Public interest and legal aid

Frances McCartney,
Solicitor.

The author considers specific issues relating to the funding of public interest litigation in Scotland.

Introduction

Scotland does not have the type of public law culture that involves the courts often ruling on issues of wider public interest. Cases are rarely taken by individuals or non-governmental organisations (NGOs) acting in what they perceive to be the wider public interest. There are no reported decisions of the powers of intervention in judicial review cases being used by NGOs or other parties. The lack of NGOs' interest in the courts could be connected to a range of factors such as the resistance of the courts to hearing issues of wider public interest that might be considered as abstract (*Davidson v Scottish Ministers*, 2002 SC 205; 2002 SLT 420, per Lord Hardie at p 216 (p 428) on the determining by the court of "abstract" questions, but see also *B, Petitioner* [2010] CSOH 64),restrictions on title and interest to sue and a lack of awareness of remedies. Whilst the role that wider public interest litigation has to play is not universally accepted (Harlow, "Public Law and Popular Justice" (2002) 65 MLR 1), the framing of the issue as one of wider public interest can cause particular difficulties in relation to the funding of environmental disputes. The Convention on Rights to Information, Public Participation and Access to Justice ("the Aarhus Convention") requires access to the courts in a way that is not prohibitively expensive, including for NGOs.

The purpose of this article is not to consider all of the structural issues which might present difficulties in bringing public interest litigation in Scotland (such as title and interest to sue) but rather some of the specific issues related to funding of such cases. In particular, this article will examine the problems associated with obtaining legal aid for cases where is it deemed there is a wider public interest.

Legal aid

The Scottish Legal Aid Board is a non-departmental public body with a board of between eight and 11 members. The Board was set up under the Legal Aid (Scotland) Act 1986. Prior to that time, local committees granted legal aid although this was the subject of criticism from the report of the Hughes Committee in 1976. The courts still retain some powers to direct grant legal aid, although the Board have indicated a desire to take over such powers. A Legal Services Cases Committee makes decisions on civil legal aid applications where the application is deemed have a wider public interest. Such applications may also be the subject of recommendations from independent reporters (solicitors or advocates employed on an ad hoc basis).

Civil legal aid has two broad tests: financial eligibility and in respect of the merits of the application. The financial test for criminal legal aid is exceptional hardship, whereas for civil legal aid there are more detailed rules regarding financial eligibility. Criminal legal aid is granted without a contribution; civil legal aid has a sliding scale of contributions with recent reforms (April 2009) giving the upper limit of £25,000 of disposable income before someone becomes ineligible on the grounds of income. The merits test includes whether the Board are satisfied that the case has reasonable prospects of success and that it is reasonable that legal aid should be granted (s 14 of the Legal Aid (Scotland) Act 1986). New guidelines indicating how the Board will apply these tests were introduced in April 2010 but are substantially similar in respect of issues of wider public interest.

Public interest legal aid rules

For most cases of wider importance, the stumbling block arises when the Board apply the tests contained in reg 15 of the Civil Legal Aid (Scotland) Regulations 2002. Regulation 15 states:

"Applicant having joint interest, etc. with other persons

"15. Where it appears to the Board that a person making an application for legal aid is jointly concerned with or has the same interest in the matter in connection with which the application is made as other persons, whether receiving legal aid or not, the Board shall not grant legal aid if it is satisfied that — (a) the person making the application would not be seriously prejudiced in his or her own right if legal aid were not granted; or (b) it would be reasonable and proper for the other persons concerned with or having the same interest in the matter as the applicant to defray so much of the expenses as would be payable from the Fund in respect of the proceedings if legal aid was granted."

The regulations do not contain a definition of joint interest. Nor is joint interest defined in the Board's own guidance. Instead, the Board guidance refers to a *wider* interest. Wider

interest is defined as: "A wider interest may be presented in an application for matters such as judicial review, appeals or reparation where several cases arise out of the same incident, or where the outcome of the case may have a direct tangible benefit to the applicant and to others" (para 4.78 of Pt IV – Civil Legal Aid Guidance).

The guidance explains that reg 15 means that: "It may be unreasonable to make legal aid available to a person to litigate, as a private citizen, at public expense, about something that is obviously not exclusive to him or her. Examples could be fluoridation of public water supplies, noise generated by a large social or cultural event, closure of public leisure facilities. Our Legal Services Cases Committee will consider any applications of this nature" (para 4.78 of Pt IV).

