OUTER HOUSE, COURT OF SESSION

[2017] CSOH 140

P545/17

OPINION OF LADY STACEY

In the Petition

CHONG WANG

Petitioner

against

SCOTTISH MINISTERS

Respondent

Petitioner: A Caskie; Drummond Miller LLP
Respondent: D Byrne; Scottish Government

8 September 2017

[1] I heard this starred opposed motion within the vacation court. I gave an *ex tempore* Opinion. This is a revised and expanded version of that Opinion.

[2] This is a Petition for judicial review, which comes before me on the petitioner's motion to allow a Minute of Amendment and to make other necessary orders in connection with that Minute of Amendment should it be allowed. It is opposed by the respondent as incompetent. The issue is whether it is competent for the petitioner to seek to amend the Petition prior to permission to proceed being granted.

[3] Counsel for the respondent argues that any such motion is incompetent in light of section 27 B(1) of the Court of Session Act 1988 (the 1988 Act). The terms of that section are as follows:

> "**27B Requirement for permissions**
>
> (1) No proceedings may be taken in respect of an application to the supervisory jurisdiction of the Court unless the Court has granted permission for the application to proceed."

Counsel for the respondent argued that moving a Minute of Amendment amounted to 'taking proceedings', which was prohibited by the section, as permission to proceed had not yet been granted.

[4] Counsel for the petitioner submitted, that the case concerns a prisoner, who wishes to move to the open prison estate. Thus Article 5(4) of the ECHR applies, which is to the effect that matters of liberty of the subject, are to be brought before the court speedily. Counsel for the petitioner reminded me of section 57(2) of the Scotland Act 1998 which is to the effect that, there is no power for the Scottish Parliament to pass any legislation which is not in accordance, with the rights of the subject, under Article 5(4), and indeed other articles of the Convention. Counsel for the petitioner was careful to tell me that he did not argue that anything in the 1988 Act as amended, is contrary to that provision, of the Scotland Act 1998. Rather, he argued that as the provisions of the 1988 Act as amended and the Rules of Court can be read so as to be in compliance with Convention rights, then, they should be read in that fashion.

[5] The chronology is as follows. On 26 April 2017 the petitioner was told that he would not progress at that stage to the open estate. He completed a complaints procedure which Counsel assured me is necessary lest it be argued that he did not fulfil all of the avenues of review open to him. His complaint was turned down. He applied for and got Legal Aid to

raise the current petition which was lodged on 26 June 2017. After it was served, a new decision was made by the respondent on 26 July 2017, also to the effect that the petitioner would not progress to the open estate, but for different reasons from those in the decision made in April 2017. The earliest date for release for the petitioner is 18 March 2018.

[6] On 17 August 2017, the respondent provided Answers to the Petition. In terms of the Rules of Court, the papers should then have been considered by a Lord Ordinary, to decide whether or not permission should be granted to proceed, and a decision should then have been made, to grant or refuse said permission, or to hold a hearing before making the decision. It was not, for reasons that are obscure to me, put before a judge and so no decision had been made.

[7] On 24 August 2017 the agents for the petitioner drafted the Minute of Amendment, and intimated it to the respondent. The Minute consists of averments about the decision made on 26 July 2017. Counsel for the petitioner argued that the correct course was to allow the Minute of Amendment. He agreed that the Petition as now lodged is otiose. The Petition does not refer to the decision of 26 July 2017, which is the one which keeps the petitioner out of the open estate at present. Instead it refers to the decision made on 26 April 2017, which has been superseded. Counsel for the petitioner argued that in all of these circumstances, the correct remedy is to allow the Minute of Amendment, rather than to require the petitioner to start again. He explained that starting again would cause delay and expense. It would be necessary for the agents for the petitioner to visit him in prison and obtain his instructions, to complete Legal Aid papers, and to apply for Legal Aid.

[8] Counsel for the petitioner referred to the case of *RA* v *The Secretary of State for the Home Department* 2016 CSOH 182 in which Lord Boyd of Duncansby, held that amendment at the stage of review of a decision to refuse permission to proceed under section 27B(1) is

competent albeit that he stated that amendment would be allowed only in rare and exceptional circumstances.

[9] In the case of *RA* v *The Secretary of State for the Home Department* a Lord Ordinary refused permission to proceed. The petitioner sought a review of that decision and along with his request for review, he lodged a Minute of Amendment and productions. The purpose of the Minute, according to Counsel for the petitioner, was to respond to the answers lodged for the respondent, and to introduce a new matter, not available at the time of the lodging of the Petition, namely a decision made by the First-tier Tribunal in an analogous case.

[10] His Lordship noted the terms of Rule of Court 24.1(2), to the effect that the principal writ may be amended at any time before final judgment if necessary for determining the real question in controversy between the parties. As permission had been refused and a request for review made, his Lordship decided that the court's judgment was not final, and so amendment was competent. He made a passing reference to the case of *B* v *Secretary of State for the Home Department* 2016 SLT 1220, noting the Opinion of the Lord President that the test for permission to proceed set out in section 27B of the 1988 Act should be applied to any Minute of Amendment. Lord Boyd of Duncansby held that the granting of permission is not an iterative process, to be undertaken between the petitioner, the respondent and the court, and that the lodging of a Minute of Amendment before permission has been granted should not be seen, as an opportunity to correct flaws in the Petition. He opined that:

> "… except in exceptional circumstances, it would only be where the minute of amendment contained matters which were not known at the time of the lodging of the petition that it would be right to allow a minute of amendment at the permission stage."

