EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 39
P261/19

Lord Brodie
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD DRUMMOND YOUNG

in the appeal by

GRAHAM NASSAU GORDON SENIOR-MILNE

Petitioner and Appellant

against

THE ADVOCATE GENERAL FOR SCOTLAND

Respondent

Petitioner and Appellant: Party
Respondent: Webster QC, MacGregor; Office of the Advocate General

2 July 2020

[1] In June 2016 the petitioner submitted a petition to the Queen in which he claimed to be recognized as a Peer of Scotland and to be entered as such on the Roll of the Peerage in respect of his ownership of a Scottish feudal barony, the Barony of Mordington. The petitioner was recognized as the Baron of Mordington by interlocutor of the Lord Lyon dated 11 November 2004, and was granted arms with baronial additaments on 30 October

2007. Although it is not the subject of any express averment, the petitioner accepts that he acquired the Barony of Mordington by purchase of the land to which it attaches from a previous proprietor. The essence of the petitioner's claim to be recognized as a Peer of Scotland is that the owner of a feudal barony is entitled, at least in cases where certain historical conditions are satisfied, to recognition as holding that office and, in consequence, to a seat in the House of Lords. The petitioner further asserts that such a peerage is not subject to the provisions of the House of Lords Act 1999, which severely restricted the ability of hereditary peers to sit in that House.

[2] The petitioner's petition to the Queen was refused; he was notified of such refusal by a letter of 4 December 2018 from the Clerk of the Crown in Chancery. That letter stated:

> "I am writing in relation to your Petition to The Queen concerning the Barony of Mordington. As you know, Her Majesty referred your Petition to the Advocate General for Scotland for consideration and report. The Advocate General for Scotland has advised that nothing further should be done in respect of the present petition, and Her Majesty has accepted this advice.
>
> I must therefore inform you that I cannot direct that your name be placed on the Roll of the Peerage and that no further action will be taken in respect of this matter".

[3] The petitioner subsequently presented the present petition for judicial review of legal advice given to the Queen by the Advocate General in respect of the claim that he submitted in June 2016. He seeks two orders: first, a declarator that the Advocate General acted unlawfully in advising the Queen to perform an unlawful act, namely to deny the petitioner his right of access to a court of law to have his underlying claim to a Peerage recognized, and secondly, a mandatory order requiring the Advocate General to reconsider his advice and to advise the Queen accordingly.

[4] The averments made in the present petition are in summary as follows. The petitioner's peerage claim concerned a title which he already owned and which had been

recognized by the Lord Lyon acting in his judicial capacity. The petition primarily concerned the legal status of that title, namely whether or not the title was a peerage. That had been the subject of the petition to the Queen, but the Queen was bound by constitutional convention to act in accordance with the advice of her ministers. Consequently the decision to refuse the petition to the Queen was effectively an act of the relevant minister, namely the Advocate General, the respondent in the present petition.

[5] The primary basis for the petitioner's peerage claim was the existence of four Scottish feudal baronies recorded on the Roll of the Peerage, namely the Dukedom of Rothesay, the Earldom of Sutherland, the Earldom of Mar and the Barony of Torphichen. Other Scottish feudal baronies had been recognised as peerages in the past but they were now extinct. In view of the recognition of the foregoing baronies as peerages, it is averred that there was no basis for failing to recognise the Barony of Mordington as a peerage. Furthermore, by the Act of Parliament of 1503 (c. 78) all baronies exceeding 100 merklands in extent were accounted greater baronies which, the petitioner avers, amounted to Lordships of Parliament in the modern sense: Stair, Institutions, I.ii.3.2. The Barony of Mordington was approximately 1,000 acres in extent at that time, which, it was said, was greater than the stipulated limit in the Act of 1503; consequently it should count as a greater barony conferring a Lordship of Parliament in the modern sense.

