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Project

‘Trapped capital’ and financial eligibility for legal aid

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Summary

This research assesses the extent to which the 2020 judgment in the case of *R (GR) v Director of Legal Aid Casework*¹ has improved access to legal aid for people with ‘trapped capital’: value in the home that exists on paper but that cannot be accessed in practice.

The research highlights that despite the GR judgment, many people with trapped capital still struggle to get legal aid and there are structural disincentives to access the scheme. This report therefore makes a series of recommendations on data, guidance, information, training, criteria, appeals and availability of legal aid in trapped capital cases.

Findings

There is uneven access to legal aid for low-income homeowners with trapped capital due to disincentives for legal aid providers to take on cases. The case of GR has improved access to legal aid in some cases of trapped capital, but individuals are reliant on finding a legal aid practitioner willing to take on their case and the provider must be able to persuade the Legal Aid Agency of their client’s eligibility.

Legal aid practitioners are concerned that granting legal aid in cases of trapped capital where they have delegated powers to do so puts them at risk of breaching their contractual requirements with the Legal Aid Agency, because their decisions may be overturned at a later stage. They also find it off-putting to apply for a legal aid certificate where the Legal Aid Agency has discretion to grant or refuse the application, as the process is time-consuming and may require several appeals to the Legal Aid Agency. These applications may also still eventually end up being refused, leaving legal aid providers at risk of breaching their key performance indicators (KPIs) in their contracts to deliver legal aid services.

The Legal Aid Agency has failed to provide adequate training to caseworkers and information to the public on trapped capital cases. The rules on financial eligibility for legal aid are complex and the Lord Chancellor’s statutory guidance provides inadequate information about how discretion will be considered and applied.

¹ [2020] EWHC 3140 (Admin)



The Legal Aid Agency has published some limited guidance for legal aid practitioners, but it does not provide enough information for them to clearly be able to identify where someone with trapped capital should receive a discretionary grant of legal aid..

Some legal aid practitioners informed us that they had been able to secure legal aid for their clients since the GR judgment and in some cases specifically mentioned the resources that Public Law Project has published on its website to assist legal aid practitioners in applying the judgment.

Barriers to legal aid due to discretionary rules on trapped capital leave individuals at risk of being unable to pursue their legal matter or having to represent themselves. Where legal aid lawyers are unable to obtain legal aid for individuals with trapped capital this can have serious consequences for individuals, who may have no other options for obtaining legal advice or representation.

The research indicates two serious consequences for individuals with low-income homeowners with trapped capital. First, application outcomes for individuals are perceived to vary and individuals may not be able to access legal aid even where they should be eligible. Second, organisations report that some individuals are wary about pursuing legal aid due to the process of proving eligibility where the Legal Aid Agency has discretion to grant or refuse applications for legal aid. In some cases, this can lead to people continuing their cases as Litigants in Person where they are eligible for legal aid or may prevent individuals from attempting to resolve their legal issue.

Recommendations

- 1. The Legal Aid Agency should take steps to improve how it monitors and publishes its own data on the number and type of trapped capital cases where legal aid providers request the exercise of discretion for certificated work and the proportion of cases granted, as well as the number of cases where delegated powers are used by legal providers to grant legal aid and the number of cases later overturned and, where relevant, appealed (p18).**
- 2. The Legal Aid Agency should develop and publish resources for legal aid providers on when legal aid should be granted in trapped capital cases and the information and any evidence that needs to be provided in an application. Such resources could be developed from the resources published by Public Law Project and evidence requirements should not be unduly onerous. It should update its forms and systems so that ‘trapped**



capital’ can easily be highlighted by providers (p19).

3. The Legal Aid Agency should remove disincentives for legal aid providers to grant legal aid in trapped capital cases by stating unequivocally that providers’ assessments will not be interfered with unless ‘manifestly unreasonable’ (p21).
4. The Legal Aid Agency should provide specific training to its staff (including decision makers and those who staff its helpline) to ensure that they are aware of the rules around the use of discretion in trapped capital cases and are able to provide correct advice to members of the general public (p25).
5. The Legal Aid Agency should provide clear information to the public about the types of cases where trapped capital may apply and any evidence they will be required to provide (p25).
6. The test that providers and Legal Aid Agency caseworkers have to consider in trapped capital cases should be made simpler. Providers and LAA caseworkers should be able to refer to a non-exhaustive list of examples of situations in which legal aid will be granted (with the risk of a breach of fundamental rights as a fallback) (p30).
7. Legal aid should be made available in all cases where capital cannot practically be accessed (including cases where accessing the capital would cause severe hardship to the applicant or their dependents) (p32).
8. Individuals who are refused legal aid on means grounds should have access to an independent appeals process with the power to overturn refusal decisions based on trapped capital (p32).



1. The GR case and trapped capital

In November 2020, the High Court handed down an important judgment concerning legal aid and low-income homeowners with ‘trapped capital’: value in the home that existed on paper, but that could not be accessed in practice.

The case concerned Claire, Public Law Project’s client, who was a survivor of domestic abuse. Claire was unable to sell her house to pay for legal advice as it was the family home where she wished to continue living with her children. Claire’s entitlement to an equal share of any potential proceeds from the sale of the property was also disputed by her ex-partner.

The decision in the case of *R (GR) v Director of Legal Aid Casework*² confirmed that in such cases the Director of Legal Aid Casework³ is able to use a discretion contained in the Means Regulations⁴ to treat a person as being eligible for legal aid, where they might otherwise be treated as having too much capital. Wherever the Director considers it fair to do so, she may value assets other than money (such as a family home) at a level which ensures the individual falls below the capital limit and qualifies for legal aid (such as by valuing it an asset at ‘£0’).⁵

The GR judgment has important implications for people who may otherwise be unable to pay for private legal advice and representation. Following the judgment, the Lord Chancellor amended his guidance to the Director (and caseworkers in the Legal Aid Agency⁶) about when the discretion should be exercised, stating:

Whether this discretion 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

² [2020] EWHC 3140 (Admin)

³ The official who oversees the Legal Aid Agency, an executive agency of the Ministry of Justice that is responsible for the administration of Legal Aid in England and Wales.

⁴ Civil Legal Aid (Financial Resources and Payment of Services) Regulations 2013, Regulation 31(b).

⁵ *R (oao GR) v Director of Legal Aid Casework* [2020] EWHC 3140 (Admin), at paragraph 76. Available at <https://www.bailii.org/ew/cases/EWHC/Admin/2020/3140.html>.



bespoke rules in Regulations 33–37 would cause a breach of the individual’s Convention rights and/or right of access to justice.⁷

The purpose of this report is to assess the available evidence in order to determine the extent to which the GR litigation has improved access to legal aid for those with trapped capital. Our findings show that legal aid is still not widely available to those who are potentially eligible⁸ and urgent work is needed by the Legal Aid Agency to ensure that those eligible for legal aid are able to access it.

The Ministry of Justice is currently consulting on amendments to the civil legal aid means test which include proposals in relation to trapped capital.⁹ This report will inform our response to those proposals, which we will publish ahead of the 7 June 2022 deadline.

2. Access to legal aid in trapped capital cases

There are several different ways in which eligibility for legal aid is decided:

- whether a matter is within the statutory scope of legal aid or otherwise qualifies for Exceptional Case Funding on the basis of their human rights;
- whether an individual meets the financial eligibility criteria for legal aid (the ‘means test’); and
- how likely a case is to succeed (the ‘merits test’).

