Case No: CO/17381/2013

Neutral Citation Number: [2015] EWHC 1965 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2015

Before :

MR JUSTICE COLLINS

- -

Between :

IS (BY THE OFFICIAL SOLICITOR AS LITIGATION FRIEND)	**Claimant**
- and -	
THE DIRECTOR OF LEGAL AID CASEWORK	**1ST Defendant**
- and –	
THE LORD CHANCELLOR	**2ND Defendant**

- -
- -

Mr Richard Hermer, QC and Mr Chris Buttler (instructed by **the Public Law Project**) for the **Claimant**
Mr Martin Chamberlain, QC, Ms Cathryn McGahey and Mr Malcolm Birdling (instructed by **the Central Legal Team of the Legal Aid Agency for the 1st Defendant and by the Treasury Solicitor for the 2nd Defendant**)

Hearing dates: 10th – 12th June 2015

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Judgmen

tMr Justice Collins:

1. This claim was lodged on 10 December 2013. It was limited to an assertion that there had been an unlawful failure by the first defendant to provide the claimant with funding to enable him to apply to the Home Office to recognise his position in this country. However, on 14 January 2014 the claim was amended to include a contention that there was a systematic failure to comply with the requirements of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) in that the guidance issued by the second defendant indicating how an application for Exceptional Case Funding (ECF) under s.10(3) of LASPO should be considered was too restrictive and did not comply with the requirements of Articles 6 or 8 of the ECHR.

2. There were five other claims which raised similar issues in relation to the guidance and in which the individual claimants asserted that there had been a wrongful refusal of ECF. It was ordered that the six claims should be heard together to deal with the individual circumstances of each claimant and the attack on the guidance. The claims came before me and on 13 June 2014 I granted judicial review in each of the six cases. My decision was appealed to the Court of Appeal by the defendants, but in this case the appeal was discontinued. The cases are reported under the title of R (Gudanaviciene) v. DLAC and Lord Chancellor. The decision of the Court of Appeal is reported at [2015] 1 WLR 2247. I shall refer to it in this judgment as R(G).

3. The claim as amended raised three grounds. The first alleged that the operation of the ECF scheme frustrated the purpose of LASPO in putting obstacles in the path of applicants which were not required and which bore particularly severely on disabled persons such as the claimant. There was thus an unacceptable risk of a breach of Articles 6 and 8 of the ECHR. The second alleged a failure to comply with Section 149 of the Equality Act 2010. The third alleged that the refusal of funding to the claimant breached his ECHR rights under Article 8 and 14 in that without legal aid the claimant was unable to make an effective application to recognise his position.

4. It was directed that the claim to be decided by me in this case should be limited to the third ground. Other cases attacked the guidance and so I had to decide the issues relating to the lawfulness of some elements of the guidance in the respects alleged and the individual circumstances of each of the six claimants. I decided and the Court of Appeal agreed that the guidance was unlawful in that it wrongly indicated that Article 8 considerations did not apply in immigration cases so that a refusal of legal aid would not breach Article 8 rights. It further was wrong to indicate that the discretion to grant ECF was severely circumscribed and that a refusal would only amount to a breach of ECHR rights in rare and extreme cases.

5. Although the claimant has no further direct reason to pursue this claim, the Official Solicitor is concerned that the scheme fails properly to deal with claims made by those who lack capacity, whether as children or as adults. This is particularly the case where the Official Solicitor has to act as litigation friend because no other person is available. That was the position in this claim. The importance of the issues raised in this claim has justified its continuation in what in effect amounts to a test case. The defendants have not sought to argue that the claimant does not now have an interest in pursuing the claim since he has obtained the grant of legal aid to enable him to make an effective application. There is clear authority that the court can continue to

entertain claims which, albeit they have become academic for the individual claimant, raise important issues which need to be determined in the public interest. That applies to this claim.

6. The claimant is a Nigerian national who has lived in this country for over 13 years. He is blind, has profound cognitive impairment and is unable to care for himself and so he lacked capacity to engage in litigation. His application for legal aid was refused on the ground that Article 8 of the ECHR was not engaged in immigration cases. That was, as I and the Court of Appeal decided, a mistaken view contained in the guidance. There would be something seriously wrong with a system applied under s10(3) of LASPO when an extremely vulnerable individual who could not afford to pay for assistance and who could not achieve an effective exercise of his Article 8 rights was deprived of such assistance. As the Court of Appeal said in paragraph 80:-

> 7. "The case of IS is extreme. It is impossible to see how a man suffering from his disabilities could have had any meaningful involvement in the decision making process without the benefit of legal representation."

8. Part 1 of LASPO deals with legal aid. Section 1(1) provides:-

> 9. "The Lord Chancellor must secure that legal aid is made available in accordance with this part".

10. Legal aid includes provision for 'advice, assistance and representation': S.(1)(2)(b). Section 9 provides:-

> 11. "(1) Civil legal services are to be available to an individual under this Part if –
>
> > 12. (a) they are civil legal services described in Part 1 of Schedule 1, and
> >
> > 13. (b) the Director has determined that the individual qualifies for the services in accordance with this Part (and has not withdrawn the determination)".

14. The Director is the director of the Legal Aid Agency (LAA), the first defendant. Section 9(2) contains a provision which enables the Lord Chancellor to add services to or vary them or remove them from Part 1 of Schedule 1. I do not need to go through the provisions of Part 1 of Schedule 1. Suffice it to say that it takes out of the scope of legal aid available under s9 a large number of cases which would have qualified for legal aid before LASPO came into force. But Section 10 provided what the ministers described to Parliament to be a safety net. It is central to this case. It provides, so far as material:-

> 15. "(1) Civil legal services other than services described in Part 1 of Schedule 1 are to be available to an individual under this part if subsection (2)…..is satisfied.
>
> 16. (2) This subsection is satisfied when the Director -
>
> > 17. (a) has made an exceptional case determination in relation to the individual and the services, and

18. (b) has determined that the individual qualifies for the services in accordance with this Part (and has not withdrawn either determination).

19. (3) For the purposes of subsection (2), an exceptional case determination is a determination –

20. (a) that it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of –

21. (i) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or

22. (ii) any rights of the individual to the provision of legal services that are enforceable EU rights, or

23. (b) that it is appropriate to do so, in particular circumstances of the case, having regard to any risk that failure to do so would be such a breach".

24. The rest of Section 10 deals with the provision of legal services for inquests which is not material for the purposes of this case.

25. Section 11(1) of LASPO requires the first defendant to determine whether an individual qualifies for legal aid in accordance with his or her financial recourses. That determination is covered by s.21 of the Act and regulations made under that section. In addition, s.11(1)(b) requires the first defendant to apply 'criteria set out in regulations made under this paragraph'. Section 11 sets out matters that the Lord Chancellor must take into account in setting the criteria. It provides by subsections (2) to (6) as follows:-

"(2) In setting the criteria, the Lord Chancellor—

(a) must consider the circumstances in which it is appropriate to make civil legal services available under this Part, and

(b) must, in particular, consider the extent to which the criteria ought to reflect the factors in subsection (3).