[6] Once the Barony of Mordington had been designated by the Act of 1503 as a peerage in the modern sense, its status could only be removed by an express statutory provision or by necessary implication from a statute. Neither of those had occurred. Moreover, the rights of feudal barons and other owners of heritable jurisdictions, including the right to sit in Parliament as members of the nobility, were expressly preserved as rights of property by article 20 of the Treaty of Union (technically the Act of Union 1707 (c. 7)). Article 20

provides that all heritable offices should continue to be enjoyed in the same manner as they were previously enjoyed under the law of Scotland.

[7] Consequently the petitioner was asserting a legal right to sit as a peer in the House of Lords. In view of that characterization of his claim, it should have been referred by the Queen to a court of law. Such a court might have been the House of Lords, or another court such as the Judicial Committee of the Privy Council. Thus the advice given by the Advocate General to the Queen denied the petitioner access to a court, and on that basis was open to challenge.

[8] In the petition some reliance is placed on Magna Carta and the English Act of Union of 1706 (6 Ann c 11). In this respect, we observe that Magna Carta has no force of law in Scotland; it is an English document, and at the time of its execution, 1215, England was an independent country from Scotland. So far as the Union is concerned, it is the Scottish Act of 1707 that is binding in Scotland, including the provisions of the treaty that form part of that Act. The references to Magna Carta are intended to support the right of access to a court of justice. In Scotland, of course, such a right has long been recognized, but its origins lie in the common law, not in any English constitutional document.

The requirement of permission to proceed

[9] Section 27B(1) of the Court of Session Act 1988 provides that no proceedings may be taken in respect of an application to the supervisory jurisdiction of the Court unless the Court has granted permission for the application to proceed. Section 27B(2) provides that the Court may grant permission for an application to proceed only if it is satisfied that the applicant can demonstrate sufficient interest, and the application has "a real prospect of success". The Advocate General opposed the grant of such permission in the present case,

on the basis that the grounds of challenge put forward in the petition had no real prospect of success. In the answers for the Advocate General, reliance is placed on the proposition that the petitioner sought to challenge legal advice provided to the Queen in relation to an issue, the recognition of a peerage, that itself is not justiciable. Furthermore, the petitioner sought to have the court examine the merits of the legal advice, which would be covered by legal professional privilege. Finally, there was no competent basis set out in the petition to invoke the supervisory jurisdiction of the Court, as the petitioner in effect invited the Court to substitute its own views for those of the Advocate General and the Queen.

The Lord Ordinary's decision

[10] The petition called before the Lord Ordinary to determine whether permission to proceed should be granted. Following an oral hearing the Lord Ordinary refused such permission. He gave reasons immediately following the hearing, and those are now set out in a note. In summary, those reasons are as follows.

[11] The petition was based on the Court's supervisory jurisdiction, under which the Court of Session has power to regulate the process by which decisions are taken by any person or body to whom a jurisdiction, power or authority has been delegated or entrusted. The sole purpose of the supervisory jurisdiction is to ensure that such a person or body does not exceed or abuse that jurisdiction, power or authority: *West* v *Secretary of State for Scotland*, 1992 SC 385, at 412-413. It is not competent for the Court to review such an act or decision on its merits. In the present case, the petition was expressly described as being for judicial review of legal advice given to the Queen by the Advocate General. That raised two fundamental problems. First, the Advocate General did not make the decision that the petitioner seeks to challenge; he merely provided legal advice. Secondly, the Advocate

General did not have committed to him and did not exercise any jurisdiction, power or authority in respect of the petitioner's application for a peerage; he simply supplied legal advice to the Queen. That was not a matter that the Court could properly review under its supervisory jurisdiction.