The issue of trapped capital relates to a specific component of the means test. To

⁷ See Legal Aid Agency, ‘Controlled Work. Lord Chancellor’s guidance on determining financial eligibility for Controlled Work and Family Mediation (April 2021)’ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/983065/Lord_Chancellor_s_guidance_on_determining_controlled_work_and_family_mediation.pdf p22; and, Legal Aid Agency, ‘Civil Representation. Lord Chancellor’s guidance on determining financial eligibility for certificated work (April 2021)’ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/983069/Lord_Chancellor_s_guidance_on_determining_certificated_work.pdf p50.

⁸ Public Law Project, ‘Practice note: ‘Trapped’ capital’ (26 July 2021) https://publiclawproject.org.uk/content/uploads/2021/07/210726-GR-v-DLAC-Practice-note-v-3_published-tbc.pdf.

⁹ Ministry of Justice, Legal Aid Means Test Review, 15 March 2022 <https://consult.justice.gov.uk/legal-aid/legal-aid-means-test-review/>



qualify for legal aid under the means test, individuals must be within three thresholds:

- gross income;
- disposal income; and
- disposable capital.

There are broader issues with the means test in terms of restrictions on who is eligible for legal aid, which have previously been raised by Public Law Project¹⁰ and others,¹¹ as well as wider issues around the accessibility of legal aid due to the capital thresholds.¹²

Trapped capital exists when someone has an amount of capital that exceeds the capital threshold, but which they are unable to access in practice to enable them to access privately funded legal advice or representation in circumstances where there is a risk of their fundamental rights being breached.¹³ Although the issue of trapped capital was highlighted in the case of GR through a domestic abuse case and can be a significant issue for survivors of domestic abuse,¹⁴ the judgment in GR has relevance across all areas of civil law.¹⁵

There are two ways in which practitioners may need to access legal aid for clients with trapped capital: either using their 'delegated authority' to grant legal aid for advice, or applying to the Legal Aid Agency for a legal aid certificate:

- Under delegated authority, organisations with legal aid contracts in certain

¹⁰ Isaac Richardson, 'The gap between the legal aid means regulations and financial reality' (Public Law Project, July 2018)
https://publiclawproject.org.uk/content/uploads/2018/07/Means_threshold_for_web.pdf.

¹¹ Donald Hirsch, 'Disqualified from justice' (Law Society, April 2018)
<https://www.lawsociety.org.uk/topics/research/legal-aid-means-test-report/>.

¹² Lisa Whitehouse, 'Report on the affordability of legal proceedings for those who are ineligible for legal aid by reason of exceeding the capital threshold' (March 2018)
<https://www.lawsociety.org.uk/en/campaigns/consultation-responses/ministry-of-justice-laspo-part-1-post-implementation-review-law-society-response>.

¹³ Such as their rights under Article 6 (the right to a fair trial) and Article 8 (the right to private and family life) of the European Convention on Human Rights or the Common Law right of access to the Court (as explored in the Supreme Court decision of R (oao UNISON) v Lord Chancellor [2017] UKSC 51).

¹⁴ Surviving Economic Abuse, 'Denied justice: How the legal aid means test prevents victims of domestic abuse from accessing justice and rebuilding their lives' (October 2021)
<https://survivingeconomicabuse.org/wp-content/uploads/2021/10/Denied-justice-October-2021.pdf>.

¹⁵ Public Law Project, 'Practice note: 'Trapped' capital' (26 July 2021)
https://publiclawproject.org.uk/content/uploads/2021/07/210726-GR-v-DLAC-Practice-note-v-3_published-tbc.pdf.



cases are able to use powers delegated to them by the legal aid regulations to grant legal aid. In these cases, the files held by the contract holder will later be audited by the Legal Aid Agency to check that legal aid has been correctly awarded. The Legal Aid Agency has powers to claim back money paid out to providers if it later determines these delegated assessments were incorrect. In some circumstances, the provider can appeal this later determination to an independent costs assessor (but work on the appeal is unpaid).

- To apply for a legal aid certificate, organisations with legal aid contracts must apply directly to the Legal Aid Agency and give reasons why legal aid should be granted. If the application is successful, the Legal Aid Agency will grant a certificate of legal aid, which allows the organisation to reclaim their costs at the end of the case. If the application is refused because the LAA considers a person has failed the means test, there is no right of appeal to an independent adjudicator. These decisions can in principle be challenged through judicial review, however this is not generally an accessible remedy (as the individual would also be deemed ineligible for legal aid for a judicial review).

Due to the complex nature of legal aid eligibility, individuals need to have their eligibility assessed by a lawyer or legal advice organisation with a contract to provide legal aid services. Some charities with specialist expertise may also be able to provide advice, information and signposting for individuals who appear to be eligible for legal aid due to trapped capital despite otherwise being over the capital threshold.

Research by other charities has demonstrated that without access to legal advice and representation, individuals may face serious consequences. Research by legal charity Rights of Women documents the severity of the issues experienced by women unable to access legal aid in domestic violence cases as a result of the legal aid regulations.¹⁶ In a survey of 239 women affected by domestic violence who were involved in family law proceedings, carried out between 2014 and 2015, 52.8% of respondents reported that they 'did nothing as a result of not being able to apply for legal aid'.¹⁷ Of particular concern was that 'for one respondent this meant that she stayed in her abusive relationship'.¹⁸

Research recently published by the charity Surviving Economic Abuse highlights a number of issues for survivors of domestic abuse around the means test for legal aid, specifically in economic abuse cases.¹⁹ The capital assessment for legal aid is one

¹⁶ Rights of Women, 'Evidencing domestic violence: nearly 3 years on' (December 2015) <https://rightsofwomen.org.uk/wp-content/uploads/2014/09/Evidencing-domestic-violence-V.pdf>.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Surviving Economic Abuse, 'Denied justice: How the legal aid means test prevents victims of



particular area of concern raised by the report, with the research finding that out of 40 women who responded to the survey, 32 women were unable to access legal aid and of these 14 women were ineligible due to the capital assessment.²⁰ The report also emphasises the problems faced by women with trapped capital, with the research finding at least 10 cases where this was an issue due to abusers preventing women from accessing jointly held assets to fund legal advice. The Surviving Economic Abuse report emphasises that trapped capital should be consistently recognised, acknowledging anecdotal evidence from legal aid practitioners that this is not currently the case.

The research presented in this report provides further evidence of the issues identified by other charities, and contributes to updating understanding of what access to legal aid looks like in trapped capital cases since the judgment in the case of GR.

domestic abuse from accessing justice and rebuilding their lives' (October 2021)
<https://survivingeconomicabuse.org/wp-content/uploads/2021/10/Denied-justice-October-2021.pdf>

²⁰ Ibid.



3. Research methodology

The research presented in this report was conducted to assess the impact of the case of GR and the accessibility of legal aid for people with trapped capital since the judgment in November 2020. The aim of the research was to establish whether those who are eligible for legal aid on the basis of trapped capital are able to access it and whether further work is needed to implement the judgment in GR.

3.1 Research questions

1. To what extent are individuals able to access legal aid in cases of trapped capital following the judgment in the case of GR?
2. How could the accessibility of legal aid be improved in cases of trapped capital?

3.2 Methods

Public Law Project reviewed relevant literature on the capital threshold for legal aid. We then conducted a survey in July and August 2021, to which we received 30 responses, and four follow-up interviews in November and December 2021. The interviews lasted between 20 and 35 minutes. We also submitted two requests for data from the Legal Aid Agency under the Freedom of Information Act (see Appendix) and reviewed the guidance available from the Legal Aid Agency via the United Kingdom Government website.²¹

3.3 Ethical considerations

All responses have been anonymised to protect the identity of individual participants. A process to ensure informed consent to participate in the research was established for the survey and the interviews that were carried out. The three key principles of informed consent are information, comprehension and voluntariness.²² An information sheet was provided to all participants, and information sheets and consent forms were provided to those who participated in interviews. The survey was set up on a web form and provided information about the research, including its aims and details about how to withdraw from the research at a later date. The information was provided so that individuals were informed about what participation in the research would involve prior

²¹ Legal Aid Agency, 'Guidance. Civil legal aid: means testing' (1 June 2014, updated 18 October 2021) <https://www.gov.uk/guidance/civil-legal-aid-means-testing>.

