

Case 200501343: Scottish Legal Aid Board

Summary of Investigation

Category

Scottish Executive and Devolved Administration: Scottish Legal Aid Board; handling of application

Overview

The complaint concerned a decision made by the Scottish Legal Aid Board (SLAB) in relation to the award of civil legal aid, which the complainant (Ms C) claimed unfairly disadvantaged her, showed bias and was a misuse of the public purse.

Specific complaint and conclusion

The complaint which has been investigated is that Ms C was unfairly disadvantaged by SLAB's decision to grant an extension of civil legal aid to her opponent in legal action, after an extension of civil legal aid was not granted to Ms C (*not upheld*).

Redress and recommendations

The Ombudsman has made a general recommendation that SLAB should consider whether the documents it produces are clear enough on how members of the public can seek a review of SLAB decisions and how to give appropriate procedural advice (not legal representation) about this to the public. SLAB should, of course, do this without compromising its obligations under statute.

SLAB have accepted the recommendation.

Main Investigation Report

Introduction

1. In November 2005 the Ombudsman accepted a complaint from a person who is referred to in this report as Ms C. She complained that a decision made by the Scottish Legal Aid Board (SLAB) in awarding an extension of civil legal aid to her opponent in legal action had unfairly disadvantaged her as her application for an extension of civil legal aid on what she felt were similar grounds had not been successful.

2. The complaint from Ms C which I have investigated is that Ms C was unfairly disadvantaged by SLAB's decision to grant an extension of civil legal aid to her opponent in legal action, after an extension of civil legal aid was not granted to Ms C.

3. Legal aid allows people who would not otherwise be able to afford it to get professional help for their legal problems. The Scottish Legal Aid Board is responsible for managing legal aid in Scotland.

Investigation

4. Ms C and her husband (Mr D) separated in August 2000. Since that time there have been ongoing legal proceedings for divorce, and both Ms C and Mr D made applications to SLAB for civil legal aid. The initial divorce application was raised by Ms C against Mr D and Ms C applied for civil legal aid to pursue these proceedings in December 2000 and in October 2003. Both applications were approved. At the time of making the complaint Ms C had no legal representation because her most recently instructed solicitors withdrew from acting on her behalf and, therefore, the grant to her of civil legal aid was suspended.

5. Mr D applied for civil legal aid in October 2004 and a legal aid certificate was issued in May 2005. In September 2005 Mr D's solicitors asked SLAB for an extension of the scope of Mr D's civil legal aid and this was granted in October 2005. Ms C submitted objections to both of these applications.

6. Ms C's initial complaint to the Ombudsman referred to the specific decisions mentioned in paragraph 2, but also to SLAB rules of confidentiality, actions and statements in a Sheriff Court, and the UK Human Rights Act 1998. It also referred more broadly to the legal profession. Given the range of issues

raised it was important for the Ombudsman to carefully determine jurisdiction. I wrote to Ms C advising her of this and requesting additional information. I also advised Ms C that the Scottish Public Services Ombudsman Act 2002 states at Schedule 4(2) that the Ombudsman must not investigate:

'The commencement or conduct of –

(a) civil or criminal proceedings before any court of law ...'.

This meant that I could not look at anything that had taken place in the Sheriff Court. The Scottish Public Services Ombudsman Act 2002 also states at Section 7(8) that:

'The Ombudsman must not investigate any matter in respect of which the person aggrieved has or had –

(c) a remedy by way of proceedings in any court of law ...'.

This section of the Scottish Public Services Ombudsman Act 2002 was relevant as information available on the SLAB website states that opponents in legal action may be able to seek a judicial review of a SLAB decision to award civil legal aid if the opponent thought that the decision was 'illegal, irrational or that there was some procedural impropriety in reaching it'. The Ombudsman is not an alternative means of appealing against a SLAB decision as this is properly done via judicial review in the courts.

7. When considering jurisdiction I consulted the Ombudsman's legal adviser and requested additional information from Ms C as well as obtaining information from SLAB. I determined that the Ombudsman could investigate the administrative actions of SLAB relating to decisions taken since May 2005 in granting civil legal aid to Ms C and how SLAB had dealt with her objections to Mr D's award of civil legal aid. In making this determination I made it clear that the Ombudsman is not empowered to determine whether or not an individual's human rights have been breached as this is a matter for the courts. However, I also advised that the Ombudsman can include in an investigation an examination of how authorities take account of human rights in terms of their policies and procedures, as was done in this case.

8. I made a detailed enquiry of SLAB about how they deal with applications for civil legal aid, the criteria used to determine applications, and what was done in this specific case. SLAB provided a comprehensive response on its procedures which took some time to assess, but was very useful in explaining how SLAB evaluates applications. SLAB also provided me with information

relating to both Ms C's and Mr D's applications for civil legal aid. I was able to obtain this under Sections 13 and 14 of the Scottish Public Services Ombudsman Act 2002. However, under Section 34 of the Legal Aid (Scotland) Act 1986, relating to confidentiality of information, I was unable to disclose this information to Ms C or include it in this report.

