

Access to justice and legal aid in civil claims

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Connect 4?



**People
not Trident**



- Jobs** not Trident
- NHS** not Trident
- Homes** not Trident
- Education** not Trident
- Climate** not Trident
- Wellbeing** not Trident
- Aid** not Trident



JUSTICE

Why legal aid?

“It is the charter of the little man to the British courts of justice. It is a Bill which will open the doors of the courts freely to all persons who may wish to avail themselves of British justice without regard to the question of their wealth or ability to pay”

**Sir Hartley Shawcross (Founding JUSTICE member),
introducing the Legal Aid and Advice Bill,
December 1948.**



The Background

- 1950 – 80% eligibility rate; 2006 – 36%
- The Carter Review (2006)
- 2009 – Access to Justice Act creates the Legal Services Commission.
- The Magee Review (2010)
- Legal Aid Sentencing and Punishment of Offenders Act 2012 (“LASPO”)



LASPO: Key features

- Aim to cut £350m a year to 2015
- Legal Services Commission abolished
- LA now controlled by executive agency:
The Legal Aid Agency
- Restricts eligibility for LA
- Cuts scope of LA
- Telephone gateways



Post-LASPO

- No automatic eligibility for those on income-related benefits
- No employment, clinical negligence or debt cases
- Very limited legal aid for housing, immigration, benefits or education cases
- Some services accessed first through telephone advice (e.g. equality and discrimination)
- Exceptional funding available for cases where a failure to provide legal aid would violate the ECHR (s10)



“Transforming legal aid”

- No eligibility for “**borderline**” cases
- Criminal legal aid for **prisoners** to challenge their treatment ends
- All legal aid claims subject to a “**residence**” test
- Legal aid for **judicial review** only recovered in cases which are issued and permission is granted.

Transforming Legal Aid, Ministry of Justice, April 2013



Where are we now?

- Arguments against proposed reform made by many, including senior judiciary.
- **The sums:** c£6m savings justifiable?
- **The ideology?**
- c16,000 responses to first consultation; c350 to JR consultation.
- Government considers the case for change remains “**strong**”.
- Changes to be implemented by **end 2014**.



Borderline cases

- Cases where not possible to assess 50% + prospects of success.
- No longer eligible for legal aid.
- Civil Legal Aid (Merits Criteria) (Amended) Regulations 2014

Prisoners and treatment

- No criminal legal aid for treatment cases
- Criminal Legal Aid (General) (Amendment) Regulations 2013
- *R (Howard League and Prison Advice Service) v Lord Chancellor* [2014] EWHC 709



The Residence Test

- 12 months continuous residence required
- Some exceptions accepted: infants, some trafficking or domestic violence claims and some immigration detention cases.
- Otherwise will apply to all applications.
- *R (Public Law Project) v Lord Chancellor* (pending)
- Regulations expected Spring 2014



Judicial Review

- Only cases which proceed to court and are granted permission will be entitled to recover
- Pre-issue advice and interim measures exempt?
- Ex-gratia payments for some claims?
- Civil Legal Aid
(Remuneration)(Amendment)(No 3)
Regulations 2014
- Criminal Justice and Courts Bill 2014



Exceptional funding?

- Originally expected around **7000-8000** applications per year.
- Only **31 cases** granted since April 2013
- **14 page form**
- Merits test required
- 28 days to process; no emergency applications



Legal aid and the law

- The common law (*ex parte Witham* etc)
- ECHR (Article 6, *Golder, Airey*, etc)
- The ECJ (Article 47, *D.E.B. v Bundesrepublik Deutschland* Case C-279/09)



Common law

- *R v Secretary of State, ex parte Leech* [1994] QB 198
- *Raymond v Honey* [1983] 1 AC 1, 13
- *R v Secretary of State, ex parte Witham* [1997] EWHC Admin 237 (NB: para 26)



Article 6 ECHR

“Whilst Article 6 para. 1 (art. 6-1) guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations", it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme ...constitutes one of those means but there are others such as, for example, a simplification of procedure.”

Airey v Ireland (1979), [26]



Article 47, CFREU

“it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve”

DEB, (2010), [60]-[61]



Where to start?

- How serious is the issue at stake?
- The litigant's ability to self-represent?
- The complexity of the relevant law and procedure.
- The financial implications.
- Can steps be taken to secure effective access to a court, without legal aid.



Access and alternatives?

- Simplification?
- Expansion of pro-bono providers?
- Mediation and other ADR services
- Technology, advice and assistance
- Core areas for reinvestment?



Challenges for the future?

