



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2016: No. 120

BETWEEN:

LEKAN SCOTT

Applicant

-and-

THE ATTORNEY-GENERAL

Respondent

JUDGMENT

(in Court)¹

Judicial review-eligibility for legal aid under Legal Aid Act 1980- adult child living at home-household income-meaning of “household”-applicant on remand for seven months at time of application

Date of hearing: May 11, 2015

Date of Judgment: May 12, 2016

Mr. Peter Sanderson, Wakefield Quin Limited, for the Applicant

Ms. Shakira Dill-Francois, Deputy Solicitor-General, for the Respondents

¹ To save time and costs, the Judgment was circulated without a hearing to hand down judgment.

Introductory

1. The Applicant is due to stand trial on May 16, 2016 for possession of a firearm and ammunition before Greaves J sitting with a jury (“the Case”). The trial judge has let it be known that no further adjournment applications to enable the Applicant to seek to retain counsel will be entertained in the Case.
2. The Applicant, who is now 27 years of age, initially applied for Legal Aid in relation to the Case on September 30, 2015. His application went through various iterations after it was initially refused, reconsidered and refused upon reconsideration. The nub of the grounds for these refusals is that the Legal Aid Committee (“the Committee”) has determined that since he was (when he initially applied) living with his parents, he continued to form part of their household and so their income needs to be taken into account.
3. In light of the written and oral evidence given by Senior Legal Aid Counsel Ms Susan Moore-Williams, it was clear by the end of the hearing that the Committee had acted throughout in a rational manner based on the factual material before it and based on an orthodox view of the governing statutory provisions. The basis of the Applicant’s application shifted and he was unable to provide financial information he was required to provide (his father’s income details).
4. On April 1, 2016, I refused the initial application for judicial review (filed on March 31, 2016) on the papers, but the Applicant’s initial counsel (Mr Worrell) renewed it in open Court. The substantive complaint (by now supported by the Applicant’s own Affidavit) was that the Applicant was of no fixed abode and not part of his family’s household, so that the income of his parents ought not to be taken into account. On April 27, 2016, I granted leave on Mr Worrell’s renewed application.
5. On May 9, 2016, Wakefield Quin Limited came on the record in place of Lion Chambers, having appeared before on May 5, 2016 in support of an application for constitutional relief in respect of this same matter. I directed on May 5, 2016 that the judicial review application should be heard first, and the constitutional attack on the legality of the income threshold provisions should only proceed if the present application fails.
6. It is not possible to pretend that there are not strong public policy considerations in play which favour the granting of the present application for an Order directing the Committee to grant a Legal Aid Certificate, if it is meritorious, with a view to avoiding:

- (1) an adjournment of the Case;
 - (2) the Case proceeding but resulting in an unfair trial; and/or
 - (3) a further constitutional challenge to the validity of the refusal of the Applicant's Legal Aid application.
7. The central question was whether or not the Committee was correct in concluding that the Applicant was part of his parent's household for the purposes of computing whether his income over the 12 months' preceding the application fell within or without the relevant financial limits. There were two dimensions to this question. Firstly, and most substantively, is an unemployed or underemployed adult child living at home and wholly or partly dependent on his parent or parents for financial support part of that household for Legal Aid purposes? Secondly, and more narrowly, if an applicant is indeed ineligible due to household income in the preceding months, does the applicant only cease to be treated as part of that household (if they are in custody when the application was initially made) upon the expiration of 12 months upon remand? Because of the haste with which the present Judgment must be delivered, only the narrower question is addressed below.

Relevant statutory provisions

8. The relevant statutory provisions are found in paragraph 2 of the Third Schedule to the Act:

“2 (1) A person's disposable income is the aggregate annual gross income of the household of which he is a member, less—

(a) \$2,000 for that person's spouse;

(b) money actually paid annually by that person (whether or not under a court order) for the support of a person under eighteen years of age who is not a member of that household;

(c) \$2,000 for each member of that household (whether or not under twenty-one years of age) who the Committee is satisfied is not financially independent; and

(d) rent or mortgage interest not exceeding \$9,600 actually paid annually in respect of the premises where that household lives.

