

## ANNEX – DRAFT REPRESENTATIONS TO THE LEGAL AID AGENCY

*These are an anonymised and adapted version of the representations sent to the Legal Aid Agency in the GR case. They are intended for use by practitioners and should not be taken as legal advice. They will need to be tailored to the particular facts and circumstances of the applicant. The representations assert that, because the applicant's property cannot be sold, the DLAC should exercise her discretion to value that property at 'nil'. Note that in some instances it may be appropriate to suggest a sum higher than nil that would nonetheless be equitable e.g. if the applicant has some borrowing capacity. Paragraphs concerning domestic abuse should be deleted if not relevant.*

Drafting notes are highlighted green and fact specific content is highlighted yellow.

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Dear Sir / Madam

### **R (oao GR) v DLAC [2020] EWHC 3140 (Admin)**

We write to make representations concerning the legal aid eligibility of our client ('the applicant') following the judgment of Mr Justice Pepperall in the above case on 24 November 2020<sup>1</sup> in support of application no. [LAA REF]. [We ask that the refusal decision dated [DATE] is reviewed in light of the judgment and these representations].

We request that the Director of Legal Aid Casework (the 'Director') exercise her discretion under regulation 31(b) of The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (the 'Means Regulations') to value the applicant's interest in [address] equitably by affording it [a 'nil' value] for all the reasons that follow, in accordance with the Lord Chancellor's Guidance<sup>2</sup>.

### **BACKGROUND**

*Insert relevant background information about the client; the proceedings for which funding is sought; their legal aid application; when/ why it was refused (if applicable)*

### **REPRESENTATIONS**

#### **The law**

The Court's decision in *R (oao GR) v DLAC* [2020] EWHC 3140(Admin)

In his judgment of 24 November 2020 Mr Justice Pepperall, finding in favour of the Claimant, held that regulation 31 of the Civil Legal Aid (Financial Resources & Payment for Services) Regulations 2013 ("the Means Regulations") confers discretion on the Director to value the Claimant's property in a manner as appears to him to be 'equitable'. Pepperall J stated '*it is a discretion open to [the Director] in all cases save in respect of the valuation of money*' (paragraph 76).

Pepperall J declined to specify precisely how the discretion should be exercised. However, given that Pepperall J held that the overarching purpose of the discretion was to secure access

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<sup>1</sup> <https://www.bailii.org/ew/cases/EWHC/Admin/2020/3140.html>

<sup>2</sup> See section 7.1 of the Lord Chancellor's guidance on determining financial eligibility for Controlled Work and Family Mediation

([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/957563/Lord\\_Chancellor\\_s\\_guidance\\_on\\_determining\\_controlled\\_work\\_and\\_family\\_mediation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957563/Lord_Chancellor_s_guidance_on_determining_controlled_work_and_family_mediation.pdf))

See section 6.3 of the Lord Chancellors Guidance on determining eligibility for certificated work

([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/957564/Lord\\_Chancellor\\_s\\_guidance\\_on\\_determining\\_certificated\\_work.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957564/Lord_Chancellor_s_guidance_on_determining_certificated_work.pdf))

to justice in compliance with Articles 6 and 8 ECHR, we submit that the guiding question for the Director should be whether the Applicant can practically and effectively use the property to purchase legal representation.

#### Relevant guidance

Both the Lord Chancellor's guidance and the Legal Aid Agency's Means Assessment guidance states that "Whether the discretion [under regulation 31(b)] is to be exercised should be determined on a case by case basis. Applying R(GR) v DLAC, it should be exercised in those cases where the Director considers that valuing the asset under Regulation 31(a) or the bespoke rules in Regulations 33-37 would cause a breach of the individual's Convention rights and/or right of access to justice"<sup>3</sup>.

#### Art. 6 and 8 of the European Convention on Human Rights

Mr Justice Pepperell accepted that the Director's decision on whether to grant legal aid engaged the Applicant's Article 6 and Article 8 rights (at paragraph 58). **[We submit that [both Article 6 and] Article 8 [is][are] engaged in the current case.]**

Paragraph 59 of the judgment contains the key principles from the Strasbourg case law on Article 6 as summarised by Lord Dyson M.R. in *R (Gudanaviciene) v. Director of Legal Aid Casework* [2014] EWCA Civ 1622, [2015] 1 W.L.R. 2247.

*"(i) The Convention guarantees rights that are practical and effective, not theoretical and illusory in relation to the right of access to the courts ...;*

*(ii) The question is whether the applicant's appearance before the court or tribunal in question without the assistance of a lawyer was effective, in the sense of whether he or she was able to present the case properly and satisfactorily ...;*

*(iii) It is relevant whether the proceedings taken as a whole were fair ...;*

*(iv) The importance of the appearance of fairness is also relevant: simply because an applicant can struggle through 'in the teeth of all the difficulties' does not necessarily mean that the procedure was fair ...; and*

*(v) Equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent ..."*

Paragraphs 70 to 72 of the judgment in *Gudanaviciene* are of further assistance as to the test under Article 8 which is 'in practice the same' and in its summary of relevant factors that may indicate that legal aid is required, dependent 'on the particular facts and circumstances of each case, including (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity'.

#### The common law right of access to the Court

Further, the right of access to justice is inherent in the rule of law and long recognised under English common law, such that impediment or hindrance must be clearly authorised by

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<sup>3</sup> See page 69, paragraph 6 of the Means Assessment Guidance: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/958995/Means\\_Assessment\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958995/Means_Assessment_Guidance.pdf) . There are identical paragraphs in the Lord Chancellor's Guidance – links to which are above.

primary legislation to be lawful and only then to the extent reasonably necessary to fulfil the objective of the provision in question (*R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51).

