OBTAINING EXCEPTIONAL FUNDING UNDER LASPO – IS IT WORTH APPLYING?[1]

PLP JR North conference
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Legal challenges around s 10 LASPO

The statutory scheme

1. There is a right under s 10 LASPO to civil legal aid for any out-of-scope matter where an exceptional case determination ['ECD'] has been made by the Director of Legal Aid Casework.

2. An ECD must be made where not to provide legal aid would breach:

    a. the individual's Convention rights (within the meaning of the Human Rights Act 1998); or

    b. any rights of the individual to the provision of legal services that are enforceable EU rights: s 10(3)(a).

3. An ECD *may* be made where there is a *risk* of such an outcome: s 10(3)(b).

The problem

4. The problem with obtaining funding in s 10 cases is well known. A derisory number of cases have succeeded on application to the LAA.

5. Part of the problem is **practical**:

[1] Yes.

a. the form is onerous;
b. there is no funding for solicitors to make applications;
c. the LAA provide no assistance to help litigants in person complete the forms;
d. the quality of decision making is poor.

6. Part of the problem is **legal**. The LAA have been applying the Lord Chancellor's *Exceptional Funding Guidance (non-inquests)*, which includes the following passages:

> [7] The purpose of section 10(3) of the Act is to enable compliance with ECHR and EU law obligations in the context of a civil legal aid scheme that has refocused limited resources on the highest priority cases. Caseworkers should approach section 10(3)(b) with this firmly in mind. It would not therefore be appropriate to fund simply because a risk (however small) exists of a breach of the relevant rights. Rather, section 10(3)(b) should be used in those rare cases where it cannot be said with certainty whether the failure to fund would amount to a breach of the rights set out at section 10(3)(a) but the risk of breach is so substantial that it is nevertheless appropriate to fund in all the circumstances of the case.
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> [18] … The overarching question to consider is whether the withholding of legal aid would make the assertion of the claim practically impossible or lead to an obvious unfairness in proceedings. This is a very high threshold.
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> [60] The Lord Chancellor does not consider that there is anything in the current case law that would put the State under a legal obligation to provide legal aid in immigration proceedings in order to meet the procedural requirements of Article 8 ECHR.

Para 18 of the *Guidance* relies on (without expressly citing), comments of the ECHR in an admissibility decision, *X v United Kingdom* [1984] 6 EHRR 136 (ECHR), which seem to take a different and more restrictive view of the circumstances in which the Convention requires legal aid than that expressed in the full Court decisions of *Airey v Ireland* [1979] 2 EHRR 305 (ECHR) and *Steel & another v United Kingdom* (2005) 18 BHRC 545 (ECHR).

The challenge

7. In *M v Director of Legal Aid Casework & Ors* [2014] EWHC 1354 (Admin) (02 May 2014), while finding the individual decision under challenge unlawful, Coulson J rejected the criticism of §7 of the *Guidance*, saying

> [75] … Mr Bowen QC's criticism of that was that it set the bar too high. But that was based on his test of a "real risk" or a "real possibility". For the reasons set out above, I have rejected that formulation and consider that, in the context of the LASPO regime, the test must be higher than that: something like "a significant risk" or "a very high risk" of breach. Therefore, I am wholly unable to say that the reference to "so substantial" is wrong or unlawful: on the contrary, it broadly chimes with my interpretation of Section 10(3)(b).

8. In contrast, in the wide-ranging judgment of Collins J in *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin) [2014] WLR(D) 266, all aspects of the Guidance set out above were found unlawful:

> [39] … *X v UK* sets too high a threshold.
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> [50] … If legal aid is refused, there must be a substantial risk that there will be a breach of the procedural requirements because there will be an inability for the individual to have an effective and fair opportunity to establish his claim. That principle will apply whether there are court or tribunal proceedings or a decision from the Home Office. It follows that I do not entirely accept Coulson J's conclusion in *M* that the test whether the refusal would impair the very essence of the right leads to a conclusion that the grant of legal aid will only rarely be appropriate. The very essence is that in procedural terms it can be put forward in an effective manner and there is a fair process.
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> [51] … the Guidance is defective in that it sets too high a threshold and fails to recognise that Article 8 does apply even in immigration cases and, despite the exclusion of Article 6, carries with it procedural requirements which must be taken into account.

