

Case No. 22/07

IN THE ISLE OF MAN LEGAL AID APPEALS TRIBUNAL

XXXXXXXXXXXX

Appellant

and

XXXXXXXXXXXX

Respondent

and

IN THE MATTER of the appeal in relation to a Legal Aid Certificate (numbered LA/02/11/00054) concerning the Respondent dated 15 September 2022 (**the Appeal**)

Hearing date: Tuesday 23 May 2023

Tribunal: Mr M C Emery (Chairman), Ms R Gale and Mr J Lindon

REPRESENTATION

The Appellant is represented in the Appeal by Ms Samani of Athena Law and the Respondent is represented in the Appeal by Ms Unsworth of Advocates Smith Taubtiz Unsworth Ltd. Ms Jay, the Legal Aid Certifying Officer (**LACO**) has appeared in the Appeal in person.

DECISION

Subject to the Respondent's Advocate, Ms Unsworth, confirming to the Tribunal in writing within the next 30 days of the date of this judgment that the Respondent's legal aid application has been formally sworn in accordance with Regulation 4(9) of the Legal Aid (General) Regulations 1997, that the Appeal be and is hereby dismissed.

REASONS FOR DECISION

Introduction

1. This judgment follows a substantive hearing before the Legal Aid Appeals Tribunal (**the Tribunal**) on Tuesday 23 May 2023.
2. With the agreement of the Advocates and the LACO, whilst ordinarily judgments of the Tribunal are not published, a redacted copy of this judgment is to be made publicly available on the Legal Aid Appeals Tribunal website, as it is understood that this judgment may be of wider interest given that it clarifies:
 - a. That the Tribunal has jurisdiction to consider appeals by an opposing party relating not only to appeals against the legal merits test, but also concerning whether or not an assisted person satisfies the financial means test for legal aid;
 - b. What additional information is required from the LACO and what typical procedural steps are appropriate in appeals concerning the financial means test; and
 - c. The types of order which the Tribunal may make in determining appeals.

Summary of proceedings to date

3. Proceedings to date can be summarised as follows:
 - a. On 15 September 2022 a Legal Aid Certificate (numbered LA/02/11/00054) (**the Certificate**) was granted by the LACO.

- b. On 27 September 2022 the Appeal was filed by the Appellant, with various written submissions filed thereafter by the Appellant, Respondent and the LACO.
- c. On 2 December 2022 there was a hearing listed before the Tribunal, whereby it was originally expected that the Appeal would be determined in full. Unfortunately during the course of oral submissions at the hearing it transpired that a piece of legislation relied upon by the LACO (namely section 14 of the Legal Aid Act 1986) relating to secrecy had in fact recently been repealed and replaced by Tynwald. The effect of this was that the veil of secrecy which had previously been relied upon by the LACO in all appeals up to and including that hearing could no longer be relied upon going forward since the amended section 14 of the Legal Aid Act 1986 states that the obligation of secrecy does *"not apply to the disclosure of information ... (a) for the purpose of ... any court or Tribunal ..."*. As a consequence, the hearing was adjourned with directions for the LACO to obtain and file written submissions (**the Written Submissions**) from the Treasury Officer, XXXXXXXXXXXX (**the Treasury Officer**) (being the person responsible for assessing financial eligibility), outlining in detail the basis upon which legal aid was granted to the Appellant and subsequent financial re-determinations, with reference to supporting documents in a paginated exhibit bundle. The reason for this direction was so that at the future substantive hearing the Tribunal could, in the event that it was satisfied that the Tribunal had jurisdiction to consider the financial means limb of the Appeal, properly be able to consider and determine the same. However, concerned with the sensitive and potential confidential nature of the Written Submissions and documents referred to therein, the Tribunal determined that upon receipt of the same a copy of the Written Submissions and any attached documents were only to be shared initially with the Respondent, who was then to be given an opportunity to file any objections to the same being shared in full with the Appellant.
- d. On 22 December 2022 the LACO filed the Written Submissions. The Respondent subsequently notified the Tribunal that she objected to the same being provided to the Appellant, or in the alternative required a number of redactions before doing so. The Tribunal did not agree with the Respondent that it lacked jurisdiction to provide the Written Submissions to the Appellant, and was concerned that the fundamental principles of open justice and fairness required the Appellant to be afforded an opportunity to consider the Written Submissions (or at least certain parts of the same) in order for the Appellant to be able to properly engage in the substantive determination of the Appeal. That said, the Tribunal noted that Respondent's pertinent submissions that information/documentation must be treated in the highest of confidence and that the Tribunal was not to be used for a collateral purpose as a vehicle for obtaining private information from an opposing party. In balancing the competing interests the Tribunal therefore ordered the Written Submissions were to be shared with the Appellant, subject to certain redactions. The Appellant was then given until Friday 17 February 2023 to file submissions if he wished to see the redacted documents, following which the Tribunal would consider and determine the same.
- e. On 17 February 2023 the Appellant notified the Tribunal that he sought disclosure of the Written Submissions on a full and un-redacted basis. By its administrative judgment dated 22 March 2023 the Tribunal highlighted that whilst section 23A of the Legal Aid Act 1986 outlines that *"the Tribunal has such jurisdiction as may be prescribed"*, no such secondary legislation has been brought into effect and unlike most other tribunals in the Isle of Man, Tynwald has not created any procedural rules for the Tribunal. The Tribunal therefore determined that it had a wide discretion in

