background was somewhat different from the present, we recognise that the five judge decision in *Moore* v *Scottish Daily Record and Sunday Mail Ltd* 2009 SC 178; [2008] CSIH 66 provides powerful support for that proposition. However we prefer to reserve a decision on the question till it arises for decision.