9. It is also important to note that Section 7(1) of the Scottish Public Services Ombudsman Act 2002 states that:

'The Ombudsman is not entitled to question the merits of a decision taken without maladministration by or on behalf of a listed authority in the exercise of a discretion vested in that authority.'

This means that if SLAB followed statute, procedures and guidance in the course of making a decision then the Ombudsman cannot call into question that decision.

10. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Ms C and SLAB were given an opportunity to comment on a draft of this report.

Complaint: Ms C was unfairly disadvantaged by SLAB's decision to grant an extension of civil legal aid to her opponent in legal action, after an extension of civil legal aid was not granted to Ms C

11. As noted in paragraph 6, the initial complaint submitted by Ms C to the Ombudsman raised a number of issues. Ms C later provided clarification of her complaint as follows:

'The questions of equality and fairness of SLAB's decision to grant the solicitor of one party assistance for junior counsel after they had refused same to the less experienced solicitor of the other party regards the same issue, in the same action, is the kernel of my complaint.'

Ms C was of the view that the SLAB procedures were unfair as they treated her and Mr C unequally because different decisions had been reached on their respective applications for legal aid.

12. SLAB made clear that their actions were driven by the Legal Aid (Scotland) Act 1986 and that the basis for assessing applications is the document *Civil Legal Aid Merits Guidelines*, issued in October 2003.

13. The first paragraph of Section A of the *Civil Legal Aid Merits Guidelines* states that:

'It is the Board's responsibility to assess whether the applicant has probable cause and whether it is reasonable to make legal aid available. Each case is considered on its own merits taking into account all of the relevant factors involved. The Board will not prejudge issues that are really matters for the court to decide ... To establish probable cause:

- the applicant must show that there is a sound legal basis for the proposed action
- [SLAB] will expect to be given information to establish jurisdiction and right, title and interest to raise proceedings.'

14. There are six pages of guidance on assessing reasonableness which are headed by the following paragraph:

'Section 14(1)(b) of the Legal Aid (Scotland) Act ... requires [SLAB] to be satisfied that it is reasonable in the particular circumstances of the case that the applicant should receive civil legal aid. The reasonableness test provides [SLAB] with a very wide discretion.'

The section goes on to list 24 general issues of reasonableness while noting that it is 'impossible to give an exhaustive list'. SLAB also advised that a key test is whether an applicant is financially eligible for civil legal aid in terms of their disposable income and disposable capital.

15. In addition, SLAB operates an Independent Checking and Quality Unit that examines a sample of decisions taken in relation to legal aid applications and Mr D's application was randomly selected and checked by this Unit. SLAB advised me that:

'The Checking Unit was satisfied that the decision to grant civil legal aid had been taken properly and in accordance with all [SLAB's] policies and procedures.'

16. In relation to human rights implications and duty of care, SLAB provided the following statement:

'All of the Board's procedures were audited for human rights implications before the 1998 Act came into effect. It is, however, important to bear in mind that [SLAB's] role is to assess whether or not it is appropriate to make civil legal aid available. [SLAB] are obliged to do that in terms of [the] existing legislation and having regard to the interests of the legal aid

applicant. While opponents have the right to submit representations about civil legal aid applications they are not a party in the civil legal aid application and they are not individuals to whom [SLAB] owe a duty of care or obligation beyond considering representations they choose to submit about civil legal aid applications. These representations are taken into account in [SLAB's] assessment of an application to help [SLAB] decide if legal aid should be made available.'

17. The SLAB statement goes on to say:

'Applications for civil legal aid are prepared and submitted by solicitors. [SLAB] have no control over the quality of the application submitted. It is, therefore, entirely possible for civil legal aid applications to be submitted in relation to the same action where the information provided in support of one application allows [SLAB] to be satisfied that legal aid should be made available while in another application there is insufficient information provided leading to a refusal of civil legal aid. Equally, one party may be financially eligible for civil legal aid while another party is not eligible. It is not a relevant consideration for [SLAB] to examine another party's ability to instruct legal representation in court proceedings. If the statutory tests for civil legal aid are met then we must make legal aid available ... It would be unfair and inappropriate to penalise another party in an action by removing or denying representation simply because of another individual's failure to obtain civil legal aid or to retain the services of a solicitor.'

18. The evidence provided by Ms C and by SLAB showed that Ms C had a grant of civil legal aid but that because she did not have legal representation, as referred to in paragraph 4, this grant had been suspended. The purpose of legal aid is to 'provide funding to help people who qualify to get legal advice and 'representation' (where a solicitor puts their case in court)'. Mrs C applied for an extension for her initial application before the sheriff. This was not granted. Mr D applied for an extension twice – once to provide advice on his appeal and a second one to provide for representation at the appeal. Ms C did not apply for an extension for counsel for the appeal stage as she was unrepresented and, therefore, we cannot know if she had made an application whether this would have been granted.