managing its own appeals, provided that the same is exercised judicially in accordance with Isle of Man law and that due regard is given to the important principles of open justice and the rights under Article 6 (the absolute right to a fair trial) and Article 8 (the qualified right to respect for private and family life, home and environment) of the European Convention of Human Rights (as applied in the Isle of Man via the Human Rights Act 2001). In applying these principles, by its judgment dated 22 March 2023 the Tribunal ordered that the Written Submissions be shared in full with the Appellant, save for one Tab of documents (containing highly confidential documentation relating to bank accounts, property, income and inheritances, not only relating to the Respondent but also to her partner) which was to remain redacted. This order of the Tribunal was not appealed.

Summary of the underlying court proceedings/the Certificate

4. In terms of a short summary of the underlying proceedings relating to the Certificate, the Certificate concerns proceedings (**the Claim**) issued by the Respondent, who is currently resident in France, before the Isle of Man High Court of Justice (**the Court**) seeking an order from the Court that a deed of gift (**the Gift**) between the Respondent's late mother (**the Mother**) and the Appellant (who is the Respondent's sibling) transferring a property to be set-aside due to alleged undue influence/financial abuse by the Appellant towards the Mother, together with the return of certain chattels. The stated value of the Claim is in the region of £850,000. A defence to the Claim was filed by the Respondent on 25 November 2021, and an Application Notice dated 6 May 2022 (**the Application**) was also filed by the Respondent seeking summary judgment/strike-out of the Claim, or in the alternative, an order pursuant to Rule 10.50 and/or 7.2(3) of the Rules of the High Court of Justice 2009, seeking security for costs from the Respondent in the total amount of £90,000. Copies of the substantial bundle of pleadings filed by the parties to date in the Claim were before the Tribunal and form part of the record.
5. Turning to the Certificate itself, this was limited to 20 hours, and was only granted to the Respondent to cover the initial first steps in respect of the Claim and the Application, since it was subject to the following limitations:

"To take further instructions from [the Respondent] having issued a claim for the distribution of the estate in accordance with the provisions of the Will...

To respond to the Application contesting the above distribution brought by [the Appellant]

To engage with Advocates Athena Law who represent the interests of [the Appellant] and thereafter advise the Certifying Officer as to case progression"

The basis of the Appeal

6. The Appellant's appeal extends not only against whether or not the Respondent satisfies the legal aid merits test, but also to the question of whether or not the Respondent is financially eligible.

