STATUTORY INSTRUMENTS

1996 No. 2555

The Criminal Legal Aid (Scotland) Regulations 1996

Citation, commencement and application

1.—(1) These Regulations may be cited as the Criminal Legal Aid (Scotland) Regulations 1996 and, subject to paragraph (2) below, shall come into force on 1st November 1996.

(2) Regulation 14(d) shall apply only to work done on or after 1st November 1996.

Interpretation

2.—(1) In these Regulations, unless the context otherwise requires–

"the Act" means the Legal Aid (Scotland) Act 1986;

"the 1995 Act" means the Criminal Procedure (Scotland) Act 1995(**1**);

"assisted person" means a person to whom criminal legal aid has been made available in relation to the proceedings in question;

"counsel" includes a solicitor-advocate;

"junior counsel" includes a junior solicitor-advocate;

"legal representative" means a person having parental responsibilities within the meaning of section 1(3) of the Children (Scotland) Act 1995(**2**) in relation to a child or a curator bonis, tutor, judicial factor or guardian;

"right of audience" means, in relation to a solicitor, a right of audience in the High Court of Justiciary which a solicitor has by virtue of section 25A (rights of audience in specified courts) of the Solicitors (Scotland) Act 1980(**3**);

"senior counsel" includes a senior solicitor-advocate, except in paragraph (2) below;

"solicitor-advocate" means a solicitor, whether instructed by another solicitor or not, when and only when he is exercising his right of audience or acting in connection with the exercise of such a right and "junior solicitor-advocate" and "senior solicitor-advocate" shall be construed in accordance with paragraph (2) below;

and, unless the context otherwise requires, any reference in these Regulations to a solicitor shall not include a solicitor when acting as a solicitor-advocate.

(2) For the purposes of these Regulations, a solicitor-advocate shall be–

(a) a senior solicitor-advocate, where he is undertaking work equivalent to that which would be done by a senior counsel in a case where the proceedings relate to a prosecution or conviction for murder or where the Board has authorised the employment of senior counsel under regulation 14(1)(a) or (2) below; and

(**1**) 1995 c. 46.
(**2**) 1995 c. 36.
(**3**) 1980 c. 46, section 25A was inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 24, and was amended by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c. 40), Schedule 4, paragraph 31.

(b) a junior solicitor-advocate, where he is undertaking work equivalent to that which would be done by a junior counsel, whether or not the Board has authorised the employment of senior counsel in the case.

Revocations and savings

3.—(1) Subject to paragraphs (2) and (3) below, the Regulations specified in the Schedule to these Regulations are hereby revoked.

(2) The revocation by these Regulations of–

(a) a transitional provision relating to the coming into force of, or

(b) an application provision which restricts the application of,

a provision, which is revoked and re-enacted by these Regulations, does not affect the operation of that transitional provision or, as the case may be, application provision, insofar as it remains capable of having effect, in relation to the provision which is re-enacted in these Regulations.

(3) Where a period of time specified in any provision which is revoked by these Regulations, is current at the date of coming into force of these Regulations, these Regulations have effect as if the provision which re-enacts that revoked provision in these Regulations had been in force when that period began to run.

Distinct proceedings for purposes of criminal legal aid

4.—(1) For the purposes of criminal legal aid, the following shall be treated as distinct proceedings:–

(a) any such identification parade as is referred to in section 21(4)(b)(**4**) of the Act;

(b) any such proceedings as are described in section 22(1)(b) of the Act;

(c) solemn proceedings other than such proceedings referred to in sub-paragraph (b) above or (j) below;

(d) any such proceedings as are described in section 22(1)(c) of the Act;

(e) summary proceedings other than such proceedings referred to in sub-paragraph (d) above or (j) below;

(f) appeals to the High Court of Justiciary against conviction, sentence, other disposal or acquittal;

(g) petitions to the *nobile officium* of the High Court of Justiciary (whether arising in the course of any proceedings or otherwise);

(h) references by the Secretary of State under section 124 of the 1995 Act;

(i) such proceedings as are described in section 22(1)(e) of the Act;

(j) such proceedings as are described in section 22(1)(da), (db) or (dc) of the Act(**5**).

