



Public
Law
Project

PLP RESEARCH PAPER

LASPOA briefing: Public Law Project's litigation

Matt Ahluwalia



The Public Law Project (PLP) is an independent national legal charity. Our mission is to improve public decision making and facilitate access to justice. We work through a combination of research and policy work, training and conferences, and providing second-tier support and legal casework including public interest litigation.

Our strategic objectives are to:

- Uphold the Rule of Law
- Ensure fair systems
- Improve access to justice

www.publiclawproject.org.uk

LASPO Briefing: PLP's litigation

Matt Ahluwalia

Background

The Legal Aid, Sentencing, and Punishment of Offenders Act 2012 ('LASPO'), and the subsequent secondary legislation, significantly changed the way that civil legal aid operates. Changes were made not only to the scope of legal aid, but also to the procedures and processes that clients and lawyers had to follow in order to access funding for legal services.

The Public Law Project (PLP) has, since its inception, been at the forefront of issues around access to justice and the Rule of Law. PLP has acted as both instructing solicitors and as a client in some of the most significant cases about LASPO. This briefing paper provides a short summary of the cases that PLP has been involved in.

Exceptional case funding

Gudanaviciene & Ors, R (on the application of) v The Director of Legal Aid Casework & Or [2014] EWCA Civ 1622

Gudanaviciene was a challenge brought by six claimants, each of whom had been refused exceptional case funding (or 'ECF') for their immigration matters. A judicial review was brought, challenging the guidance issued by the Lord Chancellor under s.4 LASPO, arguing that it was too restrictive and set too high a threshold for the granting of exceptional case funding.

For example, the Lord Chancellor's Guidance advised that when determining whether a refusal of legal aid would breach Article 6(1):

Assuming that the proceedings in question involve the determination of a civil right or obligation, caseworkers

should then go on to consider whether the failure to provide legal aid would be a breach of the applicant's rights under Article 6(1) ECHR.¹

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. (Emphasis in the original.)

Further, when advising Legal Aid Agency (LAA) caseworkers on immigration cases:

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.

The High Court found in favour of the claimants, and held that legal aid should have been granted in all six cases. PLP acted for the second claimant, IS.

The Director of Legal Aid Casework and the Lord Chancellor appealed in all but the second case. The Court of Appeal held that the critical question under Article 6(1) ECHR is whether an unrepresented litigant is able to present their case effectively and without obvious unfairness – a lower threshold than the original Guidance. The test is essentially the same for Article 8 and Article 47 as it is for Article 6, although the Article 8 test is broader than the Article 6(1) test, in that it does not require a hearing before a court or tribunal, but only involvement in the decision-making process.

The Lord Chancellor's Guidance was subsequently amended to take account of the Court of Appeal's judgment. The Court of Appeal's judgment has had a significant effect on the number of grants of exceptional case funding. Prior to *Gudanaviciene* the grant rate was around 1%; for the quarter October to December 2017, the grant rate was 54%. The LAA also reported an increase in the number of applications made.²

***IS v The Director of Legal Aid Casework & Anor* [2015] EWHC 1965 (Admin)**

IS was one of the six claimants in *Gudanaviciene*. He is a Nigerian national who, by the date of the judgment, had lived in the UK for over 13 years. He is blind, has profound cognitive impairment and is unable to care for himself, and so he lacked capacity to engage in litigation. He applied for exceptional case funding in order to get assistance in regularising his immigration status. His application was refused. In addition to the challenge brought specifically against the Lord Chancellor's Guidance, IS brought a judicial review claim against the lawfulness of the exceptional case funding scheme as it was operating.

The three grounds were: (i) the operation of the exceptional case funding scheme frustrated the Act's purpose by putting unnecessary obstacles in the path of applicants, which bore particularly severely on disabled persons; (ii) the refusal of funding breached art.8 and art.14 rights as applicants were unable to make an effective application for their position to be recognised; and (iii) there had been a failure to comply with the Equality Act 2010 s.149.