Legal Merits

7. In respect of the first limb of the appeal, namely whether the legal merits test has been satisfied by the Respondent, the relevant legal test is contained at section 2(4)(a)-(b) of the Legal Aid Act 1986 (**the Act**):

"A person must not be given legal aid in connection with any proceedings-

- (a) *If the person fails to show reasonable grounds for taking, defending or being party to the proceedings;*
- (b) *If it appears unreasonable that the person should receive it in the particular circumstances."*

8. The position of the Appellant in respect of the legal merits test is summarised as follows:
 - a. As illustrated in the Application, the claim had no reasonable prospect of succeeding and discloses no reasonable grounds for bringing the Claim and/or is an abuse of process.
 - b. The Respondent has no standing to bring the Claim, as any such claim belongs to the Executor of the Estate of the Mother, who is not a party to the Claim.
 - c. That the Claim seeks a remedy which is wrong in law, as instead of a monetary judgment the appropriate relief should involve the Court declaring that the Gift was void and returning the property to the Estate of the Mother.
 - d. That in respect of the Claim for the return of chattels, many of these assets did not belong to the Respondent and in respect of those which did, they were available for collection and there was no utility in proceedings.
9. The Respondent broadly responds to the Appellant's submission on the legal merits test as follows:
 - a. The Court is the proper arbiter of the Application, which should be heard and determined in due course and that without more its mere existence does not support a lack of legal merits.
 - b. In circumstances where a litigant in person has prepared their own Claim Form and Particulars of Claim, that an opportunity for the Claim Form and/or Particulars of Claim to be reviewed and amended by an Advocate should be afforded, and that the Certificate was sensibly limited in scope to this effect.
10. The LACO's position is broadly that the legal merits test has been satisfied because:
 - a. The Respondent's Advocate, Ms Unsworth, had confirmed to the LACO that the Court had jurisdiction to hear the Claim, the Respondent had legal capacity and that there were reasonable grounds for issuing the Claim which was proper to pursue in law and in fact. The LACO also outlined that on a privileged basis Ms Unsworth had also given her opinion as to the prospects of success and estimate of likely costs.
 - b. The LACO gave full consideration to the Respondent's application for legal aid (**the Legal Aid Application**) and the supporting documents before reaching her decision to grant the Certificate, which was strictly limited in scope to only initial consideration of the Claim and the Application as per paragraph 5 above.
 - c. That the documents considered by the LACO illustrated, in her opinion, that there was clearly an unresolved dispute between the Respondent and the Appellant, and that the dispute contains several complex elements. The LACO was of the opinion that such a dispute is justiciable and may properly be put before the Court for determination.
11. Having carefully considered the written and oral submissions and evidence submitted by the parties, and in particular noting the limited scope of the Certificate and the ability of the Respondent to amend her claim as she sees fit upon taking legal advice from Ms Unsworth, the Tribunal has concluded that there are reasonable grounds for the Respondent pursuing the Claim.
12. Section 2(4)(a)-(b) of the Act requires the Tribunal to assess only whether there are "*reasonable grounds*" for the Claim. This legal test does not require an in-depth rehearsal of future court proceedings by the Tribunal, and instead the Tribunal finds that it is clear from

the written and oral evidence submitted by the parties to date that the Appellant and Respondent, as siblings, have quite a significant dispute in respect of their Mother's Will, which requires careful consideration and determination by the Court. Without the involvement of the Court such a dispute between the Appellant and Respondent will go unresolved, which given the serious accusations made against one another in the Claim and the Application, would be in neither parties' interest.

13. For the reasons outlined above, the Tribunal finds that the Respondent satisfies the relevant merits test for the granting of legal aid.

Financial Means Test

14. The second limb to the Appeal concerns whether the Respondent satisfies the financial means test for the granting of legal aid.

Does the Tribunal have jurisdiction to consider appeals relating to the financial means test?

15. An important preliminary issue which arose at an early stage was whether the Tribunal actually has jurisdiction to consider an appeal by an opposing party in respect of an assisted person meeting the financial means test. Whilst it was certainly the case pre-2014 that there lacked any jurisdiction, following the Legal Aid (General) (Amendment) Regulations 2014 this has changed and it is clear that the Tribunal was established in 2014 with an expanded jurisdiction to consider an appeal by an opposing party in respect of whether or not an assisted person meets the financial means test.
16. In reaching the above conclusion, Regulation 11 of the Legal Aid (General) Regulations 1997 (**the Regulations**) (as replaced by Regulation 8 of the Legal Aid (General)(Amendment) Regulations 2014) now states as follows:

"11. Appeals to the Tribunal

...