“Our proper master is Justice...If we are to secure Justice’s mastery, not just at this moment but for a very long time to come, then we all need to consider how best we can reshape the justice system and how you – members of JUSTICE – can reshape it so that it can provide detailed, well-thought out and practical proposals setting out how that can and should be done.”

Lord Chief Justice, Lord Thomas of Cwmgiedd (4 March 2014)



Further reading

- JUSTICE Response to *Transforming legal aid and subsequent consultations.*
- Legal aid and ideology: the new basis for Government reform?, Angela Patrick, UK HR Blog, 4 July 2013
- Reforming judicial review: cutting pointless delay or preventing legitimate challenge?, Angela Patrick, 4 Feb 2014
- Joint Committee on Human Rights, 'Access to justice' Report, Eighth Report of 2012-13
- Ministry of Justice, Government Response to the JCHR, March 2014
- *Transforming legal aid*, Consultation papers, Ministry of Justice
- Public law project, Exceptional funding: a figleaf not a safeguard, July 2013.

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JUSTICE Student Human Rights Network Conference 2014

22 March 2014

Workshop 1: Access to justice and legal aid in civil claims¹

Background

On 1st April 2013, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force, substantially reducing the scope of civil legal aid. Broadly, LASPO removed legal aid in most cases related to private family law, immigration, welfare benefits, employment and clinical negligence. It also replaced the Legal Services Commission with a new Legal Aid Agency, giving the Government more direct control over the legal aid budget.

In the same month, the Ministry of Justice (MoJ) published a consultation paper "*Transforming legal aid: delivering a more credible and efficient system*" to announce further cuts to legal aid. These proposals focused specifically on criminal legal aid, and on civil legal aid for certain groups including non-residents and prisoners. This was followed in September 2013 by a second consultation paper "*Judicial Review: Proposals for further reform*" which proposed changes to the availability of legal aid for judicial review.

The House of Commons are currently debating the Criminal Justice and Courts Bill which contains further restrictions to the scope of judicial review. These measures significantly restrict the ability of individuals without means to secure advice and assistance from groups and organisations to challenge unlawful Government action.

Treatment in prison

Legal aid for prison law matters has been severely restricted since 2 December 2013. Funding has been removed for most advice and representation relating to treatment, sentencing and disciplinary matters. Legal aid has previously been used to assist mothers in gaining access to their children; to provide redress for disabled prisoners whose treatment violated Article 3 ECHR and to secure prisoners' rights to contact their legal representative. Funding through criminal legal aid is now only available in limited cases involving the determination of a criminal charge or an individual's liberty. Civil legal aid remains available for judicial review, subject to the changes outlined, below.

In the course of the consultation on these changes, JUSTICE questioned whether alternate mechanisms of redress available to prisoners are effective. The prisons complaints system operates within the prison service, and therefore lacks independence; none of the alternate mechanisms, including through complaints to the Prisons and Probations Ombudsman can

¹ JUSTICE thanks Sam Coe, JUSTICE intern and volunteer, for his assistance in preparing this hand-out.

award a binding remedy. This week, on 17 March 2014, the High Court rejected an application by The Howard League and the Prisons Advice Service to subject the changes to judicial review. Both charities plan to pursue an appeal to the Court of Appeal.

Borderline cases

In January 2014, public funding for cases with a ‘borderline’ prospect of success was removed by The Civil Legal Aid (Merits Criteria) (Amended) Regulations 2014 No. 131. Funding could previously be awarded for borderline cases where the matter could not be said to have over 50% prospects of success but there was “overwhelming importance” to the applicant”, or if there was a “significant wider public interest” in the case being heard.

In practice, prospects of success can be exceptionally difficult to determine, the ‘borderline’ category generally covered leading cases where the law was in a state of flux or where features of the case could not be resolved by further investigation. JUSTICE has expressed concern that individuals with important borderline cases will now be refused legal aid, individuals will be denied access to justice and the law will be poorer for these cases not being heard.

Residence test

The Government intends to exclude legal aid from anyone who cannot demonstrate that they are lawfully resident in the UK and have had 12 months continuous residence. Victims of human trafficking or domestic abuse, immigration detainees and newly settled refugees will only be eligible for legal aid in a limited number of cases if they meet certain limited criteria.

This is a novel proposal which will render a whole class of individuals ineligible regardless of the seriousness of their claim. JUSTICE has expressed significant concern about the breadth of the impact of these proposals. While a residence test might be expected to impact on particular groups – including homeless people, children and adults who have irregular immigration status and victims of domestic violence – the introduction of this test will impact on everyone who seeks legal aid. Individuals without forms of identification and proof of continuous residence will be particularly disadvantaged, including individuals who may suffer from mental health problems or drug addiction.