9. The judgment in *Gudanaviciene* is awash with useful nuggets for lawyers drafting exceptional cases applications:

[10] … the reference to certainty is not appropriate since the requirement that the breach is 'so substantial' will mean that only cases where the risk of breach is overwhelming can succeed. That the approach of the Director in accordance with the Guidance has had that effect is apparent from the fact that only 1% of the non-inquest applications for exceptional case funding (ECF) have succeeded since LASPO came into effect in April 2013.
…

[28] It seems to me to be clear that the key considerations are that there must be effective access to a court and that there must be overall fairness in order that the requirements of Article 6 are met. One aspect of effective access must be the ability of a party to present all necessary evidence to make his case and to understand and be able to engage with the process. So much is apparent from *AK & L v Croatia*. It must be borne in mind that both before a tribunal and a court the process is adversarial. Thus the tribunal cannot obtain evidence where there are gaps in what an applicant has been able to produce. Equally, it may have difficulties if there is defective written material put before it in appreciating whether there is any substance to a claim or even if any particular human rights claim is properly raised. I think the words 'practically impossible' do set the standard at too high a level, but, as Chadwick LJ indicated, the threshold is relatively high. No doubt it would generally be better if an appellant were represented, but that is not the test. Nevertheless, the Director should not be too ready to assume that the tribunal's experience in having to deal with litigants in person and, where, as will often be the case, the party's knowledge of English is non-existent or poor, the provision of an interpreter will enable justice to be done.
…

[36] Article 47(3) of the Charter provides that legal aid shall be provided in so far as necessary to ensure effective access to justice. This is a clear recognition that legal aid may be required and so goes to that extent beyond Article 6, since Article 6 only requires legal aid in criminal cases. In the explanation, as I have already stated, this is said in relation to Article 47(3):-

> "With regard to the third paragraph, it should be noted that in accordance with the case law of the ECtHR, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy … There is also a system of legal assistance before the CJEU."

Airey v Ireland is referred to as an authority for the first sentence. The use of the word 'impossible' could be argued to set a very high threshold. But I do not believe it was intended to do more than indicate that what has to be considered is whether without legal

assistance the remedy could be made effective. In addition, I think fairness must be a factor to be taken into account. That that is what is meant is consistent with the explanation of 47(1) which is said to be based on Article 13 of the ECHR but to go further because 'in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court.'
…

[59] … she has very poor command of English and, as must be obvious, she will be emotionally involved in the appeal so that she cannot approach it in an objective fashion…

[60] The reasons for refusal set out in the 26 July 2013 letter are in my view thoroughly unsatisfactory. It is said that the issues are not complex and the tribunal 'will take account of the relevant case law and legislation, including EU law and the facts of the case'. But the test under Regulation 21(5)(c) is key and it will be necessary to produce evidence to deal with the risk of harm. That does not now exist to any meaningful extent and it is difficult to follow how without assistance the claimant can be expected to obtain the necessary evidence, let alone make representations on the issue. Furthermore, there is no evidence as to whether the daughter will be able to be cared for if she were to go to Lithuania with her mother and what provision will be made for her daughter's future here. All this additional evidence cannot be obtained by the tribunal, particularly as the proceedings are adversarial. The suggestions in the refusal letter that "any further evidence in respect of your client's family or criminal case is accessible by your client and can be submitted to the First Tier Tribunal for their consideration" and "Your client can with the assistance of an interpreter, further address any question of the First Tier Tribunal and provide further factual information towards the proportionality of the decision to deport" are little short of absurd. It reflects the flawed guidance on the high level of the threshold and the exclusion of Article 8.