At first glance, it might be attractive to a prospective applicant to try and get their application categorised as having a wider public interest. The guidance suggests a lower test on reasonableness might apply to such an application: "If we are satisfied the case does demonstrate a wider public interest, we can, in the particular circumstances, treat this as a determining factor, even if the value of the claim is relatively modest. However, we must also consider questions such as prospects of success and cost-benefit" (para 4.78 of Pt IV).

However despite this apparent lowering of the cost/benefit analysis, invoking reg 15 will not usually assist. To satisfy the regulation the applicant must pass two hurdles. Firstly, the applicant must show they will be *seriously* prejudiced if legal aid is not granted. Secondly, the Board must be satisfied that the others with the same interest should not reasonably be expected to pay the costs that would otherwise be met by the Board.

There is no further guidance on what is meant by serious prejudice, nor is there reported case law. However, the current and previous guidance from the board gives an indication of the types of cases that the regulation is designed to capture. Reference is made to the closure of leisure facilities, and noise affecting a large number of persons. It may well be that the guidance is directed at (and has been influenced by) a number of high profile grants of legal aid which received a degree of criticism in the past, such as the litigation in respect of the proposed fluoridation of water and the interdict directed towards the military tattoo.

The guidance does not lay out to what extent the individual application should take steps to identify those who might have a joint interest. It also does not indicate to what degree there requires to be an overlap of interests to be considered as a joint interest. Practical problems can arise. Others might be separately represented and there may be subtle — but important — differences in position and tactics. There may be problems in identifying who such persons are, or obtaining financial information from third parties.

However, there is also a contradiction between the suggestion in the guidance that it will be easier to obtain legal aid if there is a wider interest in the application, and with reg 15 itself. Satisfying both the first hurdle within reg 15 (on serious prejudice) and the guidance on wider public interest seems virtually impossible. The guidance advises: "the criteria for a wider public interest will not be met … where we consider the interest is, in fact, a private interest." In order to meet the requirements of reg 15, an applicant must show that they will suffer serious prejudice if the application is refused. It seems that on one hand the individual is being asked to show a private interest to meet reg 15, but then may be denied the opportunity to having a wider public interest being taken into account.

It therefore appears to be an impossible argument to win. If the individual does not have a substantial impact from the issue then reg 15 is not satisfied and legal aid is refused. On the other hand, if the interest and connection to the individual is real, then the first hurdle of serious prejudice can be satisfied, only then to be told that the interest is in fact a private interest and no wider public benefit can be taken into account.

The requirement to show serious prejudice to the individual applicant is arguably out of context with the line of thinking that public law is about wrongs, not rights. As Sedley J noted in *R v Somerset County Council Ex p Dixon* [1998] Env LR 111 (rejecting a challenge to the standing of the applicant in respect of a planning permission for quarrying operations):

"Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs — that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the

attention of the court to an apparent misuse of public power. …

"Mr Dixon is plainly neither a busybody nor a mere troublemaker, even if the implications of his application are troublesome for the intended respondents. He is, on the evidence before me, perfectly entitled as a citizen to be concerned about, and to draw the attention of the court to, what he contends is an illegality in the grant of a planning consent which is bound to have an impact on our natural environment" (p 121).

In this respect, the requirement to show a serious prejudice to the individual applicant effectively rules out many public law issues concerning a misuse of power if the effect of the misuse is not one that *seriously* prejudices the applicant.

The second part of the test within reg 15 involves examining whether others should make financial contributions to the cost of the case. It appears it is the board's practice to place the onus on the applicant to show there are no others who can reasonably and properly be expected to contribute to the costs of the litigation.

This can give rise to practical problems; there may be difficulties about identifying others particularly over a wide geographic location. There may be a certain suspicion or resentment from such others in providing personal or financial information. It might be a time consuming task to trace others. In some circumstances it may be virtually impossible to identify other interested parties.

The reg 15 and board's guidance on it raise a number of issues. Regulation 15 prevents legal aid being granted for public interest cases which do not affect any person to a degree that meets the substantial prejudice test (sometimes referred to as "the interests of everyone and no-one"). In turn, this raises issues regarding environmental cases with Scotland's compatibility with the Aarhus Convention, particularly as that reliance on *pro bono* assistance will not meet the requirements of the Convention. The Compliance Committee have issued a draft decision indicating the obligation is on the state to allow litigation in a way that is not prohibitively expensive, and this is not satisfied by relying on the goodwill of the legal profession (see paragraph below).

