

PE1784/C

Faculty of Advocates submission dated 14 April 2020

Introduction

1. The Faculty of Advocates is grateful for the invitation to respond to Petition 1784.
2. The petition is focused on access to justice in the context of Article 6 rights. In particular, the petitioner seeks to call upon the Scottish Parliament to urge the Scottish Government to conduct a review of the Sheriff Court Fees Order 2018.

The issue of self-litigation

3. The Faculty notes that for the petitioner, the aim of the review is “to make self-litigation more accessible to disabled people”.
4. The Faculty has therefore given consideration to this petition in the context of access to justice through self-litigation.

Sheriff Court Fees Order 2018

5. Section 3 of the Sheriff Court Fees Order 2018 ('The Fees Order') determines the Fees payable in sheriff courts in general. Section 4 relates to fees payable only once. Section 5 refers to matters included in certain fees and section 6 refers to the Personal Injury Court fees exclusively. Section 7 determines the occasions where an extra fee is payable.
6. Sections 8 and 9 of the Fees Order contain provisions on exceptions from the payment of fees. Section 8 refers to exemptions applicable when a party is in receipt of legal aid; Section 9 to exemptions based on the party being in receipt of social security benefits. Sections 10 to 13 contemplate other exemptions based on the type of proceedings or order sought.
7. According to Section 9, those persons who are (or persons whose partners are) in receipt of income support, job-seekers allowance, a State pension credit, working tax credit (subject to a limit of an annual gross income of £18,000), income-related employment and support allowance, universal credit or who have been in receipt of welfare funds are exempted from the payment of fees. Those listed are 'means-tested' benefits; i.e. benefits conferred on a person in relation to their financial position.
8. Section 9 does not include Personal Independence Payment (“PIP”) in the list of those benefits entitling a party to apply for a fee exemption.
9. PIP (which replaces Disability Living Allowance) is a payment of monies made to those suffering from a physical disability, illness or mental health condition, regardless of income. The Petitioner is in receipt of PIP. The Petitioner does not qualify for an exemption under section 9 of the Fees Order 2018. Accordingly, he asks whether his right of access to justice under Art 6 of the ECHR has been breached.

The right of access to justice and its limits

10. The right of access to justice is fundamental to the rule of law which the Faculty supports unreservedly. In every modern democracy, persons must be able to claim their rights and protect their interests before the courts. They have the right to have disputes adjudicated timeously by independent and impartial tribunals in accordance with the law. (*Golder v. the United Kingdom*, no. 4451/70, § 36, ECHR).
11. The right to a court, of which the right of access is an aspect, may be relied upon by a party whose rights have been unlawfully interfered with but who has no possibility of submitting a claim to a court meeting the requirements of Article 6 (*Stanev v. Bulgaria* [GC], no. 36760/06, § 229, ECHR). The right to a court and the right of access are not absolute however (*Golder*, § 38). They may be subject to limitations, but these must not restrict or reduce access in such a way that the very essence of the right is impaired (*Philis v. Greece*, no. 14003/88, (no. 1), § 59, ECHR).
12. These limitations, if any, ought to pursue a legitimate aim and be proportionate in order to be compatible with Article 6 rights (*Bellet v. France*, no. 23805/94, §32, ECHR). Proportionality strikes at the balance between the means employed and the aim pursued (*García Manibardo v. Spain*, no 38695/97, §§ 36, ECHR).
13. The imposition of fees is one example of limitations on the right to access a court (as are title and interest, time limits and jurisdiction). Court fees obey a rationale, namely that of transferring the economic burden of running the courts and tribunals service from the general taxpayer onto those who use the system - or cause the system to be used, as authoritatively established by the Supreme Court in *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 at para 9. Fees also serve the purpose of incentivising settlements and prevent vexatious or spurious claims (*ibid*).
14. They must also be proportionate so as not to interfere with the right to effective access to a court. Fees must not be such as to prevent claims from being brought by making litigation unaffordable. A remission system is a way to ensure that equality considerations enter the equation when the burden is being transferred from the taxpayer to the service user (*R (UNISON)*, at para 11). So does a system which enables access to legal aid funds.
15. The remission system itself ought to be rational and proportional. In the *UNISON* case a fee payment system was introduced for claimants in Employment Tribunals. A remission system was adopted as well, on the basis of a 'disposable capital test' (para 21). This was capped at the sum of £3,000. Then the *amount* of remission was calculated according to a 'gross monthly income test'. In practice this meant that it was either impossible or not cost-effective for a worker to pursue a claim. The trend for claims in the Employment Tribunals, characterised by an imbalance of power between employer and employee, showed a 'sharp, substantial and sustained fall' (para 38).