²² Farrimond, Hannah, *Doing Ethical Research* (2012, Palgrave Macmillan).



to submitting information via the survey. Contact details were provided so that participants could contact the research team if they required further clarity on any aspects of the research. It was made clear that participation was entirely optional and participating in the survey placed no obligation on those who responded to engage with any further research with Public Law Project.

Information sheets were sent to all participants prior to interviews and once individuals consented to participate a consent form was sent for individuals to complete. In the same way as the survey, information was provided about how to withdraw from the research and contact details were provided for individuals to seek any further clarification about the research process. The interviewer also checked with participants at the outset of interviews whether they had any further questions and to confirm consent for the interview to be recorded for the purposes of transcription.

All participants were made aware that their participation in the research would be anonymous, and interviewees were given the option of choosing their own pseudonym. Anonymity has been provided to ensure that participants felt able to speak freely about their experiences. As participants were providing responses based on their experiences of work, they were asked to speak about their own views and perceptions rather than responding on behalf of the organisations that they work for.

3.4 Limitations of the research

The main limitation of this research is that it was conducted primarily with legal aid practitioners, with some input from charities providing support to people who need to access legal aid. Due to the resources available to conduct the research we did not engage directly with individuals who had lived experience of trapped capital cases. We consider that these perspectives could provide important insight for any future research conducted in this area, but particular care would need to be taken to provide adequate support and information for anyone who may be eligible for legal aid but who has not been able to access it. We also acknowledge earlier research conducted by the charities Rights of Women and Surviving Economic Abuse on the perspectives of women seeking legal aid in domestic abuse cases.²³

²³ For example, Rights of Women, 'Evidencing domestic violence: nearly 3 years on' (December 2015) <https://rightsofwomen.org.uk/wp-content/uploads/2014/09/Evidencing-domestic-violence-V.pdf> and Surviving Economic Abuse, 'Denied justice: How the legal aid means test prevents victims of domestic abuse from accessing justice and rebuilding their lives' (October 2021) <https://survivingeconomicabuse.org/wp-content/uploads/2021/10/Denied-justice->



We made attempts to engage with organisations that do not provide legal aid services but that may still be working with or supporting people with trapped capital. We had limited success with this. From the data that we were able to collect, it is possible to note that the financial eligibility assessments for legal aid are a highly specialised area and it is difficult for organisations or individuals to check financial eligibility without detailed knowledge of the process. Checking whether someone meets the means test for legal aid is usually a process carried out by organisations that hold legal aid contracts and the rules around trapped capital only apply in cases where people already meet the income threshold, meaning that the rules will apply to a relatively limited number of people.

As we were unable to obtain data from the Legal Aid Agency about either the number of cases that they process where the issue of trapped capital is raised, or the number of cases granted, it is difficult to make any firm conclusions about how many people are currently still unable to get legal aid who may be eligible. The limitations of the data means that we cannot draw conclusions about the wider experiences of those who may be eligible for legal aid on the basis of trapped capital but who are unable to obtain legal aid. We are, however, able to draw some conclusions from the data that we were able to collect about uneven application of the rules around trapped capital due to their discretionary nature and the resulting gaps in accessibility of legal aid in trapped capital cases.

Finally, it is worth noting that there is likely to be significant bias in the survey responses due to sampling methods. Public Law Project circulated the survey through existing contacts and networks and for this reason there is a high probability that those who responded are more likely to have been aware of the litigation and sympathetic to the issues raised by the case. Although responses are not representative of the overall population, they are indicative of important perspectives within the legal aid sector and the nature of the problems arising in relation to trapped capital cases.

3.5 Profile of participants

A majority of those who participated in the survey were legal aid practitioners. We received a few responses from other advisers, support workers or charity representatives:

[October-2021.pdf](#)



- 24 legal aid practitioners
- One former legal aid practitioner
- One manager of a solicitor firm's legal aid accounts
- Three advisers/support workers
- One Head of Policy and Campaigns at a domestic violence charity

As the table below shows, the majority of participants practised in the areas of domestic violence and/or family law, but other areas of practice ranged from inquests to community care to education.

Participant areas of practice



We carried out follow-up interviews with survey respondents who indicated that they had worked with people with trapped capital since November 2020 in the areas of family law and housing.



4. Findings

4.1 Relevant areas of law and types of case

Although trapped capital cases may arise in any area of civil legal aid where the means test applies, our findings tentatively suggest there are some areas where they may more frequently arise. It is difficult to make any definitive assessment of where trapped capital cases arise and the number of cases granted, as the Legal Aid Agency does not collate data for this. It would, in theory, be possible for the government to monitor this from information it already collects, as the Ministry of Justice has confirmed that it holds the information that we requested but that providing it would exceed the cost limit under the Freedom of Information Act (see Appendix). Given that there is a significant gap in understanding of how many people may be directly affected by the issue of trapped capital each year, and the proportion of cases granted legal aid under the existing discretionary rules, we suggest that the government should commit to reviewing its data monitoring in this area as a matter of urgency.

Most of the survey responses that we received related to the areas of domestic violence and family law, with some practitioners noting that trapped capital is not an issue that often comes up for the people that they work with in other areas of law, although it can arise. In the area of family law, trapped capital can affect people with private cases relating to children and finances, and finances in divorce. One charity reported that although it was difficult to say exactly how many cases per week, they confirmed they were seeing these types of cases on a weekly basis.²⁴ The issue of trapped capital may often come up in cases involving domestic abuse, where an individual owns a home with the perpetrator of abuse, and participants signaled that these are likely to be the most common type of case involving trapped capital. In housing law, participants noted that it was not a common issue, but that it can arise. This is in part because a significant amount of legal aid work in housing law relates to cases where individuals do not own their own homes, such as rent arrears and possession cases, although it was noted that it can arise in some types of housing case, for example, mortgage repossession cases or matters involving domestic abuse.

Identifying the types of case where trapped capital may apply is relatively complex and relies on legal aid practitioners understanding the regulations in relation to their area/s

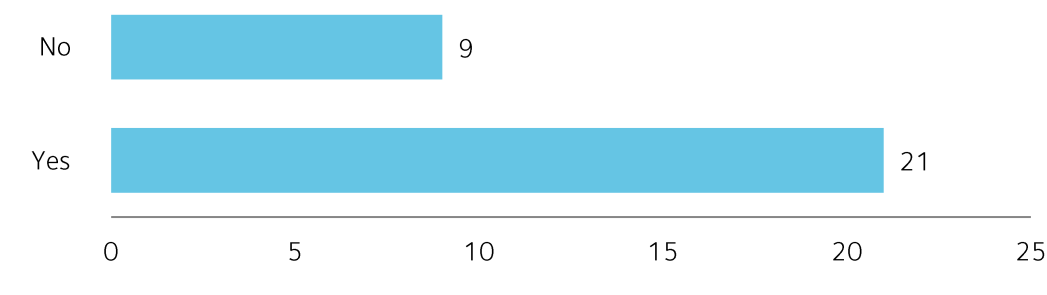
²⁴ Sarah (pseudonym) Senior Legal Officer. Organisation type: Charity. Interview date 8 November 2021.



of work and identifying specific circumstances under which legal aid may be granted on a discretionary basis. One participant, Andrew, Director at a solicitor's firm, noted that there are some areas where the means test does not apply that will therefore not be affected by trapped capital,²⁵ such as cases involving deprivation of liberty or public family law matters. Andrew also noted that he thought there are some areas where there might be specific exemptions from the means test, possibly for inquests and clinical negligence. This suggests that legal aid practitioners need to have a detailed understanding of the legal aid means regulations in order to be able to identify where discretion for trapped capital may apply, but it also relates to wider issues with the means test and eligibility for legal aid. Trapped capital is an issue specifically for low-income homeowners, but many people will not be eligible for legal aid because they do not qualify under the income threshold. It is only where individuals pass the means test for gross and disposable income that the limits on capital may be an issue, and trapped capital will only be relevant for specific types of case and where there are not other exemptions for the means test that apply within the legal aid regulations. For these reasons it is complex to determine financial eligibility and the possibility of using discretion to grant legal aid in trapped capital cases needs to be assessed by practitioners on a case-by-case basis.