The appeal/reclaiming motion

[12] The petitioner has reclaimed against the Lord Ordinary's decision on a number of grounds. We deal with the majority of those grounds individually, albeit briefly. First, however, we will consider the argument accepted by the Lord Ordinary, that no decision was taken by the Advocate General that was capable of being judicially reviewed; the Advocate General merely tendered legal advice, and no jurisdiction capable of judicial review was entrusted to him. Secondly, we will consider an argument developed by the petitioner to the effect that the Queen was obliged to accept the Advocate General's advice, with the result that the Advocate General was effectively exercising a decision-making function. On this matter we agree with an argument presented on behalf of the Advocate General that decisions of the Queen in relation to the grant of honours are not susceptible to judicial review. In addition, after considering the arguments put forward in the petitioner's grounds of appeal, we will consider the esto (alternative) argument put forward by the Advocate General, namely that even if there were any merit in the grounds of appeal such error is not material, because the same decision was inevitable in view of the merits of the case. We would emphasize that this is considered on a hypothetical basis; judicial review is not generally concerned with the underlying merits of the decision, but rather with matters such as whether a legal power exists to make the decision in question and the procedures and formal reasoning used in reaching that decision.

Decision

[13] In our opinion the present application has no real prospect of success, for two distinct reasons, each of which is conclusive by itself. In relation to the expression "real prospect of success", we follow the test explained by LP Carloway in *Wightman* v *Secretary of State for Exiting the European Union*, 2018 SC 388, at paragraph [9]. The applicant must demonstrate a real prospect, which is less than probable success but has substance. Something more than arguability or statability is required.

1. No decision was taken by the Advocate General that is capable of being judicially reviewed

[14] The Court of Session's supervisory jurisdiction was defined in *West* v *Secretary of State for Scotland*, *supra*, in the following terms (at 412-413):

> "1. The Court of Session has power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions are taken by any person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument.
>
> 2. The sole purpose for which the supervisory jurisdiction may be exercised is to ensure that the person or body does not exceed or abuse that jurisdiction, power or authority or fail to do what the jurisdiction, power or authority requires.
>
> …"

The Court added that judicial review is available "not to provide machinery for an appeal, but to ensure that the decision-maker does not exceed or abuse his powers or fail to perform the duty which has been delegated or entrusted to him. It is not competent for the court to review the act or decision on its merits". In all of the foregoing, we would emphasise the fact that the power of judicial review is intended to regulate decisions and the process by which such decisions are taken.

[15] In the present case the Advocate General provided legal advice to the Queen in relation to the petitioner's claim to a peerage. Giving advice is not the same as making a decision. In giving legal advice the Advocate General did not exercise any "jurisdiction, power or authority", whether statutory or otherwise, over the petitioner; he merely provided advice to the decision-maker. Consequently there was no decision taken by the Advocate General which was capable of being judicially reviewed. For this reason we consider that the challenge to the conduct of the Advocate General is misconceived.

[16] The petitioner submitted that the Queen was obliged to act on the advice of the Advocate General as to whether or not he was entitled to be recognised as a peer in consequence of his ownership of the Barony of Mordington. In presenting that submission, he relied in particular on the decision in *R (Miller)* v *Prime Minister; Cherry* v *Advocate General for Scotland*, 2019 SLT 1143, affirming 2019 SLT 1097. In that case, concerning the prorogation of Parliament, it was accepted that the Queen was obliged to act on the advice of the Prime Minister. Nevertheless, the present case is in our opinion fundamentally different. Advice to prorogue Parliament involves a substantive decision by the executive that the operation of the legislature should be suspended for a given period, without any possibility of the legislature's overriding that decision. It is not advice as to the law that is applicable in a particular situation but as to the substance of the decision. Furthermore, it was accepted in that case that the decision to prorogue Parliament was of a political nature, and thus in an area where the sovereign should not dissent from the government, which held office through the exercise of democratic processes.

[17] In the present case, by contrast, the advice given by the Advocate General was legal advice, and it is of the nature of legal advice that it is not binding on the person to whom it is given. That person still possesses the power to make a decision, and in exercising that

power the decision-maker may or may not take account of the legal advice, or may take account of the legal advice in part or in a discriminating fashion. In our opinion advice of that nature cannot be the subject of judicial review, for the simple reason that it is not a "decision" made in the exercise of a jurisdiction, power or authority. Furthermore, the advice had no direct effect on the petitioner's legal rights. Legal advice does not have any such direct effect.