(3) Those factors are—

(a) the likely cost of providing the services and the benefit which may be obtained by the services being provided,

(b) the availability of resources to provide the services,

(c) the appropriateness of applying those resources to provide the services, having regard to present and likely future demands for the provision of civil legal services under this Part,

(d) the importance for the individual of the matters in relation to which the services would be provided,

(e) the nature and seriousness of the act, omission, circumstances or other matter in relation to which the services are sought,

(f) the availability to the individual of services provided other than under this Part and the likelihood of the individual being able to make use of such services,

(g) if the services are sought by the individual in relation to a dispute, the individual's prospects of success in the dispute,

(h) the conduct of the individual in connection with services made available under this Part or an application for such services,

(i) the conduct of the individual in connection with any legal proceedings or other proceedings for resolving disputes about legal rights or duties, and

(j) the public interest.

(4) In setting the criteria, the Lord Chancellor must seek to secure that, in cases in which more than one form of civil legal service could be provided for an individual, the individual qualifies under this Part for the form of service which in all the circumstances is the most appropriate having regard to the criteria.

(5) The criteria must reflect the principle that, in many disputes, mediation and other forms of dispute resolution are more appropriate than legal proceedings.

(6) Regulations under subsection (1)(b) may provide that no criteria apply in relation to a prescribed description of individual or services."

It is apparent from paragraphs (b) and (c) of subsection (3) that the Lord Chancellor is entitled to consider the existence of present and future recourses in setting the criteria. But it has not been suggested by Mr Chamberlain that this means that if the refusal of legal aid would result in a breach of relevant rights, availability of present or future resources can justify refusal.

26. The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (2013 no 480) deal with financial eligibility for legal aid. In the course of argument Mr Hermer criticised certain provisions in these regulations and the way in which they have been applied. However, he has not pleaded any such matter and I do not propose in the circumstances to consider that aspect. This is not to say that it is to be assumed that there is no possible challenge to the way in which financial eligibility is considered.

27. The Civil Legal Aid (Merits Criteria) Regulations 2013 (2013 no 104) as amended deal with the criteria to be applied pursuant to s.11(1)(b) of the Act. The main attack on these regulations relate to the prospects of success. They also contain what is described as the reasonable paying individual test (Reg:7). In addition, consideration must be given to the public interest of a particular case, that is to say its value as a decision which has a wide effect (Reg:6) and whether the likely benefits to the individual and others justify the likely costs (Reg:7).

28. Regulation 4 requires the first defendant to assess in accordance with the prospects of success test set out in regulation 5 the likelihood that an individual will obtain a successful outcome at a trial or other final hearing. Regulation 5 I should set out in full. It provides:-

> "(1) Where the Director assesses, for the purposes of these Regulations, the prospects of success of a matter to which an application for civil legal services relates, the Director must classify the prospects of that matter as follows—
>
> (a) "very good", which means an 80% or more chance of obtaining a successful outcome;
>
> (b) "good", which means a 60% or more chance, but less than an 80% chance, of obtaining a successful outcome;
>
> (c) "moderate", which means a 50% or more chance, but less than a 60% chance, of obtaining a successful outcome;
>
> (d) "borderline", which means that the case is not "unclear" but that it is not possible, by reason of disputed law, fact or expert evidence, to—
>
> > (i) decide that the chance of obtaining a successful outcome is 50% or more; or
> >
> > (ii) classify the prospects as poor;
>
> (e) "poor", which means the individual is unlikely to obtain a successful outcome; or
>
> (f) "unclear", which has the meaning given in paragraph (2).
>
> (2) "Unclear" means the Director cannot put the case into any of the categories in paragraph (1)(a) to (e) because, in all the circumstances of the case, there are identifiable investigations which could be carried out, after which it should be possible for the Director to make a reliable estimate of the prospects of success."

29. Regulation 12 specifies the form of legal services which may be provided. These are by regulation 12(3):-

> (a) legal help;
>
> (b) help at court;
>
> (c) family help;
>
> (d) family mediation;
>
> (e) help with family mediation;

(f) legal representation; and

(g) other legal services.

30. Those are further defined in regulations 13 to 19.

31. Legal Help is defined in regulation 13. The definition is in negative terms in the sense that regulation 13 lists legal services which are not covered by Legal Help. In essence, those not covered constitute any services involving the issuing of any proceedings or preparing for advocacy or instructing any advocate in any proceedings or conducting any proceedings.

32. Legal representation is dealt with in regulation 18. This provides:-

> "(1) Legal representation may be provided as either investigative representation or full representation.
>
> (2) "Legal representation" means the provision of civil legal services, other than acting as a mediator or arbitrator, to an individual or legal person in particular proceedings where that individual or legal person—
>
> (a) is a party to those proceedings;
>
> (b) wishes to be joined as a party to those proceedings; or
>
> (c) is contemplating issuing those proceedings.
>
> (3) "Investigative representation" means legal representation which is limited to the investigation of the strength of the contemplated proceedings and includes the issuing and conducting of proceedings but only so far as necessary—
>
> (a) to obtain disclosure of information relevant to the prospects of success of the proceedings;
>
> (b) to protect the position of the individual or legal person applying for investigative representation in relation to an urgent hearing; or
>
> (c) to protect the position of the individual or legal person applying for investigative representation in relation to the time limit for the issue of the proceedings.
>
> (4) "Full representation" means legal representation other than investigative representation.

33. Regulation 14 covers advocacy at court under the heading 'help at court'. It seems that this is intended to apply only to cases which are in scope because within Part 1 of Schedule 1 since regulation 19 covers under the heading 'other legal services' precisely the same services as are set out in regulation 14, namely:-

34. (a) instructing an advocate;

35. (b) preparing to provide advocacy; or

36. (c) advocacy.

37. But regulation 19 continues:-

> "in proceedings in relation to which the Director, having applied the relevant merits criteria in accordance with regulations 48 to 50 (application of the merits criteria in exceptional cases), has made a determination under section 10(2)(b)…. (exceptional cases) of the Act."

38. Regulation 48 deals with inquests. Regulation 49 requires the Director to apply the same merits criteria as would apply if the case was in scope within Part 1 of Schedule 1. Regulation 50 applies the same approach to cases which need ECF because they are not in scope for reasons other than an exclusion in Part 2 or 3 of Schedule 1.

39. Regulations 32 to 46 set out the criteria applicable for the various types of legal services which can be provided. Regulation 32 deals with Legal Help, which can only be provided if the Director is satisfied (a) that there is no other potential source of funding and (b) there is likely to be "sufficient benefit to the individual, having regard to all the circumstances of the case, including the circumstances of the individual, to justify the provision of Legal Help".