The complexity of the rules around financial eligibility makes it necessary for legal aid practitioners to assess individual cases and to be able to identify where trapped capital may exist, which can vary across areas of law. The survey highlights varying levels of the frequency of trapped capital cases arising among the clients of those who responded.

Since November 2020 have you worked with people who have been or may have been eligible for legal aid on a discretionary basis due to trapped capital?

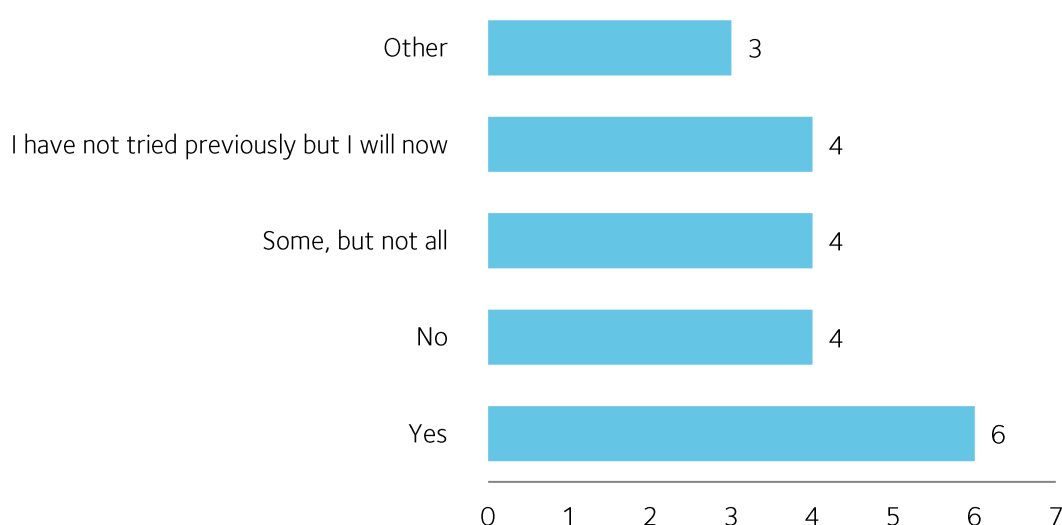


²⁵ Andrew (pseudonym) Director. Organisation type: Solicitors Firm. Interview date 16 December 2021.



In the survey responses, nine people reported that since November 2020 they had not seen any cases of trapped capital, with the majority of respondents (70%) reporting that they had. Survey responses also indicated varying levels of success in terms of whether respondents had been successful in getting legal aid for their clients in trapped capital cases.

If yes, have you been able to obtain legal aid for people in these circumstances since November 2020?



Recommendation 1: The Legal Aid Agency should take steps to improve how it monitors and publishes its own data on the number and type of trapped capital cases where legal aid providers request the exercise of discretion for certificated work and the proportion of cases granted, as well as the number of cases where delegated powers are used by legal providers to grant legal aid and the number of cases later overturned and, where relevant, appealed.

4.2 Positive impact of the GR judgment

Our findings suggest that the case of GR has had some positive impact in clarifying where legal aid should be available to those with trapped capital. As well as research participants reporting grants of legal aid for those with trapped capital since the GR judgment, there were some examples specifically attributed to the litigation, particularly where practitioners reported that they had used the Public Law Project resources published following the judgment to assist in making an application to the Legal Aid Agency. We suggest that the Legal Aid Agency could use the materials already available from Public Law Project to develop its own resources, which would enable the information to be more broadly and evenly accessible to all practitioners with legal aid



contracts. We also suggest that the Legal Aid Agency update the digital 'CCMS' system that providers use to submit applications to the Legal Aid Agency and legal aid forms to include an option to indicate that capital is trapped.

Some participants noted that they had become aware of the judgment due to information from Public Law Project or the circulation of our practice note.²⁶ A third of responses were from practitioners who had only become aware of the GR judgment due to the research itself and the circulation of the survey, an issue that is discussed in further detail below. Those who were already aware of the judgment in GR reported hearing about it from a range of sources including: social media (Twitter), Public Law Project blog/email and Public Law Project staff, family journals and other publications, internal discussions and updates within firms (notably these were people working in family law) as well as discussions between colleagues in wider domestic abuse sector, Legal Aid Practitioner Group updates, Legal Aid Agency updates, Resolution Legal Aid Committee, Practical Law weekly update and the Law Gazette.

We provided links to our practice note during the circulation of the survey to ensure that those seeing information about trapped capital and financial eligibility for legal aid for the first time due to the research would be equipped with further information should they identify it as an issue for any clients. It is important to note, however, that the survey responses demonstrate that there is not universal understanding among legal aid practitioners of when discretion might be applied to grant legal aid in cases where there is trapped capital.

Recommendation 2: The Legal Aid Agency should develop and publish resources for legal aid providers on when legal aid should be granted in trapped capital cases and the information and any evidence that needs to be provided in an application. Such resources could be developed from the resources published by Public Law Project and evidence requirements should not be unduly onerous. It should update its forms and systems so that 'trapped capital' can easily be highlighted by providers.

4.3 Barriers to legal aid in trapped capital cases

4.3.1 Uneven access to legal aid

During the research we did not speak directly with members of the public who may be

²⁶ Public Law Project, 'Practice note: 'Trapped' capital' (26 July 2021) https://publiclawproject.org.uk/content/uploads/2021/07/210726-GR-v-DLAC-Practice-note-v-3_published-tbc.pdf



entitled to legal aid, but our participants noted that guidance on financial eligibility for legal aid is extremely limited for members of the public and the government's website signposts individuals to organisations with legal aid contracts. Participants highlighted cases that they were aware of where individuals had not been able to obtain legal aid where they had trapped capital, including in domestic abuse cases. An adviser at a charity providing assistance to people with family and domestic violence matters reported that outcomes had varied for the individuals that they work with.

Outcomes have varied – some have been able to access legal aid, some have been turned away by a solicitor who is not aware of the discretion and have had to challenge the solicitor's understanding, others have been refused by the Legal Aid Agency.²⁷

One issue highlighted was the problem of legal aid deserts in some areas of law, including housing cases and private family law. Where individuals find it difficult to access legal aid lawyers, they will be less likely to receive advice on whether they are financially eligible for legal aid where they may have trapped capital. One participant, Sarah, a Senior Legal Officer at a charity, emphasised the issue specifically of legal aid deserts in private family law cases, where individuals are often unable to find a legal aid provider to take on their case, partly due to the lower levels of pay for some areas of work, leaving individuals with very limited options to either represent themselves or leaving their legal matter unresolved:

A lot of the women that we speak to, they don't have an option over whether or not they're in legal proceedings because the other side brings proceedings against them.