(3) If the certifying officer grants an application for a legal aid certificate, any party referred to in regulation 4(3A)(a) may appeal to the Tribunal.

(4) Any decision of the Tribunal on an appeal is final."

17. Regulation 4(3A)(a) of the Regulations refers to *"every other party to the proceedings"*, and Regulation 4(3B) of the Regulations confirms that *"party"* includes *"if proceedings have not started, a person who would be a party to proceedings if they had started"*.
18. It is therefore clear that the Appellant, as a party to the Claim, has standing and an unfettered ability (including, but not limited to an appeal concerning whether the financial means test has been satisfied by an assisted person) pursuant to Regulation 11 of the Regulations to appeal as against the granting of the Certificate. Whilst it is not strictly necessary to look to the relevant extract of Hansard, this was nevertheless brought to the Tribunal's attention and it was highlighted in Hansard (see Tynwald Court, Wednesday 19 November 2014, 4930) in reforming the Regulations that *"These amendment regulations extend the remit of the Tribunal to allow them to consider appeals from the opponent of the assisted person, in relation to a decision to award, or continue to award, legal aid to an assisted person"*.
19. For the above reasons, the Tribunal is satisfied that it plainly does have the jurisdiction to consider appeals by an opposing party in respect of whether or not an assisted person meets the financial means test. Looking forward, where such an appeal against financial eligibility is received in future by the Tribunal, whilst acknowledging that every case will depend upon its

facts, in order to assist with the expedient determination of future appeals of this nature the Tribunal generally expects the following procedure to be adopted going forward:

- a. Notice of an appeal is to be forwarded by the Tribunal to the respondent and the LACO.
- b. The LACO is to file with the Tribunal a response to the appeal, together with written submissions from the Treasury Officer, outlining in detail the basis upon which legal aid was granted (and, if relevant, the basis of any subsequent financial re-determinations) with reference to supporting documents in a paginated exhibit bundle.
- c. The Tribunal will share the LACO's response to the appeal and written submissions of the Treasury Officer only with the respondent, who will be asked to file their response to the appeal and also to confirm at that time whether they are happy for the unredacted written submissions of the Treasury Office to be shared with the appellant.
- d. Upon receipt of c) above, the Tribunal will share the respondent and LACO's response to the appeal with the appellant, and also the written submissions and supporting documents of the Treasury Officer (either on an unredacted or redacted basis, as determined by the Tribunal).

Did the Respondent satisfy the financial means test?

20. Noting that the Tribunal has jurisdiction, it must now consider whether or not the Respondent satisfies the financial means test. In this regard, the first argument advanced by the Appellant was that the level of scrutiny applied in the assessment of the Legal Aid Application and subsequent re-determinations by the Treasury Officer was woefully inadequate. The Appellant averred that in circumstances where there were serious allegations made by the Appellant towards the Respondent in respect of fraud, a much more rigorous exercise should have been undertaken.
21. In advance of the hearing the Appellant had alluded to issues which were allegedly not considered by the Treasury Officer. However, it is clear from the evidence of the Treasury Officer that upon these concerns being raised during the course of the Appeal that the same were considered in various subsequent re-assessments and that the Respondent was still found to have satisfied the financial means test.
22. The Appellant's Advocate, Ms Samani, was asked by the Tribunal on a number of occasions during the course of the hearing to particularise what it was which the Appellant alleged had not been properly/correctly taken into account by the Treasury Officer or alternatively, if there was as at the date of the hearing any specific financial concerns which remained unaddressed. The Appellant's Advocate was however unable to provide a positive response or provide any further information in this regard. Instead, in her oral submissions Ms Samani advanced the suggestion that because there was alleged fraudulent activity by the Respondent that more investigation was required than had been undertaken to date. The Tribunal did not find this submission persuasive. The Tribunal finds that it is clear from the evidence of the Treasury Officer that a very comprehensive process had been undertaken in assessing the Respondent's financial eligibility, and where potential new information had emerged (in the form of allegations made by the Appellant during the course of the appeal) these issues were considered and investigated by the Treasury Officer with the Respondent's Advocate, with a re-determination conducted, resulting in a finding by the Treasury Officer on each occasion that the Respondent remained financially eligible for legal aid. This process appeared to the Tribunal to be thorough, but particularly so in circumstances where

investigations must be proportionate to the nature of the legal aid certificate being granted and in this case only a limited certificate had been granted by the LACO for initial assistance to be given by Ms Unsworth to the Respondent in considering the Claim and the Application.