16. In deciding that the Fees Order in that case was unlawful under both domestic and EU law because it had the effect of preventing access to justice, the court observed that:
- Persons have the constitutional right of access to a court, which is inherent in the rule of law (para 66);
 - In order to ensure that laws are applied and enforced, people must have unimpeded access to the courts (para 68);
 - People need to know that they can enforce their rights (para 71);
 - Court fees are a justifiable, reasonable means to make resources available to the justice sector (paras 83 & 86);
 - Court fees are not incompatible with the Convention, as long as they are proportionate and pursue a legitimate aim (para 110), and
 - To be lawful, fees have to be set at a level that everyone can afford (para 91); affordability being one of a number of factors (paras 112 & 116).
17. If excessive, the cost of proceedings may be a factor impeding the possibility of submitting a claim to a court. In *Ait-Mouhoub v. France*, 22924/93, ECHR, the claimant maintained that the French government had breached his rights under Article 6 as he had failed to pay the required 'deposit' necessary for lodging a criminal and related civil complaints against the police, to the effect that the claims were considered inadmissible. He had made various applications for assistance from the Legal Aid Office, which assessed his income as *nil*. Yet he was not afforded assistance. Because of the claimant's inability to meet the cost of the actions, the court held that his right to access to a court had been infringed (§§ 57-58).
18. On the other hand, ensuring the rights afforded under Article 6(1) does not mean that the State must provide free legal aid for every civil dispute, a question extensively explored in *Airey v. Ireland*, no. 6289/73, § 26, ECHR. In coming to an assessment of whether a person qualifies for legal aid or not, it is legitimate for States to take into consideration, first and foremost, the financial situation of the litigant (*Steel and Morris v. the United Kingdom*, no. 68416/01, § 62, ECHR). It is submitted that in the same vein, it is a legitimate exercise for a State to determine, in aiming to secure access to justice for claimants, a fee exemption regime based on the economic capacity of persons.
19. The sub-committee would benefit from considering the case of *R (on the application of Leighton) v Lord Chancellor* [2020] EWHC 336 (Admin): in particular, the consideration of the competing interests at play in an issue such as this one concerning fair access to the courts. In *Leighton* a disabled wheelchair user argued that the failure to extend certain costs measures in the courts to discrimination claims was, amongst other things, a breach of her article 6 and 14 ECHR rights. Particular attention is drawn to the following guidance drawn from paragraph [121]:

“(1) The question whether the means is proportionate is to be decided by the court. In the domestic court, in contrast to the Strasbourg court, there is no margin of appreciation;

(2) However, the principle of proportionality does not entitle the courts simply to substitute their own assessment for that of the decision maker. The extent to which the domestic court will respect the judgment of the primary decision maker will depend on the context;

(3) It is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter;

(4) The Strasbourg jurisprudence does not insist that a state pursues a legitimate aim in the fairest or most proportionate way. It requires no more than that it does so in a way which is proportionate. There may be a number of ways in which a legitimate aim can be pursued. Provided that the state has chosen one which is proportionate, Strasbourg demands no more. Something may be proportionate even if it is not fair for everyone. Put bluntly (and to use words that do not appear in *Lawrence*) there is no requirement, in order for something to be proportionate, that everything is for the best in the best of all possible worlds;

(5) The court, while being vigilant to protect fundamental rights, must give considerable weight to informed legislative choices, at least where state authorities are seeking to reconcile the competing interests of different groups of society. This observation has particular resonance in the present case, as the issue is how to reconcile the competing interests of claimants and defendants;

(6) Where the balancing of costs in litigation is concerned, Parliament and the relevant rule-makers of the CPR were (following consultation) in the best position to determine how to effect the reforms and how to strike the appropriate balance between the different types of litigant;

(7) A legislative or regulatory scheme may in some circumstances be compatible with the Convention even if it operates harshly in individual cases; and

(8) There is no perfect solution to the problem of how best to enhance access to justice following the withdrawal of legal aid for most civil cases. Indeed, it is impossible to come up with a solution which would meet with universal approval.”