And certainly that's the case in private children cases, they end up representing themselves. And the amount of anxiety caused by having to represent yourself in private children proceedings against a perpetrator of abuse is immense.

And when women don't know what their legal rights are, or understand what the process is, we see lots of women agreeing to arrangements so that they can so they can kind of bring their proceeding to an end that they don't actually think are safe for their children or for them. So that's definitely a problem.

And, for other women who are not forced into proceedings by the other side, lots of them, they just don't do anything about their legal problem, so that's a particular problem in finances cases, where we're more likely to see the woman being the one who needs to start financial proceedings on divorce. And the other side, because they're in that position where they tend to be the financially

²⁷ Survey response 14, adviser/support worker, 27 July 2021.



stronger party, so they are kind of more than happy to just let things roll on and, you know, drag it out as long as possible.²⁸

This evidence of difficulties for individuals in finding solicitors to take on their cases was supported by responses from legal aid practitioners. We heard from Laura, a trainee solicitor at a firm with a family legal aid contract, who had applied for legal aid in trapped capital cases several times with no success. Laura reported her firm are no longer able to make these applications due to the requirements of their legal aid contract and the risk of making further unsuccessful applications.²⁹ All of the cases where the firm had attempted to get legal aid for their clients involved domestic abuse.

The issues arising from Legal Aid Agency decision-making are explained further in Section 4.3.4 below. Where practitioners do exist with capacity but feel unable to pursue legal aid for clients with trapped capital due to the discretionary nature of the regulations, this is likely to further exacerbate the issues arising from legal aid deserts where access to lawyers is limited or non-existent.

Recommendation 3: The Legal Aid Agency should remove disincentives for legal aid providers to grant legal aid in trapped capital cases by stating unequivocally that providers' assessments will not be interfered with unless 'manifestly unreasonable'.

4.3.2 Awareness of GR judgment and legal aid eligibility

Of those who responded to the survey, 20 people had heard about the GR judgment prior to the research, with 10 participants (one third) responding that they had only found out about it through the circulation of the research. This does not provide any statistical representation of the wider population (as noted previously, there is most likely significant bias due to the survey being sent out using Public Law Project existing contacts and networks) but serves to highlight that not all practitioners are aware of the GR judgment and there is a need for further information and training on eligibility for legal aid in cases of trapped capital. All those who were not aware of the judgment were legal aid practitioners, including three practitioners working in the area of family and domestic violence, and four in housing, as well as others across a range of areas: Mental Health, Court of Protection, Public Law, Debt and Inquest.

²⁸ Sarah (pseudonym) Senior Legal Officer. Organisation type: Charity. Interview date 8 November 2021.

²⁹ Laura (pseudonym) Trainee Solicitor. Organisation type: Solicitors Firm. Interview date 23 November 2021.



Uneven access to the advice of legal aid lawyers on possible financial eligibility is compounded the limited information provided by the Legal Aid Agency. In a Freedom of Information Act request we asked the Legal Aid Agency to disclose any guidance, or other materials, or training provided to its staff since November 2020. The response to our request provided no information in addition to the materials published on the UK Government website. There is a Legal Aid Agency web page with information about civil legal aid and means testing aimed at practitioners who hold legal aid contracts.³⁰ Although there is no information about trapped capital or the use of discretion on the main page for means assessment, there are links to additional technical pieces of guidance for legal aid providers. There is some guidance on trapped capital published by the Legal Aid Agency in Section 5.2 of the *Means Assessment Guidance* at paragraphs 5–9,³¹ and brief guidance specifically in relation to Controlled Work³² and Civil Representation.³³ These documents are publicly available but are aimed specifically at legal aid providers rather than non-lawyers and members of the general public. The complexity of the rules around means assessment also makes it difficult to identify the relevant guidance for trapped capital within these documents. The limited guidance that is available does not make clear the types of evidence the Legal Aid Agency expects in ‘trapped capital’ situations, nor does it provide any examples of ‘trapped capital’ situations where the discretion should normally be exercised.

One participant said, in relation to practitioners being able to grant legal aid for controlled work in trapped capital cases, ‘I don’t feel the latest guidance is sufficient enough to make providers feel comfortable in doing it for themselves’,³⁴ indicating the limited guidance available to legal aid practitioners. There is no option on the Legal Aid

³⁰ Legal Aid Agency, ‘Guidance. Civil legal aid: means testing’ (1 June 2014, updated 18 October 2021) <https://www.gov.uk/guidance/civil-legal-aid-means-testing>

³¹ Legal Aid Agency, ‘Means Assessment Guidance’ (May 2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/983070/Means_Assessment_Guidance.pdf

³² Legal Aid Agency, ‘Controlled Work. Lord Chancellor’s guidance on determining financial eligibility for Controlled Work and Family Mediation (April 2021)’ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/983065/Lord_Chancellor_s_guidance_on_determining_controlled_work_and_family_mediation.pdf. See Section 7, paragraphs 10–11. Page 22.

³³ Legal Aid Agency, ‘Civil Representation. Lord Chancellor’s guidance on determining financial eligibility for certificated work (April 2021)’ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/983069/Lord_Chancellor_s_guidance_on_determining_certificated_work.pdf. See Section 6.3, paragraphs 5–8. Page 50.

³⁴ Andrew (pseudonym) Director. Organisation type: Solicitors Firm. Interview date 16 December 2021.



Agency's Legal Help forms (which providers complete with their clients) to indicate that capital is 'trapped'. There is also no such option on the CCMS system for providers' applications. Another practitioner, Mary, reported that she had spoken to caseworkers at the Legal Aid Agency about applications and felt they had varying levels of understanding of the rules:

I don't think it's always straightforward for us when we do have to apply for legal aid funding, it's just not straightforward, and it's very hard, and it's hard work, and it takes a long time and you've got differences in the caseworkers. Some know and are knowledgeable and some are not knowledgeable. I've had to deal with errors before, you know and understanding their reasoning for refusals and things like that.³⁵

The main issue Mary emphasised was how time consuming it was to make applications for legal aid because the process is so complex. Mary had managed to obtain legal aid for a client in a trapped capital case, but she had to appeal the initial decision and it had required back and forth communication with the Legal Aid Agency. Mary also noted it had been time consuming to obtain the relevant information by telephone when speaking to the Legal Aid Agency, because issues with the means test are just one part of the legal aid applications process that can be detailed and complex for other reasons.

The complexity of the rules around financial eligibility and the means test also makes it difficult for members of the public to determine whether they qualify for legal aid without access to a legal aid practitioner. Three participants reported problems with signposting individuals to the Legal Aid Agency for further information in cases of trapped capital. It is difficult to draw any firm conclusions from the data about whether individuals contacting the Legal Aid Agency receive helpful advice on eligibility for legal aid in trapped capital cases, but two participants specifically emphasised concerns about signposting their clients to the Legal Aid Agency for assistance. One legal aid practitioner, Laura, said that they had referred clients to the Legal Aid Agency to help them understand why their application for legal aid was refused in domestic abuse cases despite having trapped capital. Laura said that she only had one client who had given her any feedback after speaking to the Legal Aid Agency, but the client 'was just told that her capital was over the capital limit that is within their [Legal Aid Agency] guidance, they didn't really explain to her any other reasons. They just said, look, you're over the limit so you won't be eligible'.³⁶ Another practitioner reported that they were

³⁵ Mary (pseudonym) Housing Solicitor and Supervisor. Organisation type: Solicitors Firm. Interview date 15 December 2021.