2. Decisions of the Queen in relation to the grant of honours are not susceptible to judicial review

[18] Decisions in relation to the grant of honours have not, so far as we are aware, been the subject of judicial decision in Scotland or elsewhere in the United Kingdom. The grant of honours was, however, considered by the Canadian Federal Court in *Black* v *The Advisory Counsel for the Order of Canada*, 2012 FC 1234, and in our opinion the approach taken in that case by de Montigny J applies equally to cases such as the present. De Montigny J stated (at paragraph [50]):

> "I do not think it can be seriously contended that the conferral or withholding of an honour affects the rights or expectations of a person. By its very nature, the conferring of an honour is a discretionary decision that is not substantially governed by objective standards but rather rests on moral, ethical and political considerations. Neither can one claim a right or a legitimate expectation to receive an honour. As such, the granting or withholding of an honour is not amenable to judicial review, as the courts are not in the best position to determine whether a person should or should not be awarded an honour. As Laskin JA put it in [*Black* v *Canada (Prime Minister)*, 54 OR (3d) 215],
>
> > 'The refusal to grant an honour is far removed from the refusal to grant a passport or a pardon, where important individual interests are at stake. Unlike the refusal of a peerage, the refusal of a passport or a pardon has real adverse consequences for the person affected. Here, no important individual interests are at stake. Mr Black's rights were not affected, however broadly 'rights' are construed. No Canadian citizen has a right to an honour'".

[19] The fundamental point is that an honour is, in its essence, something that lies within the gift of the sovereign. No legal right is involved. Nor does it involve any legitimate expectation. The closest analogy is with a gift in the ordinary sense, where it is obvious that the decision whether or not to make a gift is entirely discretionary in nature, and cannot be reviewed on its merits or made the subject of any form of judicial review.

[20] This was recognised to some extent in *Council of Civil Service Unions* v *Minister for the Civil Service*, [1985] AC 374, where Lord Roskill, at 417-418, discussed whether the exercise of a prerogative power (of which the grant of honours borrowers is an example) can be the subject of judicial challenge. He held, in agreement with Lords Scarman and Diplock, that the exercise of such powers can be the subject of challenge, but not on an unqualified basis. He specifically identified the grant of honours as a matter that was not susceptible to judicial review. We agree with that statement so far as it relates to the grant of honours, for the reasons given in the last two paragraphs of this opinion. Nevertheless, the general application of Lord Roskill's statement to prerogative powers is not a matter that we have to consider, and this part of his opinion may require reconsideration in the light of the decision in *R (Miller)* v *Prime Minister; Cherry* v *Advocate General for Scotland*, *supra*. Regardless of these wider considerations, we are of opinion that the decision of the Queen to grant or withhold an honour cannot be the subject of judicial review, in view of its fundamentally discretionary nature.

[21] Some further support for such an approach can be found in the decision of the European Commission on Human Rights in *X* v *United Kingdom*, (Application 8208/78 (1978) 16 D & R 162). In that case the Commission decided that the right to a hereditary peerage, as a right to sit in the House of Lords, was not a civil right for the purposes of article 6(1) of the European Convention on Human Rights. It held:

> "The Commission considers that the right to participate in the work of the House of Lords cannot be regarded as a 'civil right' within the meaning of Article 6. It is of the opinion that such a right, connected as it is to the composition of part of the legislature, falls into the sphere of 'public law' rights outside the scope of Article 6".

