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Sandy Brindley

25 May 2017

Dear Sandy,

THE ASSISTANCE BY WAY OF REPRESENTATION (PROCEEDINGS FOR RECOVERY OF DOCUMENTS) (SCOTLAND) REGULATIONS 2017

Thank you for your email dated 25 January 2017 responding to our consultation, sent out 22 December 2016.

As you will be aware, the Scottish Government is committed to make available non-means tested legal aid funding available for advice by way of representation (ABWOR) for those seeking to make representations in respect of the recovery of their medical or other sensitive documents in criminal proceedings.

We note the comments you made in your email which I have responded to below.

Paragraph 4(1) - definition of “recovery proceedings”

It is important to make clear that the regulations are a measure directly concerned with, and only with, the procedural and substantive ramifications of Lord Glennie’s judgment in the case of *WF v Scottish Ministers*. As you are aware and put simply, *WF*, procedurally, has established the right of a party to make representations where (a) an application for recovery of documents is intimated to them, and (b) the party considers that their Article 8 rights are or may be infringed. The regulations are concerned solely with making ABWOR available so that the party, if they wish, can be legally represented through public funding.

You are concerned that retaining the reference to “on the basis that the granting of the order would infringe their rights under Article 8 of the European Convention on Human Rights” is unduly restrictive. I do not agree. The reference simply echoes the policy objective of making provision for the circumstances permitted by Lord Glennie’s judgement, and these regulations are framed to deliver on that judgement.

Paragraph 4(4) - Effective participation test

Regulation 13 of the ABWOR regulations applies different threshold tests to different circumstances. One of the tests is an effective participation test. The determination under section 4(2)(c) of the Legal Aid (Scotland) Act 1986, which the regulations will supersede, currently carries an effective participation test and all applications made to date have been successful. On the basis of experience to date, the Scottish Legal Aid Board have advised that they envisage applications to oppose recovery of medical or other sensitive documents on the basis that it would infringe Article 8 are likely to satisfy the effective participation test.

You are concerned about the practicalities of how a solicitor will satisfy the Board that legal representation is required to allow their client to participate effectively in the proceedings. The solicitor would outline to the Board what it is about the client and/or the argument to be put that would require a solicitor, for the presentation to be effective.

It should be noted that the effective participation threshold applied is not novel to the Board or solicitors. For example, it is also used where publicly funded legal assistance is sought for proceedings in children's hearings. The Board indicates that solicitors generally have no difficulty articulating relevant facts and circumstances in appropriate cases.

The requirement for prior approval, with the effective participation test, gives assurance to the solicitor that work, if necessarily and reasonably done, will be paid for.

Legal aid for appeals

As we set out in the consultation, we welcomed comments on ensuring the regulations meet the policy intent, which is to deliver the points made by Lord Glennie in his judgement. I note your concerns about there being instances of failure to notify. While this is an important issue, it sits beyond the purpose of these regulations. Nonetheless, we have checked with the Board and they are not aware of any requests for publicly funded legal assistance where there has been a failure to notify under the determination. I hope that gives some reassurance.

I hope you find this response helpful. We will keep you informed of the intended laying date.

Yours sincerely

DENISE SWANSON
Head of Access to Justice Unit