³⁶ Laura (pseudonym) Trainee Solicitor. Organisation type: Solicitors Firm. Interview date 23



‘unsure whether the LAA would offer helpful or correct advice’.³⁷ One participant from a charity said:

We would not signpost women to the Legal Aid Agency [LAA] for advice on eligibility. We have been told too many times about women who have previously spoken to the LAA and been told they are not eligible before this case even when they are clearly eligible without having to apply the discretion.³⁸

Following up on this response, Sarah, a Senior Legal Officer at the charity, reported that individuals they worked with had received incorrect information from the Legal Aid Agency customer services helpline. Sarah said that one woman ‘had actually called the Legal Aid Agency to work out whether or not she was eligible for legal aid and spoke to some person on the phone who said “no, you are not financially eligible because you have a house”’.³⁹ Sarah said another woman with trapped capital had tried speaking to ‘quite a few solicitors’ and was told ‘either they don’t have capacity to take on a new case or by some of them had been told “you’re not eligible”’.⁴⁰ These findings suggest that there is an urgent need for the Legal Aid Agency to provide additional training to its staff, to ensure that they are aware of how to advise members of the public on their possible financial eligibility due to trapped capital, as well as equipping legal aid practitioners with enough information about the discretion to enable them to take on cases.

It is worth noting that in her interview response Sarah also suggested that it is difficult for charities to provide basic information about financial eligibility for legal aid that is accessible to the general public because the rules are so complicated, meaning that something too basic could put people off when they may in fact be eligible for legal aid. This makes it vital that any guidance provided on trapped capital is clear and should come directly from the Legal Aid Agency.

Another area that could be improved in particular is in relation to the recent removal of the legal aid financial eligibility calculator, which two participants mentioned.⁴¹ Without

November 2021.

³⁷ Survey response 9, legal aid practitioner, 26 July 2021.

³⁸ Survey response 14, adviser/support worker, 27 July 2021.

³⁹ Sarah (pseudonym) Senior Legal Officer. Organisation type: Charity. Interview date 8 November 2021.

⁴⁰ Ibid.

⁴¹ Sarah (pseudonym) Senior Legal Officer. Organisation type: Charity. Interview date 8 November 2021; Mary (pseudonym) Housing Solicitor and Supervisor. Organisation type: Solicitors Firm. Interview date 15 December 2021.



the financial eligibility calculator being available, it is more difficult for practitioners to work out individual eligibility under the means test, but also the support that charities can provide in helping individuals to work out whether they are potentially eligible is limited. Providing a clear, basic calculator and information about possible discretion could help to improve the information and support available to members of the public.

The findings suggest that there are gaps in knowledge about where discretion should be applied in trapped capital cases for both legal aid practitioners and staff at the Legal Aid Agency. During interviews it was clear that those who had been successful in obtaining legal aid for their clients had a high level of confidence in identifying where the discretion should be applied, and this enabled them to pursue applications to the Legal Aid Agency. It is concerning that some legal aid practitioners feel unable to make applications for legal aid in trapped capital cases due to previous refusals and that there is also evidence to suggest that information from the Legal Aid Agency is limited and at times inconsistent. Members of the public are reliant on being able to obtain accurate information and assistance from legal aid practitioners. Clear information for the general public about the possibility of discretion in trapped capital cases, if published by the government, could also assist in ensuring that individuals are supported to access legal aid where they are potentially eligible.

Recommendation 4: The Legal Aid Agency should provide specific training to its staff (including decision makers and those who staff its helpline) to ensure that they are aware of the rules around the use of discretion in trapped capital cases and are able to provide correct advice to members of the general public.

Recommendation 5: The Legal Aid Agency should provide clear information to the public about the types of cases where trapped capital may apply and any evidence they will be required to provide.

4.3.3 Delegated authority and risk

A key finding from the survey was that only four of the legal aid practitioners who responded had used delegated authority to grant legal aid to their clients with trapped capital. Those who had not exercised delegated authority, despite seeing cases of trapped capital, cited a range of reasons, including a couple of participants who were not aware of the judgment at the time. However, most participants who described their reasons for not applying primarily brought up the issue of risk, due to the discretion exercised in cases of trapped capital and the burden of Legal Aid Agency contractual requirements.

The responses suggest hesitancy among those with legal aid contracts, due to the risk



of self-granting legal aid where it is perceived that the Legal Aid Agency could later use their discretion to refuse to grant it.⁴² One practitioner stated it was 'too risky'.⁴³

Another said:

In order to correctly exercise delegated powers to self-grant legal aid funding a provider must be sure that both the merits and financial regulations are fully met. Any 'wrongful' use of delegated functions will be brought up as the Key Performance Indicator [KPI] issue. Given that the trapped capital issue requires discretion, and combined with the fact that it could be a KPI fail and if refused, we could end up out of pocket. We do not believe that it is appropriate to exercise delegated functions when the issue of trapped capital is in question.⁴⁴

Practitioners also emphasised that they could not risk granting legal aid where it could have a longer-term impact on their business due to work undertaken 'at risk'.

Legal aid margins are so tight that we cannot afford to take on costs that will not be met or we would quickly be out of business. We just cannot go 'at risk'.⁴⁵

Some of those who had used delegated authority to grant legal aid in cases of trapped capital still emphasised the risk to legal aid providers, as explained by this participant:

Obviously the risk was on the firm, but it was a clear case which fell into the category of trapped capital. The husband lived in the home, client was fleeing domestic abuse, and in refuge, but we did have to do some pro bono work and write to the other party's solicitor to ask them to confirm in writing that the husband would not agree to our client securing a loan against the property.

It was decided to take the risk as there was urgent work to be completed. However, had we needed to pay disbursements, or instruct counsel we would not have taken the risk and would have applied in the normal way rather than delegated functions.⁴⁶

This also reinforces the evidence that practitioners need a high level of confidence in order to pursue legal aid for their clients in trapped capital cases.

⁴² Public Law Project's [practice note](https://publiclawproject.org.uk/content/uploads/2021/07/210726-GR-v-DLAC-Practice-note-v-3_published-tbc.pdf) sets out our position that the LAA can only lawfully overturn a provider's exercise of discretion where it is 'manifestly unreasonable'. See Public Law Project, 'Practice note: 'Trapped' capital' (26 July 2021) https://publiclawproject.org.uk/content/uploads/2021/07/210726-GR-v-DLAC-Practice-note-v-3_published-tbc.pdf

⁴³ Survey response 8, legal aid practitioner, 23 July 2021.

⁴⁴ Survey response 2, manager of firm's legal aid accounts, 22 July 2021.

⁴⁵ Survey response 7, legal aid practitioner, 23 July 2021.

⁴⁶ Survey response 25, legal aid practitioner, 9 August 2021.



4.3.4 Legal Aid Agency decision-making

Of those who had seen clients with trapped capital, six legal aid practitioners had applied to the Legal Aid Agency for legal aid on the basis of requesting discretion to value trapped capital as nil. There were mixed experiences of this, with some legal aid practitioners reporting making several attempts to apply before legal aid was granted. One participant said, 'on my third attempt they finally agreed to value it at nil'.⁴⁷ Another survey respondent reported:

We have used this for one legal aid application, after a few initial issues, mainly due to the wording of our application, the certificate was granted once we made full and correct reference to the case, the issues and how they applied to our client.⁴⁸

Of those who did not apply, this was generally because they were not previously aware of the judgment or the issue had not come up, although there were also some explicit concerns raised about the discretionary approach that the Legal Aid Agency applies in deciding these types of case. Another practitioner suggested that they actively avoid trying to get legal aid in cases where the decision by the Legal Aid Agency is based on discretion due to capacity issues and the time-consuming nature of the work required:

[To] keep up the work dealing with Legal Aid funding is tiresome and weary. It takes a lot of time to be applying for funding with LAA often at great risk to client and firm especially emergency work.⁴⁹

Some other responses suggested that it was necessary to warn clients that despite the judgment in GR they may still not be found to be eligible for legal aid, with one practitioner highlighting that some clients were also very cautious based on their previous experience of trying to obtain legal aid. They noted that clients were 'wary' about the process 'as they have been upset when previous attempts to secure funding have been refused. The clients have therefore proceeded as a LIP [litigant in person] on several occasions'.⁵⁰

Responses also repeatedly emphasised the difficulties for legal aid providers in having to deal with the Legal Aid Agency decision-making processes:

The Agency have not listened until now. The repeated 'computer says no' was extremely draining for a client who had been subject to prolonged domestic

⁴⁷ Survey response 28, legal aid practitioner, 20 August 2021.