(2) The distinct proceedings specified in paragraph (1) above shall be treated as including the following related proceedings (which are accordingly not to be treated as distinct proceedings for purposes of criminal legal aid):–

(a) applications for bail or review of bail, or appeals in respect of bail;

(b) in relation to paragraph (1)(c) above, proceedings following a remit for sentence to the High Court of Justiciary under section 195 of the 1995 Act;

(**4**) Section 21(4)(b) was amended by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995, Schedule 4, paragraph 63(2).

(**5**) Sections 22(1)(da), (db) and (dc) of the Legal Aid (Scotland) Act 1986 were inserted by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995, Schedule 4, paragraph 63(3).

(c) in relation to paragraph (1)(f) above, proceedings following a remit from the High Court of Justiciary to the inferior court in accordance with section 185 of the 1995 Act;

(d) in relation to paragraph (1)(c) above, any proceedings up to and including the first hearing of the complaint where a charge is reduced from solemn to summary proceedings and, if a plea of guilty is tendered, thereafter to the conclusion of the case.

Duty solicitors

5.—(1) The Board shall make arrangements for there to be available, in each sheriff court district and district court district, at all times throughout the year, when required, solicitors, hereinafter referred to as "duty solicitors", for the following purposes:–

(a) attending (other than in the circumstances specified in sub-paragraph (b) below), whether in person or by means of a representative who is a solicitor, at any such identification parade as is referred to in section 21(4)(b) of the Act at which the services of the duty solicitor are required;

(b) attending on any person who has been taken into custody on a charge of murder, attempted murder or culpable homicide and who requires the services of the duty solicitor, and advising and acting for such a person until he is admitted to bail or is committed until liberated in due course of law;

(c) advising and acting for any person in custody (other than a person referred to in sub-paragraph (b) above) whose case is being prosecuted under solemn procedure, on the day when that person is first brought before a sheriff for examination and thereafter until he is admitted to bail or is committed until liberated in due course of law;

(d) advising and acting for any person who is being prosecuted under summary procedure and who is either in custody or has been liberated under section 22(1)(a) of the 1995 Act (liberation by police on undertaking to appear) on the day when that person is first brought before a court to answer to any complaint and thereafter–

(i) until the conclusion of the first diet at which he is called upon to plead and in connection with any application for liberation following upon that diet; and

(ii) where he has tendered a plea of guilty at that diet, until his case is finally disposed of.

(2) The references to "advising and acting" in regulation 5(1) shall include the services of the duty solicitor at any preliminary plea to the competency or relevancy of the petition or complaint and at any plea in bar of trial or any mental health proof.

(3) Where a duty solicitor is available by virtue of arrangements made by the Board in accordance with sub-paragraph (d) of paragraph (1) above, section 31(1) of the Act shall not apply, and criminal legal aid for the purposes specified in the said sub-paragraph (d) shall be provided only by such solicitor.

Applications for criminal legal aid in solemn proceedings

6. An application for criminal legal aid under section 23(1)(a) of the Act shall be made in writing and shall be in such form as the court may require.

Availability of other rights and facilities in proceedings to which section 23 of the Act applies

7.—(1) Where it appears to the court that an applicant for criminal legal aid under section 23 of the Act has available to him rights and facilities making it unnecessary for him to obtain legal aid, or has a reasonable expectation of receiving financial or other help from a body of which he is a member, the court shall not, unless it is satisfied that there is special reason for doing so, make legal aid available to him.

(2) The court, before making legal aid available under section 23(**6**) of the Act to a person who is a member of a body which might reasonably have been expected to give him financial help towards his defence, shall require him to undertake in writing that he will pay to the Board any sum received from that body on account of the expenses of his defence.

Applications for criminal legal aid in summary proceedings

8.—(1) An application for criminal legal aid under section 24 of the Act in relation to summary proceedings shall–

(a) be made in writing in such form as the Board may require and be signed by the applicant, or, where the applicant on cause shown cannot sign the application, by a person authorised by him, or, where the applicant is mentally disordered in terms of section 1(2) of the Mental Health (Scotland) Act 1984(**7**), by the applicant's legal representative;

(b) subject to paragraph (2) below, be lodged with the Board within 14 days after the conclusion of the first diet at which the applicant has tendered a plea of not guilty; and

(c) include a statement signed by or on behalf of the solicitor nominated by the applicant as to his willingness to act for the applicant.