(2) In sub-paragraph (1), the words “annual” and “annually” refer to the period of twelve calendar months immediately preceding the date of the

application for legal aid or, if in the Committee's opinion to take that period would on account of special circumstances distort the true current financial position of the applicant for legal aid, such other period of twelve calendar months as the Committee considers it just and proper to take instead."
[Emphasis added]

9. So household income is the total household income of the household of which an applicant is a member with discounts for:
- (a) the applicant's spouse (but not an unmarried partner);
 - (b) money actually paid by the applicant to support children living part from him/her;
 - (c) \$2000 for each dependent child or adult in the household; and
 - (d) rent and mortgage interest up to \$9600 per year.

Governing principles of statutory interpretation

10. Ms Dill Francois relied heavily on the fact that paragraph 2(1)(c) provides for a discount for dependent adults in the household as supporting the Committee's correctness in the present case in regarding the Applicant as a member of his parents' household because he was dependent on them. However, the discounts only come into play if a determination has already been made that an applicant is part of the relevant household.
11. Mr Sanderson relied on the fact that the right to legal aid is constitutionally protected and linked to wider fair hearing rights under section 6 of the Bermuda Constitution. Accordingly, the provisions of the Act should be construed generously with regard to giving effect to the fundamental rights. The relevant constitutional provisions read as follows:

"6 (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence—

....

- (e) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice or, where so provided by any law, by a legal representative at the public expense..."*

12. As far as the way the Committee applies the Act, the Applicant's counsel relied on the following passage in '*DE SMITH's Judicial Review*', Sixth Edition, at paragraph 11-093:

"There was a growing realisation that the traditional Wednesbury standard was inappropriate where a decision interfered with a fundamental right or important interest. Such decisions should be subject to the 'most anxious scrutiny of the courts...'"

13. These principles of interpretation were not disputed by the Deputy Solicitor-General; however, she argued that there was no basis for any finding that the Committee's decision was unreasonable in the *Wednesbury* sense.
14. Both counsel relied upon *R (on the application of Richards)-v-Legal Services Commission* [2006] EWHC 1809 (Admin) and the pronouncements of Leveson J (as he then was) as to the ordinary meaning of "household":

"16. Defined in the Oxford English Dictionary as "the inmates of a house collectively; an organized family including servants or attendants, dwelling in a house; a domestic establishment", the word 'household' has also been considered judicially. In London Borough of Hackney v. Ezedinma [1981] 3 All ER 439, May J cited Lord Hailsham's speech in Simmons v. Pizzey [1979] AC 37 (at page 59G) that 'household and membership of it is a question of fact and degree, there being no certain indicia of presence or absence of any of which is by itself conclusive.' This approach was followed in England v. Secretary of State for Social Services [1982] 3 FLR 222 in which Woolf J (as then he was) concluded, at page 227, that 'children can remain members of the household even though temporarily absent as long as ties with the parents and home are sufficiently closely maintained.' In that case, although the children spent weekdays in voluntary care because the parents were at work, their bedrooms were maintained, they saw their parents on the weekend, and the arrangement was not intended as permanent: they remained members of the household. This approach was also followed in Regina v. Birmingham Juvenile Court Ex Parte S. [1984] 11 Fam. 93, where Sir John Arnold P. also cited Simmons and went on to note (at page 98G) that 'at the heart of the concept it is the persons who comprise the household...and not the place where the household is located as a matter of residence.'

17. Thus, whether a child remains a member of a household is just as much a function of attitude (and, perhaps, emotion) as an application of a simple test of hours spent in the home. A student taking a gap year prior to university may not set foot in his or her parents' home for an entire year, but could still remain a member of the household. In each case, the question is one of fact having regard to all the circumstances of residence, relationship and ties."