40. Regulation 39 sets out what are described as 'standard criteria' for determinations for legal representation including both investigative and full. It provides:-

> "An individual may qualify for legal representation only if the Director is satisfied that the following criteria are met—
>
> (a) the individual does not have access to other potential sources of funding (other than a conditional fee agreement) from which it would be reasonable to fund the case;
>
> (b) the case is unsuitable for a conditional fee agreement;
>
> (c) there is no person other than the individual, including a person who might benefit from the proceedings, who can reasonably be expected to bring the proceedings;
>
> (d) the individual has exhausted all reasonable alternatives to bringing proceedings including any complaints system, ombudsman scheme or other form of alternative dispute resolution;
>
> (e) there is a need for representation in all the circumstances of the case including—
>
> (i) the nature and complexity of the issues;
>
> (ii) the existence of other proceedings; and
>
> (iii) the interests of other parties to the proceedings; and

(f) the proceedings are not likely to be allocated to the small claims track."

41. Investigative representation is dealt with in regulation 40. If the general regulation 39 criteria are met, investigative representation may be granted if the prospects of success are unclear and substantial investigative work is required and the Director has reasonable grounds for believing that on completion of the investigative work the criteria for full representation will be met both in terms of cost benefit and prospects of success.

42. Regulation 43 as amended provides that for the purpose of full representation:-

"The prospects of success criterion is only met if the Director is satisfied that the prospects of success are—

(a) very good, good or moderate";

43. Before this amendment which came into force on 27 January 2014 the regulation contained a sub-paragraph (b) which read:-

"[or] borderline, and the case is—

(i) of significant wider public interest; or

(ii) a case with overwhelming importance to the individual."

44. I do not know why the amendment deleting (b) was made. It is somewhat curious since in borderline cases the need for legal representation to tip the balance where for example it is necessary to test or challenge evidence or argue issues of law is apparent.

45. The Legal Aid (Procedure) Regulations 2012 (2012 No 3098) as their title indicates provide for how applications for the various legal services should be made. Part 8 deals with applications for ECF. In relation to legal services which are in scope, there are rights of appeal and emergency representation. These are disapplied in relation to ECF applications and rights of review are restricted – regulation 66(3). Regulation 67 provides:-

"(1) Where the civil legal services which are the subject of an application are described in a category in the Category Definitions that form part of the 2010 Standard Civil Contract or 2013 Standard Civil Contract, the application must specify—

(a) the category within which the civil legal services are described; and

(b) if the individual has identified a proposed provider, a provider with whom the Lord Chancellor has made an arrangement under section 2(1) of the Act for the provision of services which fall within the category specified in the application (unless the effective administration of justice test is satisfied).

(2) An application for a determination under section 10 of the Act must—

(a) be made to the Director in writing in a form specified by the Lord Chancellor and signed by the individual and any proposed provider; and

(b) state whether it is proposed that the services should be provided as Controlled Work, Licensed Work or under an individual case contract."

46. Thus, as the claimant states in his re-amended grounds, an applicant must understand and apply the definitions of the categories of civil legal aid and services in legal and contract documents and must use the forms prescribed for the making of the application. As will become clear, these requirements do not make it at all easy for an unrepresented individual to make an application in accordance with the regulations.

47. Regulation 68 is headed 'Determinations'. It provides:-

"(1) A determination under section 10 of the Act may specify that the determination is to be treated as having effect from a date earlier than the date of the determination.

(2) Where the Director makes—

(a) an exceptional case determination under section 10(2)(a) of the Act;

the Director must provide written reasons for the determination and notice of any right of review."

48. The power to back date is obviously of some importance since it enables providers to do work in preparing and submitting applications and to be paid for such work. But payment can only be made if the application for ECF is successful.

49. Regulation 69 enables an applicant whose application has been refused to seek a review if he uses the specified form and includes written representations within 14 days. It is to be noted that the obligation to provide reasons and notice of any right of review is limited under regulation 68(2)(a) to a case where the Director makes a s.10(2)(a) determination. The right of review under regulation 69(1) is available (so far as material) where there has been a refusal to make a s.10(2)(a) determination or there has been a determination that an individual does not qualify for services under s.10(2)(a): see regulation 69(1)(a) and (b). No doubt the reference to making a s.10(2)(a) determination in regulation 68(2)(a) extends to a refusal to make such a determination since otherwise 68(2)(a) read with 69(1)(a) and (b) is meaningless. It is difficult to understand why regulation 68 does not require reasons and an indication of the right of review in negative determinations under s.10(2)(b). It seems that the Director's practice is to give reasons and to notify of the right of review in relation to both s.10(2)(a) refusals and s.10(2)(b) adverse decisions. That must continue whatever the regulations may say since otherwise there would be serious unfairness to individuals whose applications failed whether under s.10(2)(a) or 10(2)(b).

50. An exceptional case determination must be made if otherwise there would be a breach of an individual's human rights under the ECHR or enforceable EU rights (LASPO

s.10(3)(a)). If there is a risk of such a breach, such a determination may be made if the Director considers it appropriate to do so. Thus he is given a discretion where such a risk exists. It must be obvious, having regard to the obligation to provide ECF if otherwise there would be a breach, that the extent of the risk is a highly material consideration. If a refusal of ECF is likely to mean that there will be a breach, it would be difficult for the Director to justify a refusal of ECF, provided of course that the financial and merits tests are otherwise met.

51. LASPO was enacted in order to limit the grant of legal aid with a view to making savings in the cost to public funds. To that end a significant number of claims were taken out of scope and only qualified if the criteria set out in s.10 were met. The court in R(G) stated in paragraph 56:-

> "It can therefore be seen that the critical question is whether an unrepresented litigant is able to present his case effectively and without obvious unfairness. The answer to this question requires a consideration of all the circumstances of the case, including the factors which are identified at paras 19 to 25 of the Guidance. These factors must be carefully weighed. Thus the greater the complexity of the procedural rules and/or the substantive legal issues, the more important what is at stake and the less able the applicant may be to cope with the stress, demands and complexity of the proceedings, the more likely it is that article 6(1) will require the provision of legal services (subject always to any reasonable merits and means test). The cases demonstrate that article 6(1) does not require civil legal aid in most or even many cases. It all depends on the circumstances. It should be borne in mind that, although in the UK we have an adversarial system of litigation, judges can and do provide assistance to litigants in person. The outcomes in *X v UK, Munro* and *McVicar* show that it is not a requirement of article 6(1) that legal services be provided in all but the most straightforward of cases. On the other hand, the outcomes in *Airey, P,C and S, Steel and Morris* and *AK and L* do not show that legal services are required only in such extreme cases as these. In short, we do not accept the submission of Mr Chamberlain that these decisions justify the passages in the Guidance which we have criticised at paras 44-45 above."

52. It is in my view unhelpful to refer to high thresholds in considering whether ECF should be granted. The test is that set out by Parliament in s.10 of LASPO and what that involves is stated by the Court of Appeal in R(G). The court referred to the approach of Chadwick LJ in Perotti v. Collyer-Bristow [2004] All ER (D) 463 where at paragraph 32 he said:-

> 53. "The test under Article 6.1, as it seems to me, is whether a court is put in a position that it really cannot do justice in a case because it has no confidence in its ability to grasp the facts and principles of the matter on which it has to decide. In such a case it may well be said that a litigant is deprived of effective access…..because, although he can present his case in person, he cannot do so in a way which will enable the court to fulfil its paramount and over-arching function of reaching a just decision."

