LEGAL AID FOR JUDICIAL REVIEW AND OTHER UPDATES

The good news

- Yesterday the Divisional Court handed down their judgment in *R (Public Law Project) v Lord Chancellor* [2014] EWHC 2365 (Admin). The court (Moses LJ, Jay J and Collins J) unanimously found that the residence test for civil legal aid, which was to be brought in by secondary legislation on 4 August 2014, was ultra vires and discriminatory: www.judiciary.gov.uk/wp-content/uploads/2014/07/plp-v-ssj-and-other.pdf

- The judgment is powerful. In particular, it criticises Grayling's decision to introduce the residence test in the absence of any proper evidence that it was justified; there was no evidence that it would make any savings nor that LASPO empowers the Lord Chancellor to remove a class of individuals from eligibility for legal aid:

  > "It is true that if the purpose of LASPO is correctly identified, as Mr Eadie on behalf of the Lord Chancellor would have it, as saving public funds and "seeking to further prioritise the expenditure of limited public resources in a time of real financial stringency", then restricting legal aid not only to those with the greatest need but to those with the stronger connection to the United Kingdom, falls within the purpose of LASPO. But, in my judgment, it is not possible to spell out of the statute so broad and general a purpose. As I have said, the criteria adopted by the statute are limited to criteria by which those in the greatest need of civil legal aid are identified." [44]

- Furthermore, the reliance on 'public confidence' in the legal aid system was entirely misplaced:

  > "In the context of a discriminatory provision relating to legal assistance, invoking public confidence amounts to little more than reliance on public prejudice." [84]

- Following the hearing but before judgment was handed down, Grayling wrote an article in the Daily Telegraph on 20 April 2014. In that article he stated:

  > "Most right-minded people think it's wrong that overseas nationals should ever have been able to use our legal aid fund anyway, and when it comes to challenging the action of our troops feelings are particularly strong…We are pushing ahead with proposals which would stop this kind of action and limit legal aid to those who are resident in the UK, and have been for at least a year. We have made some exceptions for certain cases involving particularly vulnerable people, such as refugees who arrive in the UK fleeing persecution elsewhere. But why should you pay the legal bill of people who have never even been to Britain?
  >
  > And yes, you've guessed it. Another group of Left-wing lawyers has taken us to court to try to stop the proposals"

- The court addressed Grayling's actions in stinging terms:

  > "Unrestrained by any courtesy to his opponents, or even by that customary caution to be expected while the court considers its judgment, and unmindful of the independent advocate's appreciation that it is usually more persuasive to attempt to kick the ball than your opponent's shins, the Lord Chancellor has reiterated the

> rationale behind the introduction of the residence test, in the apparent belief that the Parliamentary Under-Secretary had not been as clear as he thought he had been." [60]

- The draft legislation, voted through the House of Commons on 9 July 2014 by 273 votes to 203, is scheduled to go to a vote in the House of Lords on 21 July 2014: www.legislation.gov.uk/ukdsi/2014/9780111113073/pdfs/ukdsi_9780111113073_en.pdf

- It is not yet known whether the draft legislation will be withdrawn in light of the judgment nor whether the Government will seek to put the residence test in primary legislation (possibly the Criminal Justice and Courts Bill 2014) so as to take it out of the reach of judicial scrutiny.

- In addition, on 13 June 2014 Collins J handed down judgment in a multi-handed challenge to the exceptional funding scheme under s10 LASPO: *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWHC 1840 (Admin). In summary, Collins J allowed all of the claims, quashing the refusals to grant exceptional funding, finding the Lord Chancellor's guidance to be defective, confirming that Article 8 ECHR does give rise to a right to legal aid in immigration cases and holding that refugee family reunion cases were in scope for civil legal aid.

- The Public Law Project is bringing a further challenge to the exceptional funding scheme that was separated from this initial challenge, as summarised by Collins J at [53]:

> "These assert that the operation of the scheme puts unacceptable obstacles in the path of applicants and that there is a breach of the Equality Act 2010. I simply note that an application for ECF can only result in payment for any adviser if ECF is granted and, since that has only occurred in 1% of cases, solicitors are not prepared to take on such cases. This may well not be cost effective as I have already indicated. There are also complaints that the process for applying for ECF is too complicated. Those issues will have to be dealt with in subsequent hearings."

<u>The hopeful news</u>

- On 17 March 2014 the Divisional Court (Rafferty LJ and Cranston J) refused permission to apply for judicial review to the Howard League for Penal Reform and the Prisoners' Advice Service in order to challenge the removal of prison law from the scope of legal aid: [2014] EWHC 709 (Admin). In summary, the charities challenge the removal of funding on the basis that it creates an unacceptable risk of unfairness and of a breach of prisoners' human rights and right to access the courts.