### **The applicant's individual circumstances**

[As the applicant's Property/ Asset cannot be sold/ be borrowed against], we invite the Director to exercise her discretion to value [the Property/ Asset] in a manner that appears to her to be 'equitable' under regulation 31(1)(b). In our submission, the only lawful outcome would be to exercise the discretion to afford [the Property/ Asset] [a 'nil' value]. This outcome would afford the applicant full representation under Legal Aid.

Valuing the Property at its market rate [or at any sum whatsoever] would fail to give proper effect to the overarching aim of the power, which is to secure effective access to legal representation, and would ignore the practical reality of the applicant's situation. For the following reasons, it is contended that the Director must exercise this discretion in order to avoid a breach of the Claimant's right to access to the Court under the common law [and Article 6] [and Article 8] [of the ECHR].

### **Interference with Convention rights**

Without legal representation the applicant would be incapable of exercising their right of access to the court in the real world. With no private funds available to them, no borrowing capacity and no prospect of *pro bono* representation, the applicant would be forced to represent [himself/ herself]. The applicant would plainly be unable to do so effectively. [The applicant is unable to effectively cross-examine her ex-partner and abuser]. This prospect would, at the least, put [him/her] at a "substantial disadvantage" vis-à-vis [his/her] opponent [who has legal representation].

[The case concerns the determination of civil rights and obligations including []. The issues at stake include []. These are plainly matters of overwhelming importance to the client as they concern [her safety][the safety and best interests of her children][the roof over her head].]

[The case is legally [and factually] complex. The applicant will be expected to address the Court on []. The Court will determine disputed matters of fact and issues of credibility including []. [The opponent is represented].]

[The applicant is incapable of representing herself given [set out any particular vulnerabilities] in all the circumstances of the case including [set out any particular challenges, such as an expectation of negotiating with an opponent].]

[The following two paragraphs may assist in family law cases concerning domestic violence]

[Further, the applicant would be unable to enter into negotiations with her opponent, given the power imbalance in their relationship caused by the history of domestic abuse. As Mr Justice Pepperell noted, it has been acknowledged by Parliament and by the courts that victims of domestic violence face disadvantage if they represent themselves in proceedings involving the perpetrator of that violence (see paragraph 60 and *R (Rights of Women) v. Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91, [2016] 1 W.L.R. 2543). Indeed, a recent Ministry of Justice report titled 'Assessing Risk of Harm to Children and Parents in Private Law Children Cases' (June 2020) found: "Overall, however, the extensive evidence we received about the compounding vulnerability of being a litigant in person means that the

absence of legal representation can be seen as one of the orbiting influences, that make the experience of court proceedings for abused mothers re-traumatising'.<sup>4]</sup>

[Equality of arms would be denied to the applicant if unrepresented, as she would not have a reasonable opportunity to present her case. In all likelihood she would not be able to present the case at all, which may result in the Court making a final order that is not in her or her children's best interests. Such a hearing would lack both the qualities of fairness and the appearance of fairness.]

In *UNISON* the Supreme Court reiterated the importance in domestic law of considering the impact of restrictions on the principle of access to justice "*in the real world*" rather than in theory (see paragraph 93). It follows that the only lawful outcome, that gives effect to the applicant's Convention rights and upholds access to justice, is for the Director to value the Property as [nil]. This will ensure the applicant can obtain full legal aid representation.

Without full legal aid representation the applicant will be denied effective access to the courts. Denying the applicant legal aid [and forcing her to face her ex-partner unrepresented] would infringe her Article 6 ECHR right to a fair trial. [As the applicant's Article 8 ECHR right can only be vindicated by fair resolution of her family dispute concerning her home and arrangements for her children, denying the applicant legal aid would also be in breach of her right to private and family life.]

### Inability to access 'trapped' capital

Cover the following fact specific issues:

- Why the applicant cannot sell the property e.g. it is jointly owned with someone who will not consent to sale;
- If the applicant could sell, why the sale would not raise as much as the capital calculation;
- Why the applicant cannot secure a loan against their property e.g. joint owner will not consent, low income;
- Any relevant facts concerning the joint owner which may result in an inequality of bargaining power e.g. domestic abuse
- What would happen if the applicant did sell e.g. homelessness, impact on children;
- Whether the sale of the property and the proceeds of sale are subject to legal proceedings;

For a non-exhaustive list of the sort of evidence the LAA will want to see in support of the applicant's inability to access trapped capital, please see Section 5.3(8) of the Means Assessment Guidance<sup>5</sup>.

### Deadline for the decision/ Urgency

Insert details of upcoming key dates/ hearings which justify the deadline given.

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<sup>4</sup> At section 8.4.5. of the Report, which can be accessed here:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/895173/assessing-risk-harm-children-parents-pl-childrens-cases-report\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895173/assessing-risk-harm-children-parents-pl-childrens-cases-report_.pdf)

<sup>5</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/958995/Means\\_Assessment\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958995/Means_Assessment_Guidance.pdf)

[We request that the Director provides a determination of the applicant's legal aid entitlement urgently and in any event within 7 days.]

### **Backdating**

The Director's redetermination of the applicant's legal aid eligibility should be backdated to the date of the initial [decision][application] dated [date]. We note that the Director has the power to backdate a grant under regulation 35 of the Civil Legal Aid (Procedure) Regulations 2012/3098 as amended by the Civil Legal Aid (Procedure) (Amendment) Regulations 2019/130.

Accordingly, the decision should be taken based on the applicant's circumstances on that date. [Her circumstances are in any event materially unchanged.]

### **Enclosures**

We enclose the following documents for your consideration:

- [Any relevant witness statements; correspondence; evidence etc]

Yours sincerely,