⁴⁸ Survey response 3, manager of firm's legal aid accounts, 22 July 2021.

⁴⁹ Survey response 19, legal aid practitioner, 2 August 2021.

⁵⁰ Survey response 9, legal aid practitioner, 26 July 2021.



abuse, and had been finally brave enough to leave, then to have to go through the grueling process of repeated legal aid rejections and appeals...⁵¹

If a practitioner believes a means assessment is incorrect they can request internal review by the Legal Aid Agency, but ‘there is no right of review to an adjudicator to appeal a means assessment’.⁵² It is also important to take account of concerns raised in recent years about reports of the Legal Aid Agency’s ‘culture of refusal’.⁵³ The findings indicate that strong perceptions still exist that the Legal Aid Agency tends to refuse applications rather than making grants in borderline cases, ‘effectively making sure that no one who is ineligible gets legal aid’,⁵⁴ with the risk that eligible people are refused funding. In a ‘trapped capital’ case, that could result in a breach of the individuals fundamental rights. That is a situation that other parts of the legal aid scheme expressly attempt to avoid.⁵⁵

My view is the issue of trapped capital should not be discretionary, but a given. The discretionary element gives rise for future and further delay and times where urgent work may need to be undertaken.⁵⁶

Laura, a trainee solicitor, said that when her firm attempted to make applications for legal aid on behalf of clients following the judgment in GR they had quoted the case to the Legal Aid Agency:

We thought that that would change things, but they just didn't seem to take any note. They were so fixated on just the amount of capital it didn't really matter whether it was trapped or not or what we were quoting to them. It was just still much too much, too much capital for somebody to have.⁵⁷ This inflexibility, despite the judgment in GR and

⁵¹ Survey response 27, legal aid practitioner, 20 August 2021.

⁵² Legal Aid Agency, ‘Guidance. Appeals: civil means’ (1 June 2014, updated 5 February 2019) <https://www.gov.uk/guidance/appeals-civil-means>. In cases where a provider exercises discretion to grant legal aid, any issues would be picked up on billing and there would be a right of appeal to an Independent Costs Assessor. There is no right of appeal to an independent funding adjudicator on means issues where the Legal Aid Agency refuses an application for a discretionary grant of legal aid for certificated work under Regulation 31(b) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013.

⁵³ See Justice Committee, *The Future of Legal Aid* (27 July 2021) <https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/70/7002.htm>

⁵⁴ Andrew (pseudonym) Director. Organisation type: Solicitors Firm. Interview date 16 December 2021.

⁵⁵ Such as the potential to apply for exceptional case funding (‘ECF’) under s. 10(3) of the Legal Aid Sentencing and Punishment of Offender’s Act (2012) for issues that would not otherwise attract funding where there is a risk of a breach of the individual’s fundamental rights.

⁵⁶ Survey response 7, legal aid practitioner, 23 July 2021.

⁵⁷ Laura (pseudonym) Trainee Solicitor. Organisation type: Solicitors Firm. Interview date 23 November 2021.



the potential for the Legal Aid Agency to exercise discretion, suggests that relying on the Legal Aid Agency to exercise discretion in favour of granting legal aid is problematic given the broader culture of refusal that is reported by those who frequently deal with the department. One participant suggested making family homes exempt from the capital assessment, so that people are never forced to sell or remortgage their house to access legal advice. Or alternatively, exemptions could be applied in specific circumstances where someone cannot sell their home, for example in domestic abuse cases where the family home is jointly owned with the perpetrator of abused, or current cases where people cannot sell their home due to unsafe cladding. This would allow discretion to be maintained in relation to other assets.⁵⁸ Some participants felt that it should never be the case that people should be expected to sell their only home to fund legal advice,⁵⁹ especially if they are eligible for legal aid based on their income.⁶⁰

The guidance issued to Legal Aid Agency decision makers requires them to consider if a failure to exercise discretion 'would cause a breach of the individual's Convention rights and/or right of access to justice'.⁶¹ This requirement is not set out in the legal aid regulations or the judgment in GR, which confirm the Director can exercise the discretion where it is considered equitable (fair) to do so. As Public Law Project's practice note sets out,⁶² this is a complex question of law that requires decision makers to consider the issues at stake in the proceedings, the legal and procedural complexity and whether a person could effectively represent themselves. It may require individuals to gather detailed evidence of a deeply personal nature (such as the opinion of a domestic violence support worker or GP as to the impact upon them facing their abuser in Court without representation).

We suggest that it would be open to the Lord Chancellor to issue guidance that the discretion should be exercised wherever there is 'trapped capital' or to provide a non-exhaustive list of 'trapped capital' situations. Such a list could end with cases risking 'a

⁵⁸ Sarah (pseudonym) Senior Legal Officer. Organisation type: Charity. Interview date 8 November 2021.

⁵⁹ Mary (pseudonym) Housing Solicitor and Supervisor. Organisation type: Solicitors Firm. Interview date 15 December 2021.

⁶⁰ Andrew (pseudonym) Director. Organisation type: Solicitors Firm. Interview date 16 December 2021.

⁶¹ Legal Aid Agency, 'Means Assessment Guidance' (May 2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/983070/Mean_Assessment_Guidance.pdf. Page 69.

⁶² Public Law Project, 'Practice note: 'Trapped' capital' (26 July 2021) https://publiclawproject.org.uk/content/uploads/2021/07/210726-GR-v-DLAC-Practice-note-v-3_published-tbc.pdf



breach of the individual's Convention rights and/or right of access to justice' to 'catch' unusual situations that have not been anticipated.

Recommendation 6: The test that providers and Legal Aid Agency caseworkers have to consider in trapped capital cases should be made simpler. Providers and LAA caseworkers should be able to refer to a non-exhaustive list of examples of situations in which legal aid will be granted (with the risk of a breach of fundamental rights as a fallback).



5. Conclusions

The research indicates that the Legal Aid Agency has not provided staff with sufficient training and guidance on where discretion should be exercised to grant legal aid in cases of trapped capital. This must urgently be addressed to improve the process for those in need of legal aid who may either be unable to resolve their legal issue or be forced to represent themselves. Given perceptions by legal aid practitioners that a culture of refusal still exists at the Legal Aid Agency, the risk of provider's delegated decisions being overturned and the absence of an external appeals process for LAA means decisions in relation to certificated work,⁶³ there is a strong case for changing the statutory guidance issued to the Director of Legal Aid Casework and her caseworkers.

The guidance should make clear that discretion should be exercised in all cases where assessed capital cannot practically be accessed. Alternatively, it should provide a clear and non-exhaustive list of common 'trapped capital' situations, with expected evidence. Exercise of discretion where there is a risk of a breach of fundamental rights would provide an important fall back for unanticipated situations. The Civil Legal Aid (Procedure) Regulations 2012 should be amended to enable a right of appeal to an independent adjudicator where the Director refuses to exercise discretion. This would ensure that the circumstances in which 'trapped capital' will be disregarded are clear for both providers and the public and ensure evidence requirements are not unduly onerous.