Personal Independence Payment (PIP)

20. As we understand the petition, the petitioner does not appear to take issue with the fact that fees are ordinarily payable by court users. Nor does he question the provision of fee exemptions. He is silent on the issue of the accessibility of

legal aid. His criticism against the Fees Order is rather a specific one, namely that PIP is not a qualifying benefit for the grant of a fee exemption.

21. Implicit in the petitioner's argument is the premise that those in receipt of PIP are in the same position as those in receipt of the listed exempted benefits. This may not necessarily be so. Whilst the benefits mentioned at para 5 above are means-tested benefits, PIP is not.
22. A person receiving PIP may qualify for payment of a means-tested economic benefit, e.g. they may be entitled and effectively in receipt of ESA and PIP at the same time. This being so, the person receiving PIP will be able to resort to the exemption regime in section 9. The person may also qualify for the exemption regime in section 8 (Eligibility for Legal Aid). However, those who receive PIP but do not qualify for a means-tested benefit cannot take advantage of the fee exemption, unless they qualify instead under section 8 (or any of the provisions in sections 10-13).

The questions raised by the petition

23. The specific question raised by the petition is whether the exclusion of PIP from the list of available exemptions in section 9 is an impediment to access to a court in terms of the requirements of Article 6 of the ECHR. Reference is made to the legal considerations noted above in terms of balancing ECHR rights against the legitimate aims of government.
24. The answer will also depend on whether there are alternative avenues open to the Petitioner - or those in his situation, to effectively submit a claim to the Sheriff court. For example, by either being able to meet the fee notwithstanding (or by virtue of) the fact that they are in receipt of PIP, or by being able to qualify under any other of the exemptions contemplated in sections 8 & 10-13 of the Sheriff Court Fees Order 2018, including access to legal aid.
25. The broader question for the sub-committee is whether the inability to take advantage of the exemption prevents the petitioner - and any other party in his position - from having access to justice and the ability to 'self-litigate', i.e. to litigate without the assistance of a legally qualified person.
26. This in turn requires the sub-committee to take a view on the relative importance of the right to self-litigate, as set against overall access to the courts and to justice. The sub-committee may wish to take into account the matters set out in para 27 in coming to a view about whether the issue being raised by the petitioner is one related to the court fees payable to those who wish to self-litigate, rather than one of possible unintended discrimination against disabled persons.

Court fees & access to justice in the context of this petition

27. The Petition focuses on the payment of court fees by disabled and low-income party litigants. However, when considering exempting such groups from paying

court fees on the basis of protecting their access to justice under Article 6 of the ECHR, the following needs to be kept in mind:

- The relative cost of court fees in comparison to the other costs that a civil action entails. In that regard, they are fixed costs which are typically lower than the majority of other costs that need to be met;
- The context within which court fees are payable. They can be reduced (often significantly) by settling the action before Proof and they are usually recovered from an opponent where the litigant is successful (family actions being the most notable exception to this rule); and
- Other means by which these groups can meet the cost of engaging in civil litigation. Examples include the provision of legal aid and the speculative fee agreements which proliferate in personal injury actions.

28. In considering the way in which disabled low income litigants can gain access to the civil courts, it is suggested that receipt of PIP is an ineffective indicator. This is because eligibility for PIP is not based on a claimant's means or participation in the labour market. Rather, it is based on a medical assessment of the assistance they require with the activities of day to day living. Thus, there is no direct link between a litigant's receipt of PIP and their ability to meet the cost of court fees.

29. In Scotland, the primary exemption from the need to pay court fees is the litigant's receipt of legal aid¹. However, a social security exemption also applies to those who receive Income Support, Guarantee Credit under the State Pension Credit Act 2002, Jobseeker's Allowance, Employment and Support Allowance, Universal Credit and financial or other assistance under the Welfare Funds (Scotland) Act 2015².

30. The social security exemption also extends to those litigants who are in receipt of working tax credit where either the child tax credit or disability or severe disability elements are paid and their gross annual income for the purpose of calculating working tax credit is £18,000 or less. In certain instances, the social security exemption also extends to the partner of a person who receives the relevant benefit³.