15. I find that the term household ordinarily connotes a family unit or a group of people living together under arrangements similar to a family-based unit, whether in Downtown Abbey style (including servants) or on more modest terms. Whether or not

a person forms part of a particular household for the purposes of any statutory provision depends upon both the statutory context and on the factual circumstances of each particular case.

The meaning of “household of which he is a member” in paragraph 2 of the Third Schedule to the Legal Aid Act

16. I find no justification for giving the word “household” for the purposes of the Act any meaning more complicated than its natural and ordinary meaning. However, the requirement to take into account the aggregate income of any household of which a Legal Aid applicant is a member requires membership to be assessed with regard to the object and purpose of the specific provision in which this phrase appears against the wider backdrop of the Act as a whole. Although Mr Sanderson did not quite present his argument in this way, privileging reliance on general principles of construction over a focussed analysis of the relevant provisions of the Act, I find that the crucial question is whether or not the Committee is bound to consider the household membership question solely based on the position when the first of a series of applications is made.
17. Paragraph 2 of the Third Schedule to the Act clearly seeks to cure two opposing mischiefs:
 - (1) affording financially eligible applicants the funding necessary to enjoy their access to legal representation rights;
 - (2) preventing financially ineligible applicants from depleting the public purse and/or acquiring funding which could be deployed in aid of more deserving applicants.
18. This is certainly the way the Act has been interpreted in practice, as the evidence of Ms Moore-Williams made clear. The Committee attempts in practice to balance a flexible approach designed to enhance applicants’ fair trial rights with ensuring that applications are dealt with according to law. It is impossible, and would in any event be unwise, for this Court to seek to formulate any comprehensive test for determining what membership of a household means. The Committee clearly appreciates the complexities of applications on the part of adult children living at home, not to mention other shared living arrangements, situations often today attributable to challenging economic times. What this means will depend on the facts of each case. The Committee, and its Senior Legal Counsel, are better qualified to develop policies and protocols for dealing with applications, based on experience which this Court does not have.
19. It is not the function of judicial review for the merits of a decision made by the Committee to be reassessed. The only question is whether the Applicant has demonstrated that the Committee erred in law by failing to take into account material considerations, by taking into account immaterial considerations, by adopting a

flawed legal approach, and/or by making an irrational decision. Was the Committee correct to decide the household income question by reference to the state of affairs at the date of the first application in late September 2015? In March 2016, the Committee was reconsidering the third application made on January 28, 2016, by which time the Applicant had been on remand for over four months.

20. What does the Third Schedule mean when it mandates an assessment of the income of the household of which the applicant “is” a member? In my judgment, this means an assessment must be carried out at the time an application is made. Having regard to the fact that this legislative scheme is intended to give effect to constitutional fair trial rights in relation to, *inter alia*, criminal cases, I find that the question of an applicant’s household status cannot be subject to a rigid approach which either ignores financial realities or facilitates financial unreality. When there is a series of applications which in substance amount to a single application, the Committee may well generally be correct to ignore changes in status occurring after the first application, particularly if the changes are voluntary and appear to be transitory in nature. For instance:
- (a) the Committee must be entitled to ignore a change in household status which appears to have been manufactured to achieve eligibility; and
 - (b) the Committee must be entitled to take into account a material change in circumstances which show that it is unrealistic to treat an applicant as part of a household with which he has clearly severed any meaningful connection for an indefinite period of time, particularly where that severance is not at the applicant’s own election, but has occurred under compulsion of an order of the courts.

Did the Committee err in law by refusing the Applicant a Legal Aid Certificate?