Where legal aid practitioners are expected to make discretionary grants of legal aid, without any guarantee from the Legal Aid Agency that these decisions will not be overturned at a later date, it is a deterrent to practitioners granting legal aid in favour of potentially eligible clients. The LAA should state unequivocally that it will not interfere with provider's assessments unless they are manifestly unreasonable. The current guidance (or lack thereof) adds to the administrative workload of contract holders and puts them at risk of breaching their contractual obligations to the Legal Aid Agency. It was, however, also emphasised by participants that it is better to have legal aid available on a discretionary basis than not at all, due to the types of cases where people may have trapped capital, notably in domestic abuse cases.

⁶³ Due to the restriction in Civil Legal Aid (Procedure) Regulations 2012, Regulation 45(1)(a). see Legal Aid Agency, 'Guidance. Appeals: civil means' (1 June 2014, updated 5 February 2019) <https://www.gov.uk/guidance/appeals-civil-means>.



It is important to acknowledge the severe consequences where the means assessment process is not operating effectively at present, as it puts people at risk of not being able to obtain legal advice or representation in cases that engage their fundamental rights. The current system relies on legal aid practitioners being aware of the regulations, understanding how they might be applied following the judgment in the case of GR and being prepared to make applications on behalf of their clients. It is extremely difficult for individuals to find information about financial eligibility without the assistance of a legal aid practitioner, and the evidence suggests that the help available from practitioners is variable and cannot be guaranteed under the present system.

Recommendation 7: Legal aid should be made available in all cases where capital cannot practically be accessed (including cases where accessing the capital would cause severe hardship to the applicant or their dependents).

Recommendation 8: Individuals who are refused legal aid on means grounds should have access to an independent appeals process with the power to overturn refusal decisions based on trapped capital.

Appendix

Ministry of Justice response to request for information under the Freedom of Information Act. Letter to Public Law Project dated 21 September 2021.



Ministry
of Justice

24 SEP 2021

Disclosure Team
Ministry of Justice
102 Petty France
London
SW1H 9AJ

Dr. Emma Marshall
Public Law Project,
The Design Works,
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London
EC1V 7EY

data.access@justice.gov.uk

21 September 2021

Dear Dr Marshall

Freedom of Information Act (FOIA) Request – 210823004

Thank you for your request dated 23 August 2021 in which you asked for the following information from the Ministry of Justice (MoJ):

1. Since November 2020, how many applications for legal aid have been made to the Legal Aid Agency where a discretionary grant has been requested on the basis of 'trapped capital' i.e. in cases where the individual has capital that they are unable to access?
 - a. Of these applications, how many have been granted?
 - b. Please also provide a statistical breakdown of these applications and grants according to categories of law (by contract type).
2. Please provide any training materials, directions or internal policy materials provided to Legal Aid Agency employees since November 2020 regarding 'trapped capital' or the judgment in the case of *R (oao GR) v DLAC* [2020] EWHC 3140 (Admin).

If this request is too wide or unclear, we would be grateful if you could contact us as we understand that under the Act, you are required to advise and assist requesters. If any of this information is already in the public domain, please can you direct us to it, with page references and URLs if necessary. If providing the information requested at 1(b) would exceed the statutory costs limit under FOIA, we would be grateful if you could provide the other information where possible within the applicable limit, or advise on how to bring the request as a whole within the limit. Please contact me if the request can be clarified at all.

Your request has been handled under the FOIA.

I can confirm the MoJ holds the information you have requested. However, to provide as the request currently stands would exceed the cost limit set out in the FOIA.

Section 12(1) of the FOIA means a public authority is not obliged to comply with a request for information if it estimates the cost of complying would exceed the appropriate limit. The appropriate limit for central government is set at £600. This represents the estimated cost of one person spending 3.5 working days determining whether the department holds the information, and locating, retrieving and extracting the information.



Where section 12 applies to one part of a request we refuse all of the request under the cost limit as advised by the Information Commissioner's Office.

Details of applications which have requested a "discretionary grant" are not centrally recorded, and as such we would have to sift all applications made since November 2020 to locate these, and then review each of them to determine what decision was reached in respect of these. Given the number of applications made during this timeframe, it would not be possible to complete such an exercise within the cost limit, and such consequently we are not obliged to comply with your request.

Although we cannot answer your request at the moment, we may be able to answer a refined request within the cost limit. Given the aforesaid steps it would be necessary to take to comply with your request as written, it is unlikely that we will be able to respond within the cost limit unless any further request is modified accordingly. Please be aware that we cannot guarantee at this stage that a refined request will fall within the FOIA cost limit, or that other exemptions will not apply.

Despite the exemption applying as explained above, outside the scope of the Act and at our discretion, we can advise that you may wish to review the material published at <https://www.gov.uk/guidance/civil-legal-aid-means-testing> on means testing for civil legal aid, further to question 2 of your request.

For guidance on how to structure successful requests please refer to the ICO website on the following link: <https://ico.org.uk/your-data-matters/official-information/>

Appeal Rights

If you are not satisfied with this response you have the right to request an internal review by responding in writing to one of the addresses below within two months of the date of this response.


data.access@justice.gov.uk

Disclosure Team, Ministry of Justice

You do have the right to ask the Information Commissioner's Office (ICO) to investigate any aspect of your complaint. However, please note that the ICO is likely to expect internal complaints procedures to have been exhausted before beginning their investigation.

Yours sincerely

**Information Governance
Legal Aid Agency**



Ministry of Justice response to request for information under the Freedom of Information Act. Letter to Public Law Project dated 25 November 2021.



Emma Marshall
e.marshall@publiclawproject.org.uk

Disclosure Team
Ministry of Justice
102 Petty France
London
SW1H 9AJ

data.access@justice.gov.uk

25 November 2021

Dear Dr Marshall

Freedom of Information Act (FOIA) Request – 211101004

Thank you for your request dated 1 November in which you asked for the following information from the Ministry of Justice (MoJ):

Please provide any training materials, directions or internal policy materials provided to Legal Aid Agency employees since November 2020 regarding decisions in relation to: Financial eligibility for legal aid under regulation 31(b) of the Civil Legal Aid (Financial Resources and Payment of Services) Regulations 2013; and/or, Discretionary decision-making in cases of 'trapped capital' (i.e. cases where the individual has capital that they are unable to access) in relation to regulation 31(b); and/or, Implementation of the judgment in the case of R (oao GR) v DLAC [2020] EWHC 3140 (Admin), which found that the Director of Legal Aid Casework has a discretion to value capital other than money on an equitable basis under regulation 31(b).

Your request has been handled under the FOIA.

I can confirm that the MoJ holds the information that you have requested. However, the information is exempt from disclosure under section 21 of the FOIA, because it is reasonably accessible to you. The information can be accessed via the following link:
<https://www.gov.uk/guidance/civil-legal-aid-means-testing>

Decisions are considered on a case by case basis using the published guidance.

Appeal Rights

If you are not satisfied with this response you have the right to request an internal review by responding in writing to one of the addresses below within two months of the date of this response.

data.access@justice.gov.uk

Disclosure Team, Ministry of Justice

You do have the right to ask the Information Commissioner's Office (ICO) to investigate any aspect of your complaint. However, please note that the ICO is likely to expect internal complaints procedures to have been exhausted before beginning their investigation.

Yours sincerely

Information Governance
Legal Aid Agency



Public
Law
Project

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.

www.publiclawproject.org.uk