The High Court allowed the claim, holding that the manner in which the scheme operated meant that in practice the safety net, which exceptional case funding was meant to provide under s.10 LASPO, was not being provided. The scheme was therefore not in accordance with s.10 LASPO because it did not ensure that applicants' human rights were

not breached, or not likely to be breached. In particular, the application forms were too onerous and complicated, there was no funding for investigatory work, and there was no mechanism for the grant of emergency funding.

Further, the requirement in the Civil Legal Aid (Merits Criteria) Regulations 2013 that cases had to demonstrate an even or better than even prospect of success was unreasonable. Finally, some passages of the Lord Chancellor's Guidance were incorrect and unlawful.

***The Director of Legal Aid Casework & Anor v IS* [2016] EWCA Civ 464**

The Director of Legal Aid Casework and the Lord Chancellor appealed against the High Court's decision. Amendments to the exceptional case funding scheme were made in the meantime. The Merits Regulations were amended, and a number of procedural and administrative changes were made in response to the issues identified by the High Court. The application forms were made simpler, a mechanism for providing funding for investigatory work was established ('ECF for ECF'), and the LAA's caseworkers were given more training on how to deal with applications made by unassisted members of the public. Information for direct applicants, available on the LAA website, was also updated.

The appeal was brought in the Court of Appeal principally on the ground that the High Court did not apply the appropriate test in finding that the scheme as a whole was unlawful.

The Court of Appeal held that there is an important difference between a scheme or system which is inherently bad and unlawful, and one which is being badly operated. The Court held that there was not so great a deficiency of access to legal aid as to render the exceptional case funding scheme as inherently unfair.

The Court noted that the extent of the difficulties with the exceptional case funding scheme was troubling, and expressed a hope

that the LAA and the Lord Chancellor would be astute to look for improvements, and would do so on a continuing basis.

The High Court's judgment was therefore reversed, although the LAA elected not to return to the original position in terms of the Merits Regulations, retaining a lower threshold for cases of overwhelming importance to the individual or of significant wider public interest.

IS applied for permission to appeal to the Supreme Court, challenging the lawfulness of both the operation of the scheme and the Merits Regulations. Permission was refused by the Supreme Court, on the basis that whilst important issues of law were raised, the case was not a suitable one in which to determine them, because of the changes to the merits test and the application form.

Payment upon permission

Ben Hoare Bell Solicitors & Ors, R (On the Application Of) v The Lord Chancellor [2015] EWHC 523 (Admin)

Among the stated aims behind the reforms brought in by LASPO was the desire to discourage unnecessary and adversarial litigation at public expense, and to target legal aid to those who need it most. Part of the reforms included a change to funding for judicial review cases. The Civil Legal Aid (Remuneration) Regulations 2013 were amended by the Civil Legal Aid (Remuneration) (Amendment) (No 3) Regulations 2014, to provide that payment would not be made for judicial review claims unless the court granted permission, or in cases where permission was neither granted nor refused, where the Lord Chancellor considered it was reasonable to pay in the circumstances. This reform became known as 'no permission no fee'.

In *Ben Hoare Bell Solicitors & Ors, R (On the Application Of) v The Lord Chancellor* [2015] EWHC 523 (Admin), five legal aid providers brought a judicial review challenging this reform. The case argued that it was *ultra vires*

LASPO and inconsistent with the statutory purpose to provide funding for civil legal services, on the basis that the risky and unpredictable nature of judicial review proceedings would discourage providers from bringing meritorious claims. It was also argued that the reforms had a 'chilling effect'.

The High Court allowed the claim, holding that whilst the reforms were not strictly *ultra vires* LASPO, they did amount to putting providers "at risk" in situations which cannot be said to be linked to its stated purpose, and that therefore the second ground succeeded. The Court found no rational connection between the stated aim of incentivising providers to give more careful consideration as to whether a case passed the merits test on the one hand, and providers not being remunerated in situations where permission was not granted for reasons beyond the providers' control on the other, namely where: (i) the defendant withdrew the decision under challenge; (ii) the court ordered an oral hearing of the permission application; or, (iii) the court ordered a rolled-up hearing of both the permission application and the substantive application.