There is also a practical problem in respect that it is for the individual to round up others in the community or further afield who share the consequences of the legal problem. How are such people to be identified? What if those others are "lumpers" — see Genn & Paterson, *Paths to Justice Scotland: What Scottish People Do and Think About Going to Law* — and not willing to pursue legal remedies or indeed have put their faith in political or other remedies? What if they are simply not willing to engage with the applicant's solicitors?

Environmental legal aid

The role of legal aid for matters of wider interest is brought sharply into focus when considering environmental disputes. The Aarhus Compliance Committee has recently issued draft findings on two complaints against the UK. The UK's response was twofold: the Convention does not require absolute free access to the courts and thus it is reasonable for there to be an element of discretion in determining liability for expenses. Secondly, the UK argued that a combination of tools could provide access to the courts for both campaign groups and individuals.

Whilst the Convention does expressly permit a liability for expenses, it confines such liability to "reasonable" expenses. In addition, access to courts should not be "prohibitively expensive".

In 2008 a periodic report was made by the UK to the Aarhus Compliance Committee on the UK's progress in implementing the Convention. The periodic report focused on the steps and reductions to court fees for lodging cases. Although this may present some of the cost of litigating it will be, generally speaking, a small component of the overall cost. The true costs of litigating are firstly the costs of the party's own legal representatives, and secondly, the payment of expenses in the event of losing.

In two more recent complaints to the Aarhus Compliance Committee, the focus shifted to these two costs. In response the UK Government relied on three factors to allow individuals and NGOs access to the courts. The UK relied on (1) the availability of legal aid for environmental disputes; (2) the extensive use of protective costs orders; and (3) the availability of insurance to cover liability for expenses in the event of losing.

In relation to legal aid, the UK Government pointed out that legal aid was regularly granted for public interest environmental matters in England and Wales, and was also available for private disputes on environmental law. The UK argued the flexibility given to the Legal Services Commission's Funding Code would allow, for

example, a case to be taken by an individual obtaining legal aid and a NGO working in partnership. The funding code allows the contribution from the Commission on behalf of the legally aided individual and the NGO to be tailored accordingly. The UK also relied on amendments made to the funding code which clarified that contributions towards the case from others are only expected if there is a readily identifiable and constituted group. This is in direct contrast to SLAB's guidance, where individuals may have to be identified and approached.

The UK also relied heavily on the extensive use of protective costs orders in England. In their note of oral submissions, it was noted that PCOs could limit liability to as little as £1,000. This contrasts with the position in Scotland where only one protective expenses order has been granted with a cap of £30,000 (*McGinty v Scottish Ministers* [2010] CSOH 5).

Lastly, the UK pointed to a system of insurance which could be purchased to protect against liability for expenses. The availability of insurance is unlikely to assist in judicial review cases which are generally considered a type of litigation that is too uncertain for insurance to be made available, even if such costs were recoverable in Scotland.

The Aarhus Compliance Committee has recently issued draft rulings rejecting the UK's arguments and indicating that the system of access to justice in England and Wales is not compliant with the Aarhus Convention It has not (as yet) considered the position in Scotland.

Conclusion

The Gill Review has recommended reform of judicial review including recommendations to change the test of title and interest to one of sufficient interest, and by introducing rules on protective expenses orders. However, it is worth bearing in mind that protective expenses orders only assist with the "chilling fear" of an award of expenses. Such orders do not assist with the cost of bringing the action — the cost of the litigant's own legal advisors.

In any event, protective expenses orders are presently limited in scope. The current rules as set out in *McGinty v Scottish Ministers* rely on the principles set down in the English case of *R (on the application of Corner House Research v Secretary of State for Trade and Industry* [2005] EWCA Civ 192. Although there has been some shift away from the rigid application of the *Corner House* principles, the "no private interest" rule of *Corner House* remains, at least to a degree. Thus in Scotland, where it might be more difficult to show title and interest to sue without having a private interest, litigants might be able to raise the action but might not be able to obtain a protective expenses order.

The difficulties of obtaining legal aid to raise an issue with a wider interest may well breach the Aarhus Convention, but also raises wider access to justice issues.

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