[61] A matter relied on by Mr Chamberlain in his skeleton argument was that the strong merits of the appeal suggested the claimant was less likely to be disadvantaged by the absence of professional representation. That in my judgment is a very dangerous argument since it suggests the more meritorious a case the less need there is for legal assistance. The dictum of Megarry J concerning awareness of open and shut cases which turned out not to be so is cautionary.
…

[94] The claimant came here in December 1998. He had thus been here for some 14 ½ years before the decision to deport him. It is common ground that he has a right of permanent residence. The

> issue in his case may therefore turn on whether the 10 years prior to May 2013 is interrupted by any periods of imprisonment. The guidance issued by the CJEU is not in my view as clear as Mr Chamberlain submits and there is a difficult question to be determined on the facts of the claimant's case. Those and his attitudes must be carefully assessed.
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> [95] There is an Article 8 claim based on his fatherhood of a child. He has split up from his partner. There can be no doubt that that claim is extremely weak and I do not think it is such as to justify legal aid.
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> [96] The reasons for refusing legal aid include the assertions that the claimant had had legal representation at his previous hearings and it was "speculative to think that previous errors will be repeated". In addition, it is said that proceedings before the First Tier Tribunal "are not complex either in law or procedure". That observation I find remarkable and it suggests that the author has never had experience of observing appeals before the First Tier Tribunal. The reality is, having regard both to the possibility of difficulties in dealing with contentious factual matters and, in immigration law which is taking up a substantial part of the Court of Appeal's caseload, there can be considerable complexity.
> …

10. Of course, there is an appeal. Indeed, recognising the importance of the issues Collins J granted permission in all but one of the six joined *Gudanaviciene* cases himself; Underhill LJ has since given permission in that remaining one also. Judgment can therefore be expected from the Court of Appeal some time later this year, though that may not be the last word: it is a case which may well then go on appeal to the Supreme Court (and indeed perhaps Strasbourg or Luxembourg).

What now?

11. It is too soon to know whether the LAA's approach will alter pending the appeal in *Gudanaviciene*. But it is certainly worthwhile for individuals to seek to rely on it and to consider judicial review if refused on grounds criticised in *Gudanaviciene*.

The appropriate test

12. *X v UK* having been disapproved, the best Strasbourg authority on the proper test is probably found in *Steel* (at paras 61-62):

> The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend inter alia upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively… it is not incumbent on the state to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-a-vis the adversary.

13. As commented by Jo Miles, 'Legal Aid and 'Exceptional' Funding – a postscript' [2011] FL 1268 it is arguable that even the description of funding as 'exceptional' ought to be seen as misleading:

> [I]t is arguable that [*A v United Kingdom*] fails accurately to capture the Convention jurisprudence on legal aid in civil cases and so is not a reliable indicator of what Article 6 requires… [Its test] finds at most limited textual basis in the language used by the Court in *Airey* [*v Ireland* (1979) 2 EHRR 305] and later decisions. While the Strasbourg Court was clear that Article 6 confers no absolute right to legal aid in civil cases and that 'much must depend on the particular circumstances' (para 26), the *Airey* judgment does not use the words 'exceptional', or its synonyms 'special' or 'unusual', nor does 'practically impossible' or anything like it appear.

<u>Challenges in other areas of social welfare law</u>

14. Although the major importance of *Gudanaviciene* is on the *X v UK* point, which is of general application, all the *Gudanaviciene* claimants had immigration cases, and there are other, non-immigration aspects of the *Guidance* which might be susceptible to new challenge.

15. For example, the *Guidance* asserts in its section on 'welfare benefits' that '[w]here an individual is claiming a discretionary benefit, rather than a

legal right, a decision on the claim will not involve a determination of the individual's civil rights and obligations'. The two cases cited in support of this proposition are *R (A) v London Borough of Croydon* [2009] UKSC 8 (which concerns the provision of social services support to children) and *Tomlinson v Birmingham City Council* [2010] UKSC 8 (about the provision of housing assistance to homeless people). So neither of those cases involved the payment of cash social security benefits. It seems an unusual use of language to describe what was at issue in *A* or *Tomlinson* as 'welfare benefits' and indeed in *Tomlinson* (at [75]) Lord Kerr expressly drew the distinction which the case law recognises 'between social security payments and social welfare provision'.

16. If the LAA used that guidance to suggest that Article 6 is not engaged by the many 'discretionary' decisions which will be routine in determining entitlement to new social security benefits like universal credit or personal independence payment, any such suggestion would be open to challenge as contrary to the existing case law: *Schuler-Zgraggen v Switzerland* (1993) 16 EHRR 405; see also *Tomlinson* at [61].

Carol Storer
Legal Aid Practitioners Group

Tom Royston
Garden Court North

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