54. Chadwick LJ had prefaced these observations by stating that a litigant who wished to establish that he needed legal aid to enable him to have effective access had a relatively high threshold to cross. The court in R(G) stated that it did not find that

helpful. There is a need for both procedural justice (fairness) and substantial justice (reaching the correct result). Both of these have been considered in the ECtHR jurisprudence and that was what the court decided should be applied.

55. The adjective 'exceptional' does not mean any more than that the funding is outside that which can generally apply. It carries no indication that it will need any particular threshold.

56. I have set out the material provisions in the regulations in some detail. They are complicated and the prescribed forms which must be used to make applications for ECF require, as will become apparent, knowledge of not only ECHR law but of the various categories into which the specified provider of the services falls. The forms, as Mr Chamberlain recognised, are designed to be filled in by providers and not by applicants in person. Mr Hermer's first ground is that the scheme as operated by the first defendant is intrinsically unfair because it does not enable those who need assistance in either making or resisting claims or ascertaining with proper expert advice from a lawyer whether they have a valid claim or defence which needs representation to obtain the necessary assistance. The result has been and continues to be that some of the most vulnerable are deprived of a fair hearing in that they are unable to present their cases effectively. Mr Hermer described this ground as an "evidence based impeachment of the operation of the ECF scheme".

57. The evidence relied on is contained in some 85 witness statements. The evidence has been helpfully summarised in what has been described as a Scott Schedule setting out under 19 separate headings the defects in the scheme relied on by the claimant, the essential material said to support each heading and the response of the defendants to each of the headings. Statements have been lodged by providers who have made some 20% of applications for ECF. This has been relied on by Mr Chamberlain in submitting that it cannot be said to represent other than a relatively small proportion of those who have made such applications. In addition, the first defendant has evidence from Helen Keith, a solicitor in his ECF team, making the point that some 24 of the providers who have lodged statements have not submitted any application for ECF, a further 20 have submitted only one and a further 13 only two. This is relied on to suggest that there has been insufficient knowledge or experience of the scheme to justify the criticisms. Further, overall the point is made on the defendants' behalf that much of the evidence relied on relates to an approach dictated by the guidance which set too high a threshold and which I and the Court of Appeal decided was unlawful.

58. Until my decision in June 2014, the success rate in grants of non-inquest ECF amounted to a little over 1%. That on any view is a very worrying figure. It has since increased. There has been some argument about the precise calculations, but I need not go into detail. Suffice to say that I am satisfied from the claimant's evidence, albeit the defendants have said that the success rate has risen above 15%, it is more likely to be, when proper account is taken of the limitation to non-inquest cases, about 13%. That remains a very low figure.

59. The basic submission in the first ground is that the scheme is insufficiently accessible. Even for lawyers, the prescribed forms are far too complex and the information required is excessive. For those without any legal assistance, they are almost impossible to understand and to fill out satisfactorily. The defendants recognise that

the forms were designed for providers, usually solicitors. In answering the criticism, the defendants refer to the LAA website in which this is said:-

> 60. "If you choose to apply but do not use the prescribed forms then we are likely only to be able to provide you with a preliminary view based on the available information.
>
> 61. Please as a minimum include the following in your application.
>
> 62. 1. The background to your case, including all the main facts.
>
> 63. 2. What you need legal advice in or what court proceedings you need representation in.
>
> 64. 3. Why you cannot represent yourself.
>
> 65. 4. What outcome you wish to achieve.
>
> 66. 5. Any relevant information that will support your application, e.g. Court applications and orders, expert and medical reports, copies of any decisions you wish to challenge.
>
> 67. 6. Information on your financial situation.
>
> 68. If we either make an ECF determination or provide you with a positive preliminary view that your case might be exceptional, you will then need to find a legal advisor who will make the full application for you. It is also important to understand that a positive preliminary view is not a guarantee that a ECF determination will be made after the consideration of a full application and also that a determination may be withdrawn if, for example, new information is provided to us. If we are unable to make a determination or provide a preliminary view on the information you supply to us then you may seek help from a legal advisor."

69. The Provider Pack available to providers says:-

> 70. "A client may apply direct to the LAA for exceptional funding. When this happens we will deal with the application, in whatever format it is made, on the basis of the information provided by the client. In the absence of a fully completed application for an exceptional case determination and provided that there is sufficient information to do so it is most likely that the ECF Team will provide a preliminary view based on the available information".

71. It goes on to state that a fully completed application will have to be submitted together with a means form. Providers are told that they will not receive any payment unless a successful determination results and are warned that a positive preliminary view may not result in a grant of ECF if, for example, the applicant fails the means test or information given by the provider differs from that provided by the client so that the other tests fail.

72. Statements in support of this claim obtained on behalf of the claimant came from many voluntary bodies and law centres who have been unable to find providers who are

prepared to take on clients who may need some form of legal assistance. This is because, as the solicitors have indicated, they simply cannot afford to do the necessary work in investigating a client's problem and in making an application for ECF because the high refusal rates mean they will not be likely to be paid anything for the work done. Those who have provided statements were described by Mr Hermer in argument as a "roll call of the great and the good of public law". Certainly they include a significant number of solicitors who provide a service for those who cannot afford to pay for legal assistance and who have assisted and will continue to try to assist even if payment is inadequate or not available. But there is a limit to the ability to provide pro bono work: the firm must survive and can only survive if money comes in. The work which has to be done will often require relatively specialist knowledge, for example in family or immigration cases. That is not work which many solicitors will be experienced enough to deal with and those who can are reluctant to take on cases when the prospect of being paid is remote.

73. Legal aid payment rates have not only not been increased since 1998-9 but have been subjected to a 10% reduction from 3 October 2013 by The Community Legal Service (Funding) (Amendment No 2) Order 2011. There was a reduction of some 28% in the year 2013-14 in provisions of civil and family legal aid assistance and the Law Society has warned that 'the future sustainability of legal aid practice is in significant doubt'. In addition to a report from the National Audit Office of November 2014, Mr Hermer in his skeleton argument sought to rely on reports from House of Commons committees. As Mr Chamberlain pointed out in his skeleton argument, such committee reports cannot be used before courts since to do so would breach Article IX of the Bill of Rights. It is not permissible for the court to be asked to agree or to disagree with any statement made in such a report: see Office of Government Commerce v. Information Commissioner [2008] EWHC 774 (Admin).