19. In relation to the objections Ms C submitted to Mr D's application for an extension of civil legal aid, SLAB have advised that:

'After examining the first set of objections lodged ... [SLAB] were satisfied

that the issues raised were factual disputes or matters where it was for the court to determine issues. The Board's function is to determine whether or not the statutory tests of probable cause, reasonableness and financial eligibility are met. It is not [SLAB's] job to determine the facts of any particular case or to decide on the credibility of the parties. That is the court's role and it would be inappropriate for [SLAB] to usurp this function. The court has the benefit of hearing all of the evidence in a case and seeing all of the witnesses. It is, therefore, the court that must determine matters of fact. It is for this reason that [SLAB's] guidance to opponents explains that [SLAB] will not adjudicate on matters of fact. Determining whether parties have acted reasonably in a divorce action in the context of the objections put forward by [Ms C] is a matter for the court to consider.'

20. In November 2005 Ms C contacted SLAB to ask about Mr D's application to extend his grant of legal aid because during court proceedings Mr D's solicitor had apparently informed the Sheriff that the extension had been granted. A member of SLAB staff had told Mr D's solicitor that the application had been granted. However, at that point SLAB had only taken an interim decision to grant the extension and because the period for lodging objections had not yet expired this information should not have been given to Mr D's solicitor. In correspondence with Ms C SLAB explained this error and apologised for it.

Conclusion

21. Having read the background documents on the legal action and having spoken to Ms C I understand that this has been a very difficult situation for her. Part of Ms C's original complaint rested on her being 'undefended' (ie currently having no legal representation). SLAB explained that it is not their responsibility to remedy this as it is for individuals to obtain legal representation. SLAB also explained that whether or not Ms C was represented was not something that they could take into account when assessing Mr D's application for civil legal aid or Ms C's objections to it. Ms C also was of the view that SLAB's procedures were unfair because of the different outcomes of her and Mr D's applications for legal aid. However, SLAB have demonstrated that their procedures have been audited for compliance with the Human Rights Act 1998. In addition, I accept that it is reasonable that each application for civil legal aid is assessed on its own merits as it would be unfair to each individual applicant if the success or failure of one person's application were to determine the outcome of another person's application. Therefore, Ms C's and Mr D's applications were rightly

assessed separately as they were not interdependent¹. I appreciate that Ms C remains unhappy about this, but the Ombudsman cannot uphold a complaint simply because the complainant feels aggrieved by what has happened.

22. SLAB made a communication error in dealing with Ms C in November 2005. While this was regrettable, the error did not have a material bearing on dealing with legal aid matters and SLAB have apologised to Ms C for this error.

23. The evidence available to me demonstrates that SLAB have carried out their duties under the Legal Aid (Scotland) Act 1986 and followed their own process as set out in the *Civil Legal Aid Merits Guidelines*. Ms C is unhappy with the granting of civil legal aid to Mr D, but I am satisfied that the information I have seen in confidence shows that her objections were properly taken into account. I understand that Ms C might find this hard to accept as she has not seen the evidence, however, Section 34 of the Legal Aid (Scotland) Act 1986 is clear that it was not possible for SLAB to fully communicate their reasons for their decisions about Mr D's applications to her. I am also satisfied that the evidence I have seen shows that Ms C's legal aid applications were also subjected to the required tests and there is no evidence of impropriety. As SLAB have explained, the applications from Ms C and Mr D were, quite correctly, treated entirely separately and on their own merits, no matter that Ms C and Mr D might both be parties to divorce proceedings, as that is the process laid down in the Legal Aid (Scotland) Act 1986 and the *Civil Legal Aid Merits Guidelines*. On this basis I do not uphold the complaint.

24. One remaining issue is that of how individuals can seek a review of SLAB decisions. As noted in paragraph 5, opponents may be able to seek a judicial review of a SLAB decision, and a reference to this is included in the SLAB documentation made available to opponents. I asked SLAB whether or not they had advised Ms C that she could seek a judicial review. SLAB advised that they 'cannot give representation to individuals' and they 'would have been acting outwith [their] powers had [they] given advice to' Ms C. I understand SLAB's position on this, however, in discussion with SLAB I have tried to draw the distinction between offering legal advice and providing procedural clarity on the appropriate avenues open to complainants when they remain dissatisfied.

¹ I have noted that Ms C's application was at the first stage of proceedings and Mr D's was at the appeal stage.

General recommendation

25. The Ombudsman has made a general recommendation that SLAB should consider whether the documents it produces are clear enough on how members of the public can seek a review of SLAB decisions and how to give appropriate procedural advice (not legal representation) about this to the public. SLAB should, of course, do this without compromising its obligations under statute.

26. SLAB have accepted the recommendation.

23 May 2007

Explanation of abbreviations used

Ms C	The complainant
Mr D	The complainant's husband who is her opponent in legal action
SLAB	The Scottish Legal Aid Board

Glossary of terms

Civil legal aid

Funding to help people who qualify to get legal advice and 'representation' (where a solicitor puts their case in court) in civil cases

List of legislation and policies considered

Scottish Public Services Ombudsman Act 2002

Legal Aid (Scotland) Act 1986

Civil Legal Aid Merits Guidelines

Human Rights Act 1998