The Public Law Project has been granted permission to proceed with a judicial review of the proposed residence test, with a hearing expected in the case in early April 2014. These changes are scheduled for introduction in Spring 2014 (expected not before May).

Judicial Review

Judicial review provides a way for citizens to hold the state to account for unlawful acts. The Government proposes to restrict the availability of legal aid for judicial review so that providers will only be paid for the work they have carried out after the issuing of proceedings where permission is granted. The Legal Aid Agency will have an *ex gratia* discretion to make a payment where certain criteria are met.

These changes may deter solicitors from undertaking legally aided judicial review work as the risk of non-payment will be too great. JUSTICE has expressed its concern that this will undermine the ability of individuals to hold the state to account and insulate public decision-makers from effective judicial oversight. The senior judiciary has expressed its concern that the proposals will have a “chilling effect” on judicial review.

Exceptional Funding

Section 10 of LASPO provides for exceptional funding in cases where an individual's rights would be breached if funding was not provided.

When LASPO was introduced, the MoJ estimated there would be up to 8,000 claims per year for exceptional funding but between April and July 2013, there had only been a few hundred claims. Only two claims, other than inquests, are known to have received funding during that period, and only a further seven cases between July and September 2013. As of March 2014, only 31 claims (including inquests) had been successfully made under the Exceptional Funding provision.

JUSTICE is concerned that the provision for Exceptional Funding will be incapable in practice of supporting access to court for those individuals who might currently benefit from legal aid but who are excluded by the latest round of cuts. The process is extremely technical and requires all applicants to complete a 14 page application, including a merits assessment of their case. There is no provision for assessments to be made in emergency cases and no special provision for especially vulnerable groups, such as those with learning difficulties or dementia.

Costs, financial support and interveners

The Criminal Justice and Courts Bill includes wider proposals which may make it more difficult for individuals to bring a claim or to obtain support from charities and NGOs in pursuing a judicial review:

- a) **Protective costs orders:** An individual may ask the Court to issue a Protective Costs Order in their favour. Following established practice, the Court may cap the costs which may be recoverable against a claimant where the costs risk might mean that the case would not otherwise be heard. In these cases, it must be in the public interest for the order to be made and for the litigation to proceed. The Bill would restrict these orders to cases where an applicant has been granted permission. The Minister also seeks authorisation to change the circumstances when an order will be considered in the "public interest" and the protection it might offer by secondary legislation.
- b) **Financial information:** The Bill will require all claimants to provide information about their financial circumstances (most legally aided claimants will provide most of this information to the Legal Aid Agency) before a claim may proceed. It is unclear what impact this measure will have in practice, but little information has been provided by Government on why these measures are considered necessary. Notably, the courts already have the power to order third parties who are acting as parties to the litigation to contribute to the costs incurred. It is unclear how this provision will impact on families and friends who support an individual to bring a claim; on commercial organisations and on organisations which support members' test litigation which affects both the organisation and a wider group of its members.
- c) **Interveners:** The Bill would reverse the current practice whereby the costs of responding to an intervention are generally considered "costs in the case" (broadly, loser pays) unless the intervener has acted unreasonably. Instead, the costs of all parties will generally be payable, except in "exceptional circumstances". Even the unsuccessful party will recover. Arguably, the more relevant the intervention to the court's determination, the more expensive it may be. Interveners already make a

financial contribution to the relevant case (in which they will generally have no direct interest) by meeting the costs of their own participation. The current rules reflect the public interest function of interveners, and the role of the court in granting permission for any intervention and determining its scope. An intervener is only able to act subject to the discretion of the court in any case.

If a significant – and largely unquantifiable – costs risk will arise in any intervention, then this will pose a serious deterrent to interveners without significant resources. Charities and not-for-profit organisations are currently the most frequent interveners (JUSTICE is one of the most frequent). These organisations – which, by their terms of reference, work for the public interest – run on very limited resources and are subject to the oversight of a Board of Trustees appointed to manage risk. It is likely that – for many – intervention will, in future, be too risky to consider, even in cases of the highest public importance.

Issues for group discussion

- **Is there a human right to legal aid?**
- **Isn't this just a debate about lawyers' fees?**
- **It is unlikely that the budget for legal aid will be restored. What happens next?**
- **Are there alternatives to ensure access to justice in the areas which legal aid is no longer available to help?**
- **What is the point of having 'interveners' anyway?**