74. In its key findings, the National Audit Office noted that in 2013-14 the LAA agreed funding for Legal Help in 326,004 fewer cases than would have been expected without the reforms and for representation in court for 36,537 fewer cases. In the need for the courts to deal with many more litigants in person resulted in an additional cost of about £3 million per year (also within the MOJ budget). The most worrying finding was that the Ministry did not know whether or not all those eligible for legal aid were able to access it. Accordingly, it could not be satisfied that it was targeting funding at those most in need. Some areas of the country have no active providers of legal aid. Figures showed that in 14 local authority areas no legal aid funded work was commenced and that in 39 other such areas a maximum of 49 pieces of legal aid work per 100,000 inhabitants were commenced. The bulk of those figures arose when the over restrictive guidance was applied. There has been, it is said, a change of approach since June 2014 when my judgment was delivered in R(G).

75. A particular adverse effect of the LASPO reforms has been on family cases and the increase in litigants who should have been granted legal assistance but have to appear in person. In a recent judgment delivered on 10 March 2015 MG and JG v. JF and JFG [2015] EWHC 504 (Fam), Mostyn J expressed concerns at the effect of the failure to grant legal aid in children proceedings, which are no longer in scope. He observed on the facts of the case before him that it was impossible for the applicants to be expected to represent themselves having regard to the factual and legal issues at

large. There would, he said, be a gross inequality of arms and "arguably a violation of their rights under Articles 6 and 8 of the ECHR."

76.In paragraph 15 of his judgment, Mostyn J observed:-

> 77. "Since the reforms have taken effect there have been an appreciable number of cases which have demonstrated that the blithe assumption in the consultation paper (that the parties' emotional involvement in the case will not necessarily mean that they are unable to present it themselves and that there is no reason to believe that such cases will be routinely legally complex) is unfounded. This was entirely predictable".

78. He then identified nine judgments. He continued:-

> 79. "This is a formidable catalogue. Each case focussed on the gross unfairness meted out to a parent in private law proceedings by the denial of legal aid. I do not think it would be right to say that those were examples of the law of unintended consequences since, as I say, the problems were entirely predictable".

80.In Lindner v. Rawlins [2015] EWCA Civ 61, the Court of Appeal heard a case where an unrepresented husband had to deal with a refusal to order disclosure from the police in a defended divorce case. The wife neither appeared nor was represented and the court observed that the appeal was 'technical and unusual and that the husband could not be expected to have mastered the area of law to be able to present his appeal in a way which assisted the court'. The result, as Aikens LJ states in paragraph 34, was that the court had to spend considerable time in going through the relevant documents and researching the applicable law.

81. He continued:-

> 82. "All this involves an expensive use of judicial time, which is in short supply as it is. Money may have been saved from the legal aid funds, but an equal amount of expense, if not more, has been incurred in terms of the cost of judges' and court time. The result is that there is, in fact, no economy at all. Worse, this way of dealing with cases runs the risk that a correct result will not be reached because the court does not have the legal assistance of counsel that it should have and the court has no other legal assistance available to it".

83.In Re:D (A Child) [2014] EWFC 39, a decision on 14 November 2014 an unrepresented father who lacked capacity had applied to revoke a care order and the local authority was seeking to place his child for adoption. Sir James Munby, P eventually after what Mostyn, J describes as 'heavy pressure' persuaded the LAA to award some legal aid. Sir James observed (paragraph 31 (vi) of his judgment):-

> 84. "Thus far the State has simply washed its hands of the problem, leaving the solution to the problem which the State has itself created - for the State has brought the proceedings but declined all responsibility for ensuring that the parents are able to participate effectively in the proceedings it has brought – to the goodwill, the charity, of the legal profession. This is, it might be thought, both unprincipled and unconscionable. Why should the State leave it to private

individuals to ensure that the State is not in breach of the States' – the United Kingdom's obligations under the Convention?"

85. Sir James suggested that in a case where an unrepresented parent faced serious allegations but the LAA refused legal aid the court might have to provide payment from its own budget. In Re: K and H (Children: Unrepresented Father: Cross examination of child) [2015] EWFC 1, Judge Bellamy took up this suggestion, but the Court of Appeal has recently allowed an appeal by the Lord Chancellor stating that the court had no power to make any such order. As Mostyn J observed:-

> 86. "It can be said that in the field of private children law the principle of individual justice has had to be sacrificed on the altar of public debt".

87. It is difficult to imagine a family case, particularly when there are contested issues about children, in which there would not be an interference with the Article 8 rights of either parent or the children themselves. Thus unless the party seeking legal aid could albeit unrepresented present his or her case effectively and without obvious unfairness, a grant of legal aid would be required. That does not mean that every case will require it: some may be sufficiently simple for the unrepresented party to deal with. Obviously if there is a lack of capacity even such cases may require legal aid. That issue I will have to consider in further detail later. But I am bound to say that I believe that only in rare cases, subject to means and merits if properly applied, should legal aid be denied in such cases. As it is now applied, the scheme is clearly wholly deficient in that it does not enable the family courts to be satisfied that they can do justice and give a fair hearing to an unrepresented party. While the problem may perhaps be less acute in other civil cases, I have no doubt that the difficulties I have referred to in family cases apply.

88. The defendants have drawn attention to the fact that some of the solicitors who have made statements in which they have said that they would find it impossible to take on new clients who wished to apply for ECF have made subsequent applications. It must be borne in mind that solicitors might in any case receive payment from the client for any preliminary work so that the failure of the application and so the lack of payment for any work will not be damaging. Naturally, solicitors advise any client on the likelihood of success in the application and should not advance an application which is obviously untenable. I do not think that any adverse conclusion can be drawn from the submission of further applications. Some may have been from existing clients and some from clients who have been able to afford the amounts set by the solicitors for doing the preliminary work. Further, it may be that there was hope that after R(G) the abysmally low rates of grant would be increased to a reasonable level. That has not happened.

89. Thus the scheme is not working as it should. The evidence produced for the claimant provides no confidence that there are likely to be any real improvements. The first matter relied on is the lack of accessibility. The prescribed forms are said to be far too complicated to be able to be completed by lay persons and there is little chance that an individual will be able to find a provider who is prepared to do the necessary work to make an ECF application. Even experienced solicitors have difficulty with the forms.

90. In R(PLP) v. Lord Chancellor [2015] 1 WLR 251, Moses LJ giving the only reasoned judgment observed at paragraph 87:-

91. “Nor has it proved necessary to consider the proposed application form to apply for exceptional funding under Section 10. Mr Eadie, on behalf of the Lord Chancellor, accepted that it was far too complicated and needs simplification and revision if it was going to be of any assistance to residents, let alone a foreigner”.

92. It is said by Mr Chamberlain that the transcript does not show that Mr Eadie did make that concession. But whether or not he did is not material since the observations were based on the court’s knowledge of the forms. Furthermore, it is accepted as is inevitable that the forms are indeed far too complicated for lay persons to complete.