23. In reaching its decision the Tribunal is mindful of the limited resources of the Treasury Officer/LACO to investigate matters and that there was the continued involvement throughout the process of Ms Unsworth as an officer of the Court, who confirmed during the course of the hearing that she had raised, as she ordinarily would do so, the seriousness of the application to the Respondent when it was first filed and the fact that it is a criminal offence to fraudulently obtain legal aid. The Tribunal also attaches significant weight to the evidence of the Treasury Officer on the thorough process undertaken, particularly in circumstances where there is no contemporaneous evidence before the Tribunal illustrating a clear error by the Treasury Officer on financial eligibility. For these reasons the Tribunal does not agree with the Appellant that the level of scrutiny applied by the Treasury Office was inadequate.

Has the Respondent complied with Regulation 4(9) of the Regulations?

24. The Appellant's second and final ground of appeal on the financial means test was the argument that the Legal Aid Application was not formally sworn by the Respondent in France in accordance with Regulation 4(9) of the Regulations, which reads as follows:

"In the case of a person resident outside the Island and not able to be present there while his application is being considered, the application-

...

(b) shall be sworn-

...

(ii) if he is resident [outside of the Commonwealth or the Republic of Ireland], before a consular officer in the service of the Government of the United Kingdom, or any other person for the time being authorised to exercise the functions of such consular officer or having authority to administer an oath in that place, and

(c) shall be accompanied by a statement in writing signed by some responsible person who has knowledge of the facts, certifying that part of the application which relates to the applicant's income and capital."

25. Regulation 4(11) of the Regulations is also of relevance, which states:

"The requirements of paragraph 9 may be waived by the Chief Registrar where compliance with them would cause serious difficulty, inconvenience of delay..."

26. This ground of appeal in respect of the financial means test unfortunately only arose during the course of oral submissions at the hearing. In response to this being raised Ms Unsworth stated that she required time to consider the same, and so the parties were afforded an opportunity by the Tribunal to file supplemental written submissions limited to this issue following the conclusion of the hearing (**the Supplemental Written Submissions**).
27. Having considered the Supplemental Written Submissions, the position of the Respondent on this point is that Regulation 4(11) of the Regulations is significantly out of date, and that with the Chief Registrar no longer playing any active role in the assessment and granting of legal aid, this function now purportedly rests with the Treasury Officer despite the wording in the legislation to the contrary. The Respondent avers that Regulation 4(11) of the Regulations has

been applied routinely by the LACO using her apparent wide discretion pursuant to Regulation 4(2) of the Regulations (which states “*every application shall be made in writing in an approved form or in such other form as the certifying officer may accept as sufficient in the circumstances of the case and shall be lodged with the certifying officer*”). The Respondent asserted that such a process had been followed in this case and an oath was sworn before Ms Unsworth in a video call. However, the Tribunal is of the view that Regulation 4(9) of the Regulations is a mandatory requirement, and the wording of the regulations is clear in that it is only the Chief Registrar who may waive the same. Whilst there may be issues with the regulations being out of date, it is not for the Tribunal, as a creature of statute, to overrule the same and it is bound by the wording of the legislation. As such, the Tribunal agrees with the Appellant that Regulation 4(9) of the Regulations has not been complied with and Regulation 4(11) of the Regulations does not apply to this situation as there was no waiver by the Chief Registrar. The Tribunal agrees with Ms Samani that Regulation 4(2) of the Regulations only applies merely to the form of application, and it does not allow one to ignore mandatory requirements set out in the regulations made by the Legal Aid Committee pursuant to its powers under section 16(1) and 16(2)(c) of the Act.