In response to the judgment, the Remuneration Regulations were amended again to make provision for payment in the three situations identified above.

Victims of domestic violence

Rights of Women, R (on the application of) v The Lord Chancellor and Secretary of State for Justice [2016] EWCA Civ 91

Paragraph of Part 1, Schedule 1 of LASPO made provision for services provided to a person who was, or was at risk of being, the victim of domestic violence. The Civil Legal Aid (Procedure) Regulations 2012 specified the types of evidence of domestic violence that had to be provided in support of an application for legal aid. Following amendments made in 2014, the Regulations stated that, save for certain exceptions, legal aid would not be available unless documentary verification of

domestic violence was provided within the 24-month period before the application for legal aid was made.

Rights of Women (RoW) is a charity that campaigns and provides education and training on women's rights, and is well-known for its expertise on gender-based violence. RoW brought a judicial review, seeking to quash the amendments. The issue was whether procedural regulations were unlawfully used to introduce more restrictive criteria for eligibility than those found in LASPO 2012 (i.e. that the amendments were *ultra vires* LASPO), or whether they frustrate the statutory purpose, by prescribing the acceptable types of supporting evidence too rigidly and narrowly, thus excluding many women who ought to be eligible for legal aid under the terms of LASPO 2012. The argument focused principally on the requirement that the supporting evidence must be less than 24 months old.

The High Court dismissed the claim, and RoW appealed to the Court of Appeal. The Court of Appeal found that the amended Regulation was not *ultra vires* LASPO, but allowed the appeal on the basis that the 24-month time limit frustrated the statutory purpose, and that the amended Regulation did not cater for victims of domestic violence who had suffered financial abuse.

In response to the judgment, the two-year time limit on evidence was extended to five years. In January 2018, the time limit was removed completely.

Residence test

The Public Law Project, R (on the application of) v Lord Chancellor [2016] UKSC 39

The Public Law Project, R (on the application of) v Lord Chancellor [2016] UKSC 39 was a challenge brought by PLP against the proposed introduction of a 'residence test' for civil legal aid.

In 2013, the Lord Chancellor decided to introduce a residence test for eligibility for civil legal aid, to the effect that, with some exceptions, an applicant would have to be lawfully resident in the UK at the time of application and to have been lawfully resident for a 12-month period at some point before that.

Whilst the Draft Order was being debated in Parliament, PLP brought a judicial review, arguing firstly that LASPO did not permit the Lord Chancellor to reduce the class of individuals who were entitled to receive public funding for legal services, and that therefore the Order was *ultra vires*, and secondly that the Order was discriminatory.

The High Court found in PLP's favour on both grounds. The Court of Appeal overturned the High Court's judgment and found in favour of the Lord Chancellor on both grounds. PLP appealed to the Supreme Court.

The Supreme Court unanimously found in favour of PLP on the *ultra vires* ground, coming to this view at the end of the arguments on that issue. Their Lordships decided not to deal with the discrimination ground.

Conclusion

What each of these cases show is that LASPO created, in primary legislation, a statutory duty to provide legal aid in the areas that are in scope, and to provide exceptional case funding where there would be a risk of a violation of Convention rights or breach of EU law. The courts have shown that they are prepared to examine closely whether the operation of the legal aid system serves to actually fulfil that purpose.

These cases also underline the importance of judicial review in holding public bodies to account in their decision-making, such as the LAA and the Ministry of Justice. Reforms to the operation of the exceptional case funding scheme, the rules around payment for providers, and to the rules around evidence

requirements for victims of domestic violence, were only made after the courts had made findings of unlawfulness.

The LASPO review should recognise the importance of judicial review in maintaining

and ensuring access to justice and upholding the Rule of Law. Any further attempts to limit access to public law remedies need to be very carefully scrutinised.

References

¹ European Convention on Human Rights.

² Ministry of Justice, [Legal aid statistics England and Wales bulletin October to December 2017](#) (29th March 2018).



Public
Law
Project