That is entirely consistent with the view that the grant of an honour, even if it entails the right to take part in the work of the legislature, is not a matter that can be the subject of a legal right in the proper sense of that expression. In one ground of appeal the petitioner contends that the Lord Ordinary's decision amounts to a breach of his right to a fair trial under article 6 of the Convention. The decision in *X* v *United Kingdom* makes it clear that in the present case there cannot be any denial of the petitioner's rights under the Convention; any right to sit in the House of Lords and take part in its business is not protected by article 6.

[22] The petitioner submitted that, if the Queen was obliged to accept the Advocate General's advice, that meant that the Advocate General was effectively making a decision which was susceptible to judicial review. In our opinion such an argument must be rejected, for the reasons discussed in the foregoing paragraphs. Even if a decision-making function were involved, the grant of honours is not susceptible to judicial review. The petitioner further placed some reliance on the fact that in the present case he asserted his right to an existing peerage rather than one that was newly created. In our opinion this distinction is immaterial. The fundamental point is that the existence of a peerage is within the gift of the sovereign, and that applies to existing peerages, which may in some circumstances be withdrawn, as well as to new peerages.

3. Other arguments for the petitioner

[23] As already noted, the petitioner presented a substantial number of other arguments. First, he submitted that the Lord Ordinary ought to have recused himself from the case

because of what he describes as the Advocate General's attempt at "character assassination", on the ground that a judge could not read what was written about the petitioner without the possibility of inadvertent bias. We have no hesitation in rejecting this ground. Judges are expected at all times to act with total objectivity and impartiality. On occasion counsel for one party makes derogatory comments about the other party. A judge should invariably treat such comments with proper circumspection, and should only have regard to them if they appear to be borne out by the facts of the case. If a judge is to be criticised for bias or lack of impartiality or objectivity, that is an extremely serious allegation, which must be backed up by detailed evidence. That is wholly lacking in the present case. Information was available about previous litigation, but that litigation was not relevant to be Lord Ordinary's decision, and there is no indication that he took that into account in any way.

[24] The petitioner contends that the Lord Ordinary mischaracterized the nature of the petition, in having regard to the giving of advice by the Advocate General but not the decision to give advice. We are unable to see any significant distinction in this respect; if advice is given, there must inevitably be a decision to give that advice, and both the decision and the advice will normally be considered together.

[25] The petitioner criticises the Lord Ordinary for a failure to give proper reasons for his decision, and in particular for failing to explain which decision the petitioner should have challenged. In our opinion there is no merit in this argument. The Lord Ordinary gave reasons for his decision that are clear and intelligible. Furthermore, there was no obligation on him to provide any advice to the petitioner as to which decision he should challenge; his only responsibility was to deal with the arguments before him.

[26] The petitioner criticises the Lord Ordinary for taking irrelevant considerations into account, in that he took into account the merits of the underlying peerage claim. This

contention appears to be based largely on the amount of time taken up in court in explaining the merits of the underlying claim. Nevertheless, the Lord Ordinary records in his note that he did not reach any views or make any observations on the detail or substance of the points made by the petitioner which underlie the petition and which relate to the alleged denial of the petitioner's right to a peerage. That is borne out by the terms of the Lord Ordinary's note, which does not consider the merits.

[27] The petitioner submits that the Lord Ordinary ought to have made use of the *nobile officium* to permit the petitioner access to a court of law. Reference was made to *Cumbria County Council*, [2016] CSIH 92. In our opinion this ground of appeal is misconceived. The Court of Session's powers under the *nobile officium* are equitable in nature, and the Court is only obliged to consider their exercise if an application to that effect is made. No such application was made in the present case.

4. The Advocate General's alternative argument

[28] The Advocate General presented an alternative argument to the effect that, *esto* there were any merit in the grounds of appeal, such error is not material because the same decision was inevitable in the absence of any error. We will consider this argument briefly, but we must emphasize that our decision is based on the reasoning in paragraphs [14]-[27] above.