93. The ECF application form commences with a requirement, following regulation 67 of the Procedure Regulations, to specify whether Licensed or Special Case Work on the one hand or Controlled Work Services were required. If the former, a form CIV App 1 (for non-family work) or CIV App 3 (for family work) had to be submitted in addition. If the latter, a different form is required. Licensed Work is defined in regulation 29(2) to mean:-

94. “….the provision of any of the following forms of civil legal services –

95. (a) family help (higher); or

96. (b) legal representation that is not Controlled Work or Special Case Work”

97. Special Case Work is defined by regulation 2 to mean “Civil Legal services provided under an individual case contract in the circumstances described in regulation 54(3).” Essentially, this covers cases in which costs are expected to exceed £25,000 or cases which have wide public interest or, for example, are going to the Supreme Court. Controlled Work is defined in regulation 21(2). It is likely to be a common form of work applied for since it covers “any of the following forms of legal services –

98. (a) legal help;

99. (b) help with family mediation;

100. (c) help at court;

101. (d) family help lower; or

102. (e) legal representation for proceedings in [four specified tribunals].”

103. These are first-tier Mental Health tribunals in England and Wales and both the first tier and upper tier tribunals dealing with immigration and asylum cases. Thus the legal representation applications which are for Licensed work cover representation in courts and all tribunals not mentioned in regulation 21(2)(e).

104. While it is accepted by the defendants that the prescribed forms are not designed for applicants who do not have legal knowledge (which will of course include the vast majority of lay applicants), it is said that the forms identify the key information needed by the LAA to make an ECF decision. The ECF form was, it is said, devised to make the process as easy as possible. I have already referred in paragraph 30 above

to the information on the LAA website. There was consultation held with inter alia the Law Society and reliance is placed on a response by the Law Society representative who said:-

> 105. "There is general concern about how long the form is, and the practicality of practitioners being asked to take on such work for free. However, given the nature of the test the Government has set, I am not convinced there is a lot the LSC can do about that".

106. Reliance is also placed on the existence of a telephone help line which is manned by caseworkers or lawyers employed by the LAA during normal working hours. This can do no more than indicate the nature of what is required. It is said that there were 62 applications by individuals who were not lawyers in the first nine months of the scheme. But the evidence is that only one such application has succeeded and the evidence of that successful applicant makes sorry reading as will be apparent when I refer to it in due course.

107. Providers must have a contract which permits them to do any particular work for which legal assistance is sought. Such contracts are reconsidered from time to time and if too many applications which fail are made, the provider may find that the firm is penalised. That is apart from the reluctance to carry out unpaid work which has seriously reduced the number of those solicitors who are prepared to take on ECF applications.

108. The ECF application form requires the giving of information under five headings, A to E. There are four separate sub-headings in A under the heading "Generic Information". The first asks "How important are the issues at stake for the client?", the second asks "How complex are the proceedings, the area of law or the evidence in question?". It continues:-

> 109. "◦ You should discuss factual, procedural and legal complexity.
>
> 110. ◦ Please specify the court, tribunal or other forum in which the case will be heard (e.g. First Tier Tribunal, County Court, High Court)."

111. The third asks "how capable is the client of presenting their case effectively?" It continues:-

> 112. "Please consider the client's education or relevant skills/experience, any relevant disabilities, the client's capacity, including whether a litigation friend may be able to conduct proceedings on the client's behalf."

113. The fourth requires that any additional information that is relevant to the question of whether ECF should be made available is specified.

114. Section B is headed 'Legal Aid under Article 6 ECHR' and contains the question 'Does the case involve a determination of the applicant's civil rights and obligations?'. If the answer is yes, reasons should be given providing references to any supporting case law if appropriate. The second question is whether the failure to provide legal aid would be a breach of the client's right under Article 6(1) ECHR. If the answer is yes, the same requirement to give reasons and refer to supporting case law is stated.

115. Section C is headed 'Other ECHR Rights'. It asks whether the failure to grant ECF would breach any other ECHR right, and, if so, reasons and, if appropriate, supporting case law should be provided. Section D asks the same question and requires the same information if it is said that the failure to grant ECF would breach an enforceable EU right to legal services, for example under Article 47 of the Charter of Fundamental Rights.

116. Section E asks for the extent of the services to be provided. This requires the level of services to be specified under the three headings: licensed work, special case work services and controlled work services. These are defined in the Procedure Regulations as I have already indicated. Reasons must be given why the services requested are the minimum required to meet the obligations under ECHR or EU law.

117. Finally, there is a section which deals with urgent case details, limited to licensed work or special case work services. It asks for details of any imminent dates for an injunction or other emergency proceedings, for a hearing or for the expiry of a limitation period. The questions posed are first whether a delay would 'cause risk to the life, liberty or physical safety of the client or his or her family or the roof over their heads?'. The second question is whether a delay would 'cause a significant miscarriage of justice or unreasonable hardship to the client, or irretrievable problems in handling the case?'. If either question is given a positive answer reasons must be given.

118. The form has not reflected the decision in R(G). Sections B and C are now largely unnecessary. Article 6 does not apply in immigration cases but Article 8 at least almost certainly will, as it will in virtually all family cases. Since the same question will be asked, namely will an unrepresented litigant be able to present his or her case effectively and without obvious unfairness, whether Article 6 or 8 applies, there is no need to distinguish them. Some cases may raise other articles and those can be specified, but it is unlikely that either Article 6 or 8 will not also apply.

119. I see no reason why a form for those who do not have providers should not in addition be prescribed. This need do no more than require the information set out in the website. The LAA has trained lawyers for whom it should be simple, provided all information is given, to see whether it appears that there would be a need for legal assistance.

120. There is an additional need to fill in the forms which go into merits and means. I need not dwell on the means form. Merit is covered in the forms which deal respectively with non-family and family proceedings and are used for in-scope applications but only for representation, whether investigative or full. They are undoubtedly far too complicated for litigants in person and are not needed when, for example, the ECF application is for Legal Help. The prospect of success is not directly relevant in such applications.

121. There is no reason why a form for ECF should not be simplified for practitioners. There is no need to go into human rights law in relation to the essential question which has been identified in R(G). A form can set out the R(G) test and ask why legal assistance is needed in order to satisfy that test. No doubt it will also be appropriate to seek to identify any relevant EU law provision or other ECHR right.

122. There is as it seems to me a further and fundamental defect in the form and the scheme. It fails to deal with Legal Help which is needed when solicitors are seen by a client and

work is needed to see whether he or she does need funding. Solicitors can be expected to take initial instructions and see whether there is a reasonable probability that assistance will be needed. But it may be necessary to obtain medical or expert evidence or in some instances the services of an interpreter. Without any payment this will not be possible. No doubt solicitors can charge those who can afford it a sum for making the necessary enquiries, but the system means that those who are most in need because they cannot afford even a relatively small amount will suffer. In my view, the forms should cover this possibility since merits is not an issue, save that obviously the client's case on an initial consideration is one which needs to be investigated. If after having investigated the case the solicitor makes an application which is properly refused the failure to be paid for the work involved in filling out the forms will not be unreasonable and will not prevent the solicitor from carrying out the necessary preliminary work. It is in my view essential to fill the gap created by the removal of the Green Form scheme which, regrettably, was sometimes misused. Consideration must in my view be given to this since the evidence is that solicitors are for good reason not prepared to engage in work for which payment is not likely to be received. It must be obvious that without some such help there is at least a risk of a breach of human rights.