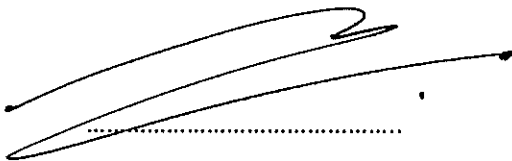
28. For the above reasons the Tribunal therefore finds that Regulation 4(9) of the Regulations has not been complied with by the Respondent and the Legal Aid Application should have been sworn before a British consular office in France. For completeness there were additional submissions contained in the Supplemental Written Submissions concerning the administering of Oaths, but given the above finding these submissions are no longer relevant as the Tribunal has found that Regulation 4(9) of the Regulations has not been complied with.
29. Noting the finding by the Tribunal that the Respondent has not complied with Regulation 4(9) of the Regulations, the Respondent states in the Supplemental Written Submissions that she can simply re-swear the application in France. In contrast, the Appellant disagrees and asserts that the regulations do not provide for the “rectification” of the Legal Aid Application, and so *“as regrettable as that might be, a new application will need to be submitted (which application must comply with the mandatory requirements of the Regulations) for consideration by the LACO”*.
30. In considering the powers of the Tribunal in determining any appeal, it is stated at page 19 of the *Legal Aid – Advocates Handbook – 6th edition (the Handbook)*, that the Tribunal has the power to order any of the following:
 - a. *“Dismiss the appeal*
 - b. *Direct the Certifying Officer to offer a Legal Aid Certificate subject to terms and conditions, or to amend the Legal Aid Certificate as the Tribunal thinks fit*
 - c. *Direct the Certifying Officer to set terms and conditions*
 - d. *Refer the matter, or any part of it, back to the Certifying Officer for their determination and report”*
31. However, the above appears to be an incorrect historic reference in the Handbook to the pre-2014 wording contained at Regulation 11(8) of the Regulations, which referred to the previous powers of the Legal Aid Committee. As outlined above at paragraph 16, this specific paragraph of the regulations was repealed and replaced with a new Regulation 11 in accordance with Regulation 8 of the Legal Aid (General) (Amendment) Regulations 2014, which established the Tribunal as the arbiter of appeals in place of the Legal Aid Committee. In contrast to the previous wording for the Legal Aid Committee, in the replaced wording for the Tribunal no such similar wording dealing with its powers upon determining any appeal was included. As

such, there is no specific legislation confirming the powers of the Tribunal upon determining any appeal. That said, it would seem reasonable to assume that similar broad powers were intended for the Tribunal, and it is notable from paragraph 30 above that there was a broad power to dismiss the appeal and/or to vary the Legal Aid Certificate as the Committee saw fit.

32. In circumstances where the only defect in the Certificate is a technical breach by the Respondent to have the Legal Aid Application originally sworn before a British consular office in France in accordance with Regulation 4(9) of the Regulations, the Tribunal determines that the most practical method of dealing with the Appeal is to use its wide powers in determining any appeal before it to make an order that the appeal is dismissed, but that this order is expressly subject to the Respondent's Advocate, Ms Unsworth, confirming in writing within the next 30 days of the date of this judgment to the Tribunal that the Legal Aid Application has been formally sworn in accordance with Regulation 4(9) of the Regulations.
33. The Tribunal is of the view that the above is the most logical, efficient and just manner to deal with the Appeal, ensuring that the technical defect in the Legal Aid Application is satisfactorily addressed, whilst allowing the parties to move forward with the Claim and the Application without further delay.

Conclusion

34. For the above reasons and subject to the Respondent's Advocate, Ms Unsworth, confirming to the Tribunal in writing within 30 days of the date of this judgment that the Legal Aid Application has been formally sworn in accordance with Regulation 4(9) of the Regulations, the Appeal be and is hereby dismissed.
35. The Tribunal is grateful to the valuable assistance of Ms Samani, Ms Unsworth and the LACO for their written and oral submissions during the course of the Appeal. The Tribunal trusts that the LACO will ensure that the appropriate public guidance will be reviewed as a consequence of this judgment and that a redacted copy of this judgment will be circulated to the Legal Aid Committee.



Mark Christopher Emery

Chair of the Isle of Man Legal Aid Appeals Tribunal

4 July 2023