[29] Nevertheless, we consider that, had we detected any error in the Lord Ordinary's reasoning, we would have refused the appeal on the basis of the Advocate General's alternative argument. The petitioner's claim was based on his ownership of the Barony of Mordington. Prior to 1707 the word "baron" was used in Scotland to designate two distinct categories of landholder, known respectively as *barones majores* and *barones minores*. The

distinction between these is explained in Greens' Encyclopaedia of the Law of Scotland (Dunedin Ed), volume XI, paragraph 410 (a passage written by T Innes of Learney). The concept of a baron in Scotland was originally wide, and extended both to those with other titles, such as Earl or Viscount, who were the *barones majores*, and to other landholders who held *in liberam baroniam*, who were the *barones minores*. Originally these were ranked together, but after 1587 the *barones minores* were relieved from attendance in Parliament and became a distinct order from the peers.

[30] In *Lord Gray's Motion*, 2000 SC (HL) 46, Lord Hope referred to the same distinction (at 63B-D):

> "Prior to the Union of 1707 the Scottish Parliament, which had only one chamber, consisted of three estates: the bishops, the nobility and the burgesses…. After the episcopacy was abolished in 1689, the titled nobility or peerage constituted an estate by themselves, distinct from that which consisted of the commissioners of the shires who represented the lesser baronage".

It is thus apparent that in Scots law the *barones majores* were drawn from the hereditary peerage, and the *barones minores* were landowners who held their land on barony titles. In *Spencer-Thomas of Buquhollie* v *Newell*, 1992 SLT 973, Lord Clyde observed (at 979) that the essential feature of a barony title was the noble quality of the feudal grant; this was something separate from the land conveyed. Notwithstanding the personal nature of the title, however, it is apparent from the discussion in both Greens' Encyclopaedia and *Lord Gray's Motion* that the *barones minores* were not part of the peerage and did not have any right to sit in Parliament in consequence of their barony title.

[31] In the Treaty of Union, the right of Scottish peers to sit in the Union Parliament is governed by article XXII, which provides that 16 peers will be elected to represent Scotland in the House of Lords. Such elections were regulated by the Act of 1706 c 8. It is apparent from the closing part of that Act that the 16 peers were to be chosen by the peers of Scotland;

the barons (evidently the *barones minores*) were to take part in the election of representatives of the shires, and the burghs were to choose their own representatives. In that provision the lesser barons were treated as ordinary freeholders, and not as members of the peerage.

[32] The legal position of peers on one hand and minor barons on the other differs in one other respect which is of considerable importance in the present case. In *Oliphant* v *Oliphant*, 1633, Mor 10027, it was held that a peerage could not be sold by one subject to another; a peerage was described as "a right… which no subject can dispone, without the approbation of the prince". Minor baronies, by contrast, can be bought and sold; on occasion areas of land were sold with a barony title, which might entitle the purchaser to style himself or herself as the baron or baroness of that land. We understand that that is how the petitioner acquired the Barony of Mordington. Section 63 of the Abolition of Feudal Tenure etc (Scotland) Act 2000 abolishes any conveyancing privilege incidental to a barony, although the section expressly provides that nothing in the Act affects the dignity of baron or any other dignity or office (whether or not of feudal origin). Nevertheless, it would be extraordinary if the right to sit in the upper house of Parliament could be acquired by the mere purchase of an area of land. On the foregoing analysis, that would not happen; only the hereditary peerage would have had the right to sit in the House of Lords. Moreover, following the enactment of the House of Lords Act 1999, no one is to be a member of the House of Lords by virtue of a hereditary peerage, although 90 hereditary peers, selected by their fellows, are exempt from that provision.

[33] We would accordingly have concluded, if it were relevant, that the Barony of Mordington did not confer any status either as a peer or as a member of the House of Lords. It was a minor barony unconnected with any peerage. On that basis, even if there had been an error in the Lord Ordinary's reasoning, we would have refused permission to proceed.

Conclusion

[34] For all of the foregoing reasons we conclude that the petition has no real prospect of success. We will accordingly refuse the appeal.