(2) Paragraph (1)(b) above shall not apply where either–

(a) in the circumstances specified in section 24(6) of the Act the court has adjourned the trial diet to enable an application for legal aid to be made to the Board and that application is lodged with the Board within 14 days of the adjournment; or

(b) the Board considers that there is special reason for it to consider a late application.

Attendance for interview and supply of information

9. An applicant for criminal legal aid under section 24 of the Act shall, if required by the Board to do so, attend for interview by a representative of the Board or supply such further information or such documents as the Board may require to enable it to determine the application.

Availability of other rights and facilities in summary proceedings

10.—(1) Where it appears to the Board that an applicant for criminal legal aid under section 24 of the Act has available to him rights and facilities making it unnecessary for him to obtain legal aid, or has a reasonable expectation of receiving financial or other help from a body of which he is a member, the Board shall not, unless it is satisfied that there is special reason for doing so, make legal aid available to him.

(2) The Board, before making criminal legal aid available under section 24 of the Act to a person who is a member of a body which might reasonably have been expected to give him financial help towards his defence, shall require him to undertake in writing that he will pay to the Board any sum received from that body on account of the expenses of his defence.

Notification of decision

11.—(1) The Board shall inform an applicant for criminal legal aid under section 24 of the Act, and the solicitor nominated by him, of its decision in regard to the application.

(**6**) Section 23(2) was amended by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995, Schedule 4, paragraph 63(4).

(**7**) 1984 c. 36.

(2) Where the Board refuses an application for criminal legal aid under section 24 of the Act, it shall inform the applicant and the solicitor that the application has been refused on one or more of the following grounds, that–

(a) the proceedings in question are not proceedings for which such legal aid is available;

(b) the Board is not satisfied that the expenses of the case cannot be met without undue hardship to the accused person or his dependants;

(c) the Board is not satisfied that in all circumstances of the case it is in the interests of justice that legal aid should be made available to him; or

(d) it appears to the Board that the applicant has available to him rights and facilities making it unnecessary for him to receive legal aid or has a reasonable expectation of receiving financial or other help from a body of which he is a member, and the Board is not satisfied that there is special reason for making legal aid available to him.

Applications for review

12.—(1) An application for a review under section 24(5) of the Act shall–

(a) be in writing;

(b) be signed by the applicant, or, where the applicant on cause shown cannot sign the application, by a person authorised by him, or, where the applicant is mentally disordered in terms of section 1(2) of the Mental Health (Scotland) Act 1984, by the applicant's legal representative; and

(c) subject to paragraph (2) below, be lodged with the Board within 10 days of the time when notice of the refusal of his application was given to the applicant.

(2) Paragraph (1)(c) above shall not apply where the Board considers that there is special reason for it to consider a late application for a review.

Legal aid for criminal appeals

13.—(1) An application under section 25(**8**) of the Act for legal aid in relation to an appeal against conviction, sentence, other disposal or acquittal in criminal proceedings shall–

(a) be in writing in such form as the Board may require and be signed by the applicant, or, where the applicant on cause shown cannot sign the application, by a person authorised by him, or where the applicant is mentally disordered in terms of section 1(2) of the Mental Health (Scotland) Act 1984, by the applicant's legal representative;

(b) include a statement signed by or on behalf of the solicitor nominated by the applicant as to his willingness to act for the applicant;

(c) in the case of an application for criminal legal aid in respect of an appeal under sections 106(1) or 175(2) of the 1995 Act where the person was, before 26th September 1995, convicted of or, as the case may be, found to have committed the offence, include, where the solicitor nominated by the applicant is of the opinion that in all the circumstances there are substantial grounds for taking an appeal, a statement as to the nature of those grounds; and

(d) in the case of an application for criminal legal aid to which section 25(2)(c) of the Act(**9**) applies, include a statement of the grounds of appeal and any other circumstances which the applicant considers relevant to enable the Board to be satisfied that in all the

(**8**) Section 25 was amended by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995, Schedule 4, paragraphs 63(5) to (8).