123. According to the statement of Simon MacCulloch, a policy manager in the Legal Aid and Legal Services Policy Team, the MoJ recognised that the policy of not paying providers for unsuccessful applications meant that they would need, in principle, to consider bearing the risk of costs incurred. This was in the context of dealing with disabled clients and the extra costs which were likely to be involved. He says:-

> 124. "In summary, our view was that legal service providers routinely made judgments about degrees of risk and accepted or rejected business accordingly. We did not consider it unreasonable to expect them to do so sensibly in respect of the relatively small cost of making an ECF application."

125. This approach applied to all cases, not just those involving clients who were under a disability. It was clearly unreasonable when the rate of success was as low as 1% because of the high hurdle erected by the guidance. It remains very low and it is hardly surprising that providers cannot afford to take the risk that no payment for work reasonably done will result. The suggestion that there may be other firms who can provide pro-bono work is hardly reasonable since there is a need for there to be a contract to carry out the work and expertise in understanding and dealing with it.

126. It is instructive to follow the evidence of an individual who has tried to apply in person. The successful applicant is known as JLE. She describes her experience of trying to get legal assistance as a total nightmare. I need not go into great detail. Suffice to say that she had had a most unfortunate history of abuse when a child and suffered from post natal depression. She was convicted of administering a toxic substance to her very young daughter. As a result of this and her then mental condition, care proceedings were instigated by the local authority in respect of her daughter and her as yet unborn son. It must have been obvious that her desire to maintain contact with her children engaged her Article 8 rights and involved a difficult case which she would be unable to deal with if unrepresented. Her application was refused in a very lengthy but seriously flawed response. She wished to apply for a review. She says (and this is not disputed) that the person to whom she spoke tried to dissuade her on the basis that the matter was not complex. She was advised to go to different solicitors

(she had approached her former solicitors) or to a CAB and seek pro-bono help. She had to attend a hearing, which fortunately turned out not to be of great importance, unrepresented, an experience she found incredibly stressful. This was because of delays by the LAA. Eventually, ECF was provisionally granted subject to full means information being supplied.

127.JLE concludes:-

> 128. "In my experience solicitors in my area are not (at least in the absence of payment) willing to help people to make applications for [ECF]. Further, the LAA made no concessions at all for the fact that I was unrepresented. I was actively requested to fill in lengthy and complicated forms, refused funding for legal reasons I could not understand, discouraged from appealing and ultimately denied the positive decision to which I was entitled in time to enable me to be represented."

129. It is, as I said, a sorry story. But the refusal on merits grounds I shall have to deal with in relation to the claimant's second ground.

130.JLE's experience shows that the LAA's approach was at best unhelpful. Certainly the 'preliminary view' process did not assist. Since the prescribed forms must be submitted, the problems they create for unrepresented persons in particular are not overcome. The LAA says it does work because three direct applicants whom PLP assisted were given positive preliminary views. That hardly is a clear indication that the system works as it should, particularly as the three were assisted by PLP.

131.The providers who have made statements all refer to the hours that routinely have to be spent in preparing and lodging applications for ECF. At least 5 hours is in many cases needed. Some time has often to be spent in obtaining full evidence to satisfy the means test. It is difficult to follow why that is needed in cases where it will not be required if the merits test fails. No doubt in some cases, notably where there is some urgency, means will have to be established but otherwise the routine requirement seems to me to be unnecessary. The LAA's view is that without knowing whether the applicant has the means to pay it cannot determine whether refusal would breach his human rights. No doubt without the means information a decision to agree to provide assistance cannot be made, but there is no reason why a decision should not be made that subject to full means information, on merits grounds ECF would be granted. That was done in JLE's case and would in many cases save unnecessary work by the providers for which payment might not be received.

132.Subject to the issues I have dealt with in applications for Legal Help, merit forms will have to be submitted. Again, whether the approach to merits is reasonable and lawful I will have to consider in dealing with the claimant's second ground.

133.Complaint is made that the time taken to make applications is unreasonably increased by the LAA's insistence on a high level of detail. Examples are given of failure without corroborative evidence to accept particular assertions, for example, in relation to capacity of applicants said to suffer from mental problems. It is the LAA's case that, while it would expect to see any existing reports, it would only require further information if a specific assertion reasonably required in its view further information. Suffice to say, albeit responses are given to the number of cases referred to on behalf

of the claimant, the amount of detail required has been in many cases excessive. An example is the case of a paranoid schizophrenic who was due to lose his home. It was said to be reasonable to require evidence of the impact of his schizophrenia on his capability. He had, it was said, been unwell for some 12-13 years so that medical evidence should have existed. In another case an autistic applicant with learning difficulties wanted contact with his daughter. The view expressed by the LAA in refusing assistance was in these terms:-

> 134. "The District Judge expressed a view that the client's family members should not be a Mackenzie friend because of the nature of the allegations….However, supporting evidence to confirm this has not been provided".

135. It continued:-

> 136. "The Court is a safe environment which offers your client a fair chance to present his views to the court".

137. The unreasonableness of this is all too obvious. There have been too many such examples.

138. Before considering the matters which particularly concern the Official Solicitor (OS) I should see whether the amended guidance meets the concerns expressed by the court in R(G). In paragraph 8, this is stated:-

> 139. "The purpose of Section 10(3) of the Act is to enable compliance with ECHR and EU law obligations in the context of a legal aid scheme that has refocused limited resources on the highest priority cases. Caseworkers should approach Section 10(3)(b) with this firmly in mind. It would not usually be appropriate to fund simply because a risk (however small) exists of a breach of the relevant rights. The greater the risk of a breach, the more likely it is that it will be appropriate to make a determination. However, the seriousness of the risk is only one of the factors that may be taken into account in deciding whether it is appropriate to make a determination. Regard should be had to all the circumstances of the case."

140. Also in paragraph 13 reference is made to the Court of Appeal's observations in R(G) that Article 6(1) does not require that funding be granted 'in most or even many cases'.

141. I am far from persuaded that LASPO should be construed, despite what Ministers said it was intended to achieve, to limit grants of legal aid to the highest priority cases. What Parliament has provided is that it must be granted if without it an individual will suffer a breach of his Convention or, where material, EU law rights and may be granted if there is a risk of such breach. If such breach or risk of breach is properly described as highest priority, there is no problem. But the test expressed in R(G) must be followed.

142. In considering factual complexity, paragraph 22 requires caseworkers to consider whether the case turns on issues of fact that are within the applicant's knowledge. The volume of evidence, whether expert evidence needs to be considered and whether key

issues of fact have already been dealt with in previous proceedings is also relevant. That an applicant has knowledge of factual issues on which the case turns is not a satisfactory test, since, if there is an issue, cross examination of the other side will be likely to be crucial. Overall, I think the indication still suggests that legal assistance should be limited to cases which are of the highest priority and so there is a high hurdle to be surmounted by an applicant.

