



Practice note: ‘Trapped’ capital

This note is intended to set out guidance for practitioners following the decision in R (oao GR) v DLAC [2020] EWHC 3140 (Admin). It is relevant to practitioners advising low-income individuals who pass the income part of the means assessment but have ‘trapped’ capital which causes them to exceed the relevant capital limit.

‘Trapped’ capital exists on paper but in practice cannot be accessed or used to fund legal representation. Commonly, this will be an interest in the family home valued greater than £8,000 after capital disregards have been applied. Examples include where:

- A co-owner will not consent to sale.
- The property itself is the subject matter of the dispute¹.
- The client has fled the property due to domestic violence and consequently the LAA does not consider it to be the individual’s ‘main or only dwelling’².
- Sale of the property would be contrary to the best interests of the applicant’s children.
- Sale of the property would cause the applicant significant hardship.
- Sale of the property would place the applicant at a disadvantage in the proceedings for which they seek legal aid.

Should trapped capital be included in the Means Assessment?

Following the decision in R (oao GR) v DLAC [2020] EWHC 3140 (Admin), the Director of Legal Aid Casework has a discretion to value capital *other than money* on an equitable basis. Although GR concerned a domestic abuse survivor, the discretion applies in *all civil areas of law*. This means that it is possible for ‘trapped’ capital to be excluded by affording it a ‘nil’ value and this should be considered in all cases where the client would pass the means assessment but for the existence of the ‘trapped’ capital.

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

Facts of the case

The Director of Legal Aid Casework (“DLAC”) rejected GR’s legal aid application due to ‘trapped’ capital in GR’s home, which she jointly owned with her abusive ex-partner. GR was on Universal Credit, had no savings and was unable to obtain a loan. Her ex-partner would not consent to her borrowing against the property. The sale of the property was subject to a family law dispute and this was the reason GR had applied for legal aid. There was no way GR would be able to represent herself effectively in court, which would have involved cross-examining her domestic abuser personally about the treatment he subjected her to.

Legal issues

The DLAC rejected GR’s argument that [regulation 31\(b\)](#) of the Civil Legal Aid (Financial Resources and Payment of Services) Regulations 2013 (“the Means Regulations”), permitted the DLAC to value her home in a ‘manner as appears to the Director to be equitable’. GR argued that the DLAC should exercise her discretion to value her property as nil; reflecting the fact that her house could not be sold or borrowed against. Contrary to this, the DLAC submitted that GR’s home should be valued in accordance with [regulation 37](#) of the Means Regulations, which deals specifically with interests in land and confers no equitable discretion on the DLAC.

The Court’s ruling ([link](#))

¹ Though note that in such cases an additional capital disregard applies – see regulation 38.

² Such that the LAA does not apply the equity disregard – see regulation 39.



Mr Justice Pepperall held for GR in finding that the DLAC's interpretation was wrong in law and that the DLAC *did* have a discretion under regulation 31(b) to value GR's property equitably taking into account, when construing the regulations, that '*The Lord Chancellor will have had firmly in mind the state's obligations under Articles 6 and 8 to provide legal aid where it is necessary to provide fair and effective access to justice.*' GR's application for legal aid was remitted to the DLAC for reconsideration.

How to use the judgment in *GR*

Civil areas of law where determinations are delegated to the Provider

In controlled work, or other areas where Providers have delegated authority to make determinations³, it is open to practitioners to apply the discretion themselves, taking into account any relevant guidance⁴. Where a provider exercises a discretion that has been delegated to them, an assessor may only overturn a determination that an individual qualifies for assessment where the provider's determination was manifestly unreasonable⁵.

Making representations to the Legal Aid Agency

In applications to the LAA, accompanying representations can request that the Director exercise discretion. That is not a pure discretion – it must be exercised compatibly with public law principles and the Convention rights of the individual. The overarching purpose of the discretion is to secure access to justice in compliance with Articles 6 and 8 ECHR⁶. Representations that invite the Director to exercise discretion should focus on:

- Demonstrating that there is a risk of a breach of the individual's convention rights or right of access to justice if legal aid is not made available to the applicant, by reference to⁷:
 - o The importance of the issues at stake.
 - o The legal and procedural complexity of the proceedings.
 - o The capacity of the individual to represent themselves.
- Demonstrating that the Claimant cannot practically and effectively use the property to purchase legal representation (either through sale or secured lending, or a deferred payment agreement with the provider). Representations should be supported by a summary of the client's instructions and any available evidence (such as an email from an estate agent or mortgage broker).

The Lord Chancellors' Guidance⁸ and LAA Means Assessment Guidance⁹ contain further guidance on the Director's discretion relevant to any representations. Section 5.3(8) of the LAA Means Assessment Guidance gives examples of the sorts of supporting evidence that the LAA expects an applicant to provide in order to show that they are unable to use their asset to purchase legal representation.

Further notes:

³ Para 3.2 of the General Specification, Standard Civil Contract 2018.

⁴ See section 5.3 of the LAA Means assessment Guidance (footnote 9 below) and section 7.1 of the [Lord Chancellor's guidance on determining financial eligibility for Controlled Work and Family Mediation](#)

⁵ See para 6.3 of the Costs Assessment Guidance for use with the 2018 Standard Civil Contracts, the [Points of Principle of General Importance Manual](#), page 23, CLA 59, 22 November 2016, HAL/138352 and [R \(Oao Duncan Lewis\) v Lord Chancellor \[2015\] EWHC 2498 \(Admin\)](#).

⁶ Per paras 65 and 73 to 75 of the judgment in *GR*.

⁷ These are the criteria identified by the Court in para 72 of [R \(Gudanaviciene & Others\) v Director of Legal Aid Casework & Lord Chancellor \[2014\] EWCA Civ 1622](#), concerning the Exceptional Case Funding scheme.

⁸ See section 6.3 of the [Lord Chancellors Guidance on determining eligibility for certificated work](#).

⁹ [P69, section 5.3](#).



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- The judgment was handed down on 24 November 2020 and has not been appealed.
- If applicants have been denied legal aid before 24 November 2020 due to them owning assets which could not, in fact, be used to fund their legal proceedings the LAA should be invited to make a fresh decision in light of *GR*.
- A refusal by the LAA to consider whether to exercise its discretion may be unlawful. The LAA decision maker should be referred to *GR* in any appeal representations. PLP may, subject to capacity, be able to assist to challenge the decision further.
- Applicants with a mortgage and a low percentage of the equity in their home may benefit from changes which took effect on 28 January 2021¹⁰.

PUBLIC LAW PROJECT
26 JULY 2021

¹⁰ The effect is that the full value of any secured debt will now be deducted when calculating the value of the property under Regulation 37, when previously this 'mortgage disregard' was capped at £100,000.