- On 30 June 2014 Arden LJ granted the charities permission to appeal this refusal.

- Rights of Women have issued a judicial review challenging the evidence gateways imposed by LASPO for domestic violence victims. In summary, the challenge is that the Regulations fail to make provision for non-physical forms of domestic violence and are therefore ultra vires LASPO. A decision on permission is awaited.

- The press release is available here: http://www.publiclawproject.org.uk/news/39/press-release-the-law-society-backs-legal-challenge-by-rights-of-women-

to-restore-access-to-legal-ai

The bad (but also maybe hopeful) news

- Regulations now prohibit the Lord Chancellor paying for legal aid work undertaken for the purpose of making a judicial review application unless (1) the court gives permission or (2) the case settles or is withdrawn prior to permission and the Legal Aid Agency (LAA) exercises a discretion to pay in those circumstances.

The scheme

- The full provision is in the new Regulation 5A inserted into the Civil Legal Aid (Remuneration) Regulations 2013 by the Civil Legal Aid (Remuneration) (Amendment) (No3) Regulations 2014. This came into force on 22 April 2014.

  > "Remuneration for Civil Legal Services: Judicial review
  > 5A. (1) where an application for judicial review is issued, the Lord Chancellor must not pay remuneration for civil legal services consisting of making that application unless either the court –
  > (a) gives permission to bring judicial review proceedings; or
  > (b) neither refuses nor gives permission and the Lord Chancellor considers that it is reasonable to pay remuneration in the circumstances of the case, taking into account, in particular –
  > i. the reason why the provider did not obtain a costs order or costs agreement in favour of the legally aided person;
  > ii. the extent to which, and the reason why, the legally aided person obtained the outcome sought in the proceedings; and
  > iii. the strength of the application for permission at the time it was filed, based on the law and on the facts which the provider knew or ought to have to known at that time."

- The purpose (says the Government) is to address the problem that:

  > "Legal aid is being used to fund a significant number of weak cases which are found by the court to be unarguable" *Transforming Legal Aid consultation paper*

- The answer, it said, was to:

  > "…build into the civil legal aid scheme a greater incentive for providers to give more careful consideration to the strength of a case before applying for judicial review…"

- When the Regulations were published there was confusion about the status of interim relief applications. Even though they do not appear on the fact of the Regulations, the LAA have stated that interim relief applications will continue to be paid for regardless of whether or not they are successful [see appended email]. It is difficult to know how this will play out in practice given that separating out the work done on an application for permission and the work done on an application for interim relief will surely be a difficult, and often artificial, exercise. Some have suggested loading all permission work onto a claim for payment for interim relief but it seems unlikely that such a practice would work given that the LAA's intention is to use the Regulations to save money. It should also be remembered that payment for interim relief applications will still be subject to the reasonableness criteria and so there is a risk that where an unreasonable amount of work was done on an application, or where there was no need to make the application at all, the LAA will refuse to pay.

- As set out in the Regulations, the LAA have a discretion to pay providers in cases that do not reach the permission stage (this discretion does not exist where permission is refused). The non-exhaustive list of criteria are set out at 52A(2)(b)(i)-(iii).

- The changes brought in by the Regulations have been inserted into the civil contracts by amendment. The contracts provide for applications for payment for work done on permission applications where there has not been a permission decision (e.g. because the case has settled) to be made to the LAA for them to exercise their discretion. If the application is refused then the provider has the right to an internal review. There is no right to an independent funding adjudicator and nor are there any set timescales for the LAA's determination of internal reviews.

The impact

- There is a very real concern that the effect of these Regulations will be to prevent meritorious judicial review claims from being brought. This is for a number of reasons, including:
    - The tight financial margins that legal aid firms work within, meaning that they cannot shoulder the financial risk of not getting paid for work done on an application for permission;
    - The fact that judicial review is a front-loaded process and so a great deal of work done will be at risk;
    - The absence of disclosure and information available to the claimant meaning that the defendant holds most of the cards and the merits of a claim are difficult to assess before the cards are face up on the table;
    - The short time limits that apply in judicial review, particularly in urgent cases, with the result that merits assessments must often be undertaken very quickly and without accessing all the necessary information;
    - The difficulty of assessing the merits of a claim that raises a particularly novel or complex point of law;
    - The additional work that is required on an application for permission in a case where the client requires a translator or a litigation friend, or where it is difficult to get instructions or keep in touch with the client;
    - The risk that an issue will arise that is beyond the control of the client or the solicitor that renders the claim academic or irrelevant;
    - The chance that procedural bars to permission, such as delay, standing or whether a decision is highly likely to have been the same in spite of the conduct complained of, will knock out a claim even though it is meritorious; and
    - The court may act in ways which increase the at-risk work, for example, it may order a rolled-up hearing or an oral permission hearing of its own volition.