21. The primary reason for refusing the Applicant’s application was that he had failed to produce income information from his father, one of the working members of the home the Applicant admitted residing in. The Committee was naturally suspicious of the belated attempt by the Applicant to suggest that, in fact, he was of no fixed abode when his application was refused, in part, on the grounds that it was not possible to determine his eligibility as a member of his parent’s household. I am unwilling to second-guess the Committee’s judgment in this regard.
22. Did the Committee err in law in failing to adopt the correct legal approach to the question of whether the Applicant’s renewed application should be considered on the basis that the Applicant remained a member of his parents’ household for the purposes of the Act? It is crucial to assess the relevance of the agreed facts that:
- (a) by in or about March 2016, the Applicant had been in custody for several months; and
 - (b) a prominent member of his household (his father), by refusing to assist him to obtain Legal Aid, had acted in a manner which was inconsistent with the Applicant’s continuing status as a member of that household.

23. The sequence of events which now appears most significant is as follows:

- September 30, 2015: Applicant's application received by the Committee via fax;
- October 7, 2015: Applicant is interviewed and recorded as stating he has been on remand for three weeks (i.e. since mid-September) and residing with his parents for about 1 year;
- October 21, 2015: the application is refused because, based on the income of the Applicant's mother alone, the income limits are exceeded;
- November 2, 2015: the Applicant makes a second application which is refused on the same grounds;
- January 28, 2016: the Applicant makes a third application supported by what the Committee is concerned may be false information about his residential status. This application was refused, taking into account seven months' of the mother's income alone. Thereafter, attempts by the Committee to obtain the father's income were unsuccessful;
- March 18, 2016: the Applicant, having apparently had some advice from Mr Sanderson, informs the Committee he resided at a number of locations during the 12 months preceding his original application. This appeared to the Committee to be an attempt to advance self-serving 'facts' to support his eligibility when he was in fact ineligible;
- March 24, 2016: taking the six months on remand into account and only six months' of the Applicant's mother's income into account, the father's income was now pivotal to determining eligibility. The Committee, reconsidering the third application, refused the application on the grounds that full disclosure of household income was not provided.

24. As I indicated in the course of the hearing, the Committee cannot be criticised for the way in which they handled the application in the sense that the Applicant did not present the most coherent or consistent series of applications and the present picture is somewhat different to that which confronted the Committee in its deliberations. Looking at the matter in hindsight, with a focus sharpened by the fact that the Applicant is next week due to stand trial on serious criminal charges, has no lawyer and has been on remand for more than seven months, it now seems clear that:

- (a) the Applicant's father clearly had an ambivalent attitude towards the Applicant being regarded as part of his household, a position which is unsurprising in that the father had no legal obligation to support a 27 year old and may well have been angered at the fact that his son had been charged with serious offences;

- (b) the longer the Applicant remained in prison, the more tenuous his connection with his former household became. Applying a mathematical approach to computing the 12 month period did not necessarily give due account to the importance of the Applicant's rights under section 6 of the Bermuda Constitution, particularly since by March 2016 it was (or ought to have been) obvious that neither the Applicant or his assumed household had the resources to privately retain legal counsel;
- (c) the Committee could have (and Mr Sanderson argued that it should have), taking all these considerations into account, formed the view by March 24, 2016 that the Applicant should not be regarded as having been part of his parents' household at all as the date of his third application; and
- (d) the most significant factor which had changed, and which was highly relevant to the Applicant's household status, was that he was by January 28, 2016 an applicant for Legal Aid who had been on remand for 4 months and was unlikely in the short or medium term to be released from custody unless and until he was acquitted at trial.

Disposition of application

- 25. I accordingly find that the Committee erred in law in reconsidering the Applicant's application for Legal Aid in March 2016 on the basis that he was at that time still to be regarded as part of his parents' household for eligibility purposes. This finding should not be taken to suggest that the mere fact that an applicant is remanded in custody operates, without more, to effect a change of the household to which he belongs. Whether such a change has occurred will depend on the facts of each case.
- 26. The Applicant is entitled to an Order of mandamus directing the Legal Aid Committee to issue him a Legal Aid Certificate in respect of the case.
- 27. Unless either party applies within 14 days to the Registrar to be heard as to costs, the Applicant shall be awarded the cost of the present application, to be taxed if not agreed.

Dated this 12th day of May, 2016 _____
IAN RC KAWALEY CJ