143. Legal Help is dealt with in paragraph 39. This provides:-

> 144. "Where an individual makes an application for Legal Help alone, caseworkers should consider particularly carefully whether the Section 10(3) criteria are met. It will not be sufficient that such assistance is merely helpful for the presentation of the case. The failure to provide Legal Help will in itself not usually amount to a breach of ECHR or enforceable EU rights to legal aid. In particular, where the source of the obligation to provide legal aid is Article 6(1), it should be recalled that the obligation can only arise where there is a 'determination of an individuals civil rights and obligations' and caseworkers should consider whether an application for Legal Help alone does in fact relate to such a determination".

145. The guidance does not deal with Article 8 albeit the court in R(G) made it clear that the procedural requirements inherent in Article 8 are essentially the same as those in Article 6(1). Effective access required to protect Article 8 rights is needed and that means that legal aid is required to ensure that there is such access and it is fair. Thus the approach set out in paragraph 39 would seem to be applicable where article 8 rights are concerned.

146. If followed literally, paragraph 39 would seem to be intended to mean that Legal Help would not be available in circumstances where an applicant wants to know whether his case does merit legal assistance. That is the gap in the scheme to which I have referred. I think the guidance is too limiting and fails to recognise that without Legal Help there may well be a real risk that lack of further legal assistance will breach Convention or EU rights.

147. In paragraph 44, the Guidance under the heading "Private Family Law" identifies some particularly relevant considerations:-

> 148. "◦ In relation to the complexity of the proceedings caseworkers should take into account that large number of litigants in England and Wales represent themselves in family proceedings every year.
>
> 149. ◦ In relation to legal aid and factual complexity; for example, does the case involve unusually complex questions of trust law?
>
> 150. ◦ What support (other than legal representation) is the applicant likely to receive? Caseworkers should take into account that judges are used to dealing with unrepresented parties in family proceedings and the court may be supported by for example CAFCASS in reaching a decision."

151. It is not surprising in the light of this that the concerns of family judges to which I have already referred have arisen. The reality is that there is a limit to the

extent to which it is proper for a judge to assist one party to litigation and if there is either factual, legal or procedural complexity it is difficult to see how an unrepresented party who will inevitably be likely not to be able to approach the matter objectively can have a fair hearing. If there are factual issues to be determined, evidence may be needed, whether medical or expert or other evidence, and the court in adversarial proceedings has no power to obtain such evidence. No doubt some litigants who would not meet the means test for legal aid will choose to represent themselves, but that is not a relevant consideration in deciding on an application by one who cannot afford legal assistance. The belief that because courts and tribunals have to deal with litigants in person legal representation can be refused is one which must be very carefully applied. It should only be used to refuse an application if the issues are truly relatively straightforward.

152. Reference has been made on the claimant's behalf to cases in which the LAA has refused to grant legal aid when a judge seized of the material proceedings has requested it because otherwise a fair hearing will not take place. Obviously, the means test must be met and that might justify refusal. But it is difficult to see that save in a rare case to fail to comply with the judge's request would be justified. It is not generally appropriate for a caseworker who is not apprised of the full circumstances to second guess the judge's view. There must be a very good reason indeed for such a refusal.

153. The OS has particular concerns for patients, namely persons lacking mental capacity, and children who cannot engage in litigation without a litigation friend. He is a litigation friend of last resort in the sense that he will act only where no other litigation friend can be found. He will not, save in rare cases, himself conduct litigation and needs to have external funding. His concerns not only relate to cases in which he has acted as a litigation friend, but more generally that the scheme fails to meet the needs of those who lack capacity. It must be obvious that the difficulties in dealing with the prescribed forms and in making applications apply with greater force where children or adults who lack capacity are concerned. The response given is that a litigation friend can conduct the litigation and can apply for ECF. Equally, it is said that a litigation friend can conduct a case and so can be expected to be treated in the same way as would a litigant who had capacity. The evidence from Mr Bryant, the head of ECF determinations in the LAA, is that the ECF team does not expect litigation friends to conduct the litigation as advocates, but they step into the protected person's shoes. The same point is made by the policy manager in the Ministry of Justice's legal aid policy team, Mr Holmes, in his statement.

154. There is a powerful disincentive for a litigation friend to act since he or she undertakes not only to pay the protected persons costs but any costs that the court may order to be paid by the protected person. While the litigation friend will expect to recover from the protected person such costs, that is unlikely to be realistic when the protected person lacks means and so could be financially eligible for legal aid. Equally, a litigation friend is under a duty to act always in the protected person's best interests and those may not be in accordance with the protected person's views, albeit those views must always be put to the court. Thus in many cases it would be inappropriate for a family member (for example a parent of a child) to act as a litigation friend since there may be a need for objectivity which could not be met. Further, McKenzie friends cannot be used. It follows that in many cases involving impecunious children or adults who lack capacity there will be real difficulties in finding a litigation friend

prepared to act having regard in particular to liability for costs. Thus the OS may have to act if approached. He will not normally be able to act for an impecunious individual, unless, absent a CFA or a costs undertaking from the opposing party, there is legal aid.

155. Problems have arisen in that the LAA has in a number of cases required the lack of capacity for an adult to be established. It is said that evidence is not now requested and cases in which that request was made occurred in the early days and are not to be repeated. Nevertheless, there have been instances when information perhaps in the form of existing reports has been requested. It seems somewhat improbable that an individual would falsely assert a lack of capacity but no doubt that could occur. I was told that if the OS were acting no issue would be raised about capacity. However, it will often be necessary to have some medical evidence and that must be paid for. Furthermore, solicitors must be available to act. The defendants say that the OS's concerns that protected persons cannot be expected to make applications themselves is based on the incorrect assumption that solicitors are unwilling to make such applications. The evidence before me as I have said shows that it is no assumption but entirely correct.

156. Before a directions hearing which I heard on 15 April 2015, the claimant was contending that the first defendant was deliberately setting out to ensure that as few applications succeeded as possible. Thus bad faith was raised: There had been a directions hearing before Sales J in July 2014 in which inter alia he ordered disclosure of the LAA training material. There was a considerable degree of argument about the proper disclosure; some of the documentary material was redacted. I am pleased to say that I persuaded the claimant to abandon the contention of bad faith. It seemed to me that it was both unnecessary and inflammatory because if the way in which the ECF was dealt with was unlawful, the reason why that was so was immaterial. It would obviously have lengthened the hearing since evidence would have had to be examined to no good purpose. In any event, it would have taken powerful and cogent evidence for me to have found bad faith. The training material has not been relied on since it is equally immaterial for my decision.

157. A further concern raised is the lack of an adequate system to deal with urgent applications. For in-scope applications, those which are urgent are to be dealt with in 48 hours and full merits and means forms will be required only if the emergency certificate is granted. I have already noted that regulation 66(3) of the Procedure Regulations disapplies this urgent case procedure for ECF applications. It is difficult to understand the reason for