- The Regulations have only been in effect since 22 April 2014 and so it is difficult to assess the impact at this stage. It is really important that people are vigilant about recording the impact that the Regulations have on them and their clients as evidencing the problems is likely to be the best way of campaigning to reverse them.

- In the short time that they have been in force, a number of firms have reported the following concerns or changes in their usual practice:

- **Imposing a higher merits test:** The LASPO statutory scheme provides for judicial review claims to be funded where the client meets the financial

eligibility criteria and the claim meets the relevant merits criteria. This means that providers should take on judicial review claims for impecunious litigants where the prospects are 50%+. However, the effect of the Regulations is to force providers to impose a higher merits test so as to reduce the risk of not getting paid. This takes their actions outside of the LASPO statutory framework and is contrary to their obligations under the contract: providers are therefore put in an impossible position. A number of firms have introduced internal risk assessments to work out whether a particular case can be taken on. Risk factors will include anything that makes the claim more onerous to run (e.g. the vulnerability of the client) or more complex and unpredictable.

- **Turning away meritorious cases:** The logical consequence of imposing a higher merits test is that some meritorious cases will not be run because it is too risky to do so. These cases are likely to be those raising the issues set out above and as a result the Regulations will impose a bar to access to justice that the Government has simply refused to acknowledge.

- **Making judges think more carefully about refusing permission:** It may be that the effect of the Regulations will be to make the judiciary apply the permission test (i.e. arguability) more rigorously than they do now. As everyone knows, the permission test is a flexible one depending on the judge and the subject matter - in many cases the test applied is certainly simply whether the case is arguable. However, it may be that if the judiciary are sufficiently cognisant of the possible damage that these Regulations can do, they will grant permission more easily. This will be good for providers but ironic for Grayling: the Regulations may result in more JRs being brought, not less.

- **Problems with the LAA discretion:** There is a fear, particularly in light of the LAA's decision making under the exceptional funding scheme, that the LAA will be restrictive in their decision making on payment under the Regulations. There is are also concerns about the nature of the discretion itself. First and foremost, the presumption is that providers will not be paid and so we can be certain that the LAA will refuse payment in at least some cases. Secondly, the criteria for the exercise of the discretion are problematic - material that a provider "ought" to have known about when assessing the merits of the claim seems like a devilish detail and it seems likely that where a court has refused to make an order for costs, the LAA will nevertheless decide to pay. However, we have yet to be able to analyse how the LAA are making their decisions and it is hoped that they way the discretion is exercised will at least become clearer over time. More fundamentally, the problem with the discretion is that it is after the event: this simply cannot cure the chilling effect that the risk of not getting paid will have on providers and the absence of any set time scales, or any payment for the work done on seeking payment (!), may deter providers from taking on cases altogether.

- **Changing relationship with counsel:** The Regulations create new sensitivities and tensions between counsel and solicitors. Counsel's advice on the merits of a JR will now have the added pressure of the risk that if that assessment is wrong, the solicitor will not get paid. It is likely that this will impact most on the junior bar where solicitors will be unwilling to try new and junior counsel because the financial risk they are running is simply too high.

Strategies to minimise risk

- Each firm and set of chambers will have to think very carefully about how they are going to manage the risk introduced by the Regulations. Some things to think about include:
    - Using investigative help as much as possible so as to minimise the

work that is done on the permission application itself. For example, get counsel to do a long advice under investigative help that can then be relatively easily turned into grounds (although obviously this assumes the luxury of time…);

- Carefully record why investigative help has been used rather than legal help or a certificate;
- Create a template or aide memoire for the LAA discretion so that providers can think about it and record relevant information as they go along. For example one of the factors to be taken into account by the LAA when exercising the discretion is the merits of the application for permission at the time it was issued taking into account not only the facts known to the conducting solicitor but also what they reasonably ought to have known. Fee earners need to give themselves time to make appropriate factual enquiries and to show that they have done so;
- It may be worth considering amendments to the firm's pro forma letter before claim to include a request for the defendant to disclose both specific information that the fee earner has identified as relevant but also any information or documents that the defendant will rely on as relevant.
- Put in place a clear decision-making process internally so that junior fee earners are not forced to make decisions when it is clearly inappropriate for them to do so.
- Work together with counsel to undertake a careful merits assessment at an early stage and record the details and reasoning behind that merits assessment; and
- Keep records of LAA decision making, both at first instance and in the internal review process. Evidence of inconsistent and inaccurate decisions was, for example, key in the challenge to the legality of the exceptional funding scheme.

- A group of solicitors firms and an NGO (Deighton Pierce Glynn, Ben Hoare Bell, Mackintosh Law, Public Law Solicitors and Shelter) have issued proceedings to challenge the Regulations. A permission decision is awaited.

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