31. Thus, the current Scottish approach to court fee exemptions does take account of those who suffer from disability and/or are on a low income. A similar approach is taken in Northern Ireland⁴. However, as the Petition notes, the position in England & Wales differs.

¹ The Sheriff Court Fees Order 2018 SSI 2018/81, art 8, The Sheriff Appeal Court Fees Order 2018 SSI 2018/82, art 3, The Court of Session etc. Fees Order 2018/83, art 4

² The Sheriff Court Fees Order 2018 SSI 2018/81, art 9, The Sheriff Appeal Court Fees Order 2018 SSI 2018/82, art 4, The Court of Session etc. Fees Order 2018/83, art 5

³ Ibid

⁴ The County Court Fees Order (Northern Ireland) 1996 SR 1996/103, art 8, Supreme Court Fees Order (Northern Ireland) SR 1996/100, art 9

The position in England and Wales

32. When assessing the different systems, it important to consider the following:

- Court fees in England are often higher than in Scotland and Northern Ireland; and
- Access to civil legal aid in England is more restricted than it is in Scotland.

33. In England & Wales, the provision of exemptions relies on the operation of a two part test⁵. The first of these is the “disposable capital” test⁶. This is a tiered, incremental test that links the court fee to the litigant’s level of “disposable capital”.

34. Where a litigant’s level of “disposal capital” falls within a qualifying band, the second test comes into play. This is the “gross monthly income” test⁷. This operates on the basis of a “gross monthly income” ceiling and floor. These are used to determine whether the litigant is eligible for an exemption, and where they are, the level of contribution (if any) they need to make to their court fees.

35. It is during the calculation of a litigant’s “gross monthly income” that PIP is considered. PIP payments received by a litigant are regarded as an “excluded benefit” for the purposes of calculating their “gross monthly income”⁸.

36. In general terms, the “disposable capital” and “gross monthly income” limits are such that the majority of party litigants who are not legally aided⁹ and either out of work or on a low income will either not need to pay court fees or pay a reduced level of court fees.

Contrasting the position in England and Wales with that in Scotland

37. On that basis, the system in England & Wales appears to be more generous than those that operate in Scotland and Northern Ireland. It can therefore be argued that the system in England places someone who wishes to self-litigate, such as the petitioner, in a better position.

38. However, that needs to be assessed in light of the features mentioned above at para 26 about the costs of litigation, in particular, the more widespread availability of legal aid in Scotland compared to England and Wales.

39. In the context of protecting the Article 6 rights of disabled, low income and vulnerable people, it is arguable that their access to justice is improved, and rights best protected, through access to legal representation rather than through court fee exemptions. The provision of legal aid not only grants a court fees exemption, but it also provides them access to legal professional assistance. Such assistance

⁵ Civil Proceedings Fees Order 2008 SI 2008/1053, Schedule 2

⁶ Civil Proceedings Fees Order 2008 SI 2008/1053, Schedule 2, paras 3 to 10

⁷ Civil Proceedings Fees Order 2008 SI 2008/1053, Schedule 2, paras 11 to 14

⁸ Civil Proceedings Fees Order 2008 SI 2008/1053, Schedule 2, para 1

⁹ Civil Proceedings Fees Order 2008 SI 2008/1053, Schedule 2, para 18

arguably provides them with far greater access to justice than eliminating or limiting their exposure to court fees.

40. The sub-committee may require to balance any desire to improve the opportunity for self-litigation against the benefits of a legal aid system that allows for representation for vulnerable and low income groups. Reducing court fees and/or increasing exemptions may assist the ability of a person to self-litigate; but this may be at the cost of requiring a reduction in legal aid provision, as a budgetary response.
41. In balancing these matters the Faculty notes that comparing the position of PIP in England and Wales to that in Scotland is of limited assistance. The two regimes are quite different and as a result, it does not assist to simply look at how one particular benefit, such as PIP for example, is treated without considering the wider context.
42. In summary the Faculty encourages the Scottish Government to conduct a review of the Sheriff Court Fees Order 2018 to address the issue raised in the petition about whether the exclusion of PIP from the list of available exemptions in section 9 constitutes an impediment to access to a court in terms of the requirements of Article 6 of the ECHR in light of the relevant considerations which the Faculty has set out in its Response.