(**9**) Section 25(2)(c) was inserted by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995, Schedule 4, paragraph 63(6)(b).

circumstances of the case it is in the interests of justice that the applicant should receive criminal legal aid.

(2) Regulations 9, 10 and 11(1) above shall apply in relation to legal aid under section 25 as they apply in relation to legal aid in summary proceedings under section 24.

Prior approval of Board for employment of counsel and expert witnesses and for work of an unusual nature or likely to involve unusually large expenditure

14.—(1) Subject to paragraph (2) below, the prior approval of the Board shall be required–

(a) where the proceedings are in the High Court and are not proceedings relating to a prosecution or conviction for murder, for the employment of senior counsel alone, of senior counsel with junior counsel, or of more than one junior counsel;

(b) where the proceedings are in the sheriff court or the district court, for the employment of counsel;

(c) for the employment of an expert witness; and

(d) for work of an unusual nature or likely to involve unusually large expenditure.

(2) Paragraph (1) above shall not apply where the Board, on an application made to it for retrospective approval for the employment of counsel or, as the case may be, of an expert witness, considers that the employment would have been approved by them and that there was special reason why prior approval was not applied for.

Matters of special urgency

15.—(1) Where an applicant seeks legal aid under section 24 or section 25 of the Act in a matter of special urgency, the Board may, if it thinks fit, make criminal legal aid available to him notwithstanding that it has not been satisfied–

(a) in the case of an application under section 24 of the Act, as to the matters specified in subsection (1) of that section; and

(b) in the case of an application under section 25 of the Act, as to the matters specified in subsection (2) of that section.

(2) Where criminal legal aid is made available under paragraph (1) above, the Board shall–

(a) specify that it is available only for such limited purposes as it thinks appropriate in the circumstances;

(b) require the assisted person as soon as practicable to satisfy it that the requirements of section 24 or, as the case may be, section 25 of the Act are met;

(c) in the case of the assisted person not so satisfying it, cease to make criminal legal aid available to him.

Duty to report completion of proceedings

16. It shall be the duty of the solicitor acting for an assisted person to inform the Board of the conclusion and outcome of the proceedings in respect of which criminal legal aid was made available to the assisted person.

Changes of solicitor

17.—(1) Where the solicitor nominated by an assisted person determines that he should cease to act for him, the solicitor shall notify the Board and, where possible, the assisted person accordingly, and shall supply to the Board a statement of his reasons for ceasing to act.

(2) Where an assisted person has required the solicitor nominated by him to cease to act for him, the solicitor shall notify the Board accordingly and shall supply the Board with a statement of the circumstances, so far as they are known to him, in which he was required to cease to act.

(3) Where an assisted person desires that a solicitor other than the solicitor presently nominated by him shall act for him, he shall apply to the Board for authority to nominate another specified solicitor to act for him, and shall inform the Board of the reason for his application; and the Board, if it is satisfied that there is good reason for the application may grant the application.

Duty of Board to cease to make criminal legal aid available and right to recover sums paid out of the Fund

18.—(1) The Board shall cease to make criminal legal aid available if it is satisfied, after taking account of any explanation offered by the assisted person in respect of sub-paragraphs (a) to (d) below, that he–

(a) has wilfully failed to comply with the provisions of these Regulations as to the information to be furnished by him; or

(b) knowingly made a false statement or false representation in furnishing such information; or

(c) has conducted himself in connection with the proceedings in such a way as to make it appear to the Board unreasonable that he should continue to receive legal aid; or

(d) has wilfully or deliberately given false information for the purpose of misleading the Board in considering his financial circumstances under section 24 of the Act.

(2) Where the Board, in accordance with paragraph (1) above, ceases to make legal aid available–

(a) the Board shall have the right to recover from the assisted person the amount paid out of the Fund in respect of the fees and outlays of his solicitor and counsel;

(b) the solicitor who acted for the assisted person shall have the right to receive from him the difference between the amount payable out of the Fund and the full amount which would be payable to him on a solicitor and client basis in respect of fees and outlays; and

(c) the Board may direct that the assisted person shall cease to be entitled to criminal legal aid in connection with those proceedings.

St Andrew's House,
Edinburgh
3rd October 1996

James Douglas-Hamilton
Minister of State, Scottish Office