Counsel for the petitioner relied on that case, and argued that it was absurd to require the court to decide whether or not to grant permission to proceed on the basis of a petition which was no longer accurate. Counsel for the petitioner submitted that there was no point in refusing leave to amend and repeating the process with a fresh petition.

[11] In this case, there are answers from the respondent, which say that the decision complained of has been overtaken by events, and that there is another decision. It seems to me that when considering granting permission, any Lord Ordinary will look at the Answers and if such averments are made by Counsel on behalf of the Scottish Ministers, no Lord Ordinary is going to ignore them. Counsel for the petitioner would of course confirm to the court that the answers were factually accurate. In those circumstances there seems little chance of permission to proceed being granted. Counsel for the petitioner raised what he described as a tentative possibility, that I might grant permission today. If I granted permission, that would trigger an automatic period of adjustment which would allow him to change, to use a mutual term, his pleading. But he was very careful to tell me, that it was tentative and that he did not seek in any way to subvert the statute.

[12] Counsel's argument then may be summarised thus. It is competent to amend at this stage, and the most efficient way to proceed is to allow an amendment which would bring the pleadings up to date. He relied on the case of *RA* v *The Secretary of State for the Home Department*.

[13] Counsel for the respondent broadly agreed the chronology set out by Counsel for the petitioner. He argued that it is incompetent to allow the Minute of Amendment because of the terms of section 27B of the 1988 Act.

[14] Counsel for the respondent argued that the words of the section are clear. Moving a Minute of Amendment must count as taking proceedings. This is prohibited by the words of

section 27B(1). He went on to refer to various authorities to show that the court had no power to alter an Act of Parliament in order to facilitate a procedural matter. The cases to which he referred are as follows: *Maitland petitioner* 1961 SC 291; *Newman Shopfitters Ltd* v *M J Gleeson Group Plc* 2003 SLT Sheriff Court 83; *L petitioners (No 1)* 1993 SLT 1993.

[15] Counsel for the respondent argued, that the cases make it plain, that the court cannot try to subvert either the words of a statute or the meaning, as properly construed, of a statute. He argued that the case of *RA* v *The Secretary of State for the Home Department* was, to some extent, obscure; when pressed, he said that if Lord Boyd of Duncansby was holding that it is competent to amend in the present situation, then he respectfully disagreed with him.

[16] Reference was also made to an *ex tempore* decision given by Lord Brailsford in June 2017 in the case of *Novak* v *Scottish Ministers.* Counsel produced a transcribed note taken by Counsel, of the opinion. Lord Brailsford found it incompetent to amend at the stage of a pre-permission judicial review.

[17] In a short reply, Counsel for the petitioner started to argue that, if Counsel for the respondent was right, then no *interim* motions, for example, to prevent a person being deported, could be applied for before permission to proceed was granted. Nor could a petition ever be served, as he argued that the service would count as proceedings. I indicated at that stage, that such an argument should have been raised by him in his opening speech. He argued that it arose from Counsel for the respondent's argument, but I do not accept that. It was plain before the discussion started what the respondent's position was, and if Counsel for the petitioner wanted to argue the matter he should have done so at the outset. Thus I did not hear Counsel's full argument, and of course I reserve my position on it. But I am bound to say, that it did not strike me that his undeveloped submission was

plainly right. Had that been the position, then I would have considered hearing him in full and asking Counsel for the respondent if he wanted another opportunity to reply. But it did not strike me as plainly right. Rather it seemed to me, to be an extravagant submission.

[18] I prefer the arguments of Counsel for the respondent. I agree that the section in the 1988 Act as amended is plain in itself. It introduces a new step in judicial review. That step is described as a requirement for permission, before anything happens, in the petition that has been lodged.

[19] I note that the situation in the case of *RA* was slightly different from the situation before me, in that permission had been refused and an application made for review of that decision. I am not persuaded however that the plain words of the statute can be read as Counsel for the petitioner contends they should be. In discussion, I tested with Counsel the possibilities that might cause difficulty, if I am right, in saying this is not competent. For example, a respondent could make a series of fresh decisions, thereby confounding the petitioner ever getting the matter before a court. I do not suggest that the Scottish Ministers would do so, but as a way of testing it, that would be possible. Counsel for the respondent readily agreed that that would be an abuse of process, which could be dealt with by a petition stating the history and arguing that it was an abuse of process. Similarly, I think Counsel for the petitioner agreed that if a petitioner raised a matter in a petition, paid the fee (or did not if he was fee exempt, but in theory paid the fee) and then attempted to get a completely different matter before the court in the same petition, that would be something that should not and would not be allowed. The difficulty of course is, in a case such as the one before me, where no one is acting in bad faith, there is no question of a series of decisions, and the matter that is complained of is, broadly speaking, the same matter, that is, residual liberty of the petitioner. It is not, however, the same decision that is complained of.

[20] I accept that Counsel for the petitioner was able to put forward an argument that it would save time and trouble to allow the Minute of Amendment. But I do not accept the further argument, that refusing the Minute of Amendment is absurd. It seems to me that it amounts simply to this. A petition in which the petitioner complains of the operative decision is required. The court is required to give a view whether the Petition should proceed at all. If it does proceed then ultimately the court will be asked to adjudicate upon it. There needs to be a petition, which sets out the grievance of the petitioner. I am persuaded by Counsel for the respondent's arguments, which are essentially on statutory interpretation, that the statute is clear.

[21] In this case, the decision about permission had not been made. I decided that I would make that decision. I refused permission. That decision was made on the basis of all the information that was contained in the Petition and in the Answers. This Petition should not proceed because there is no point in it proceeding. I am of the opinion that the petitioner will have to lodge a fresh petition, to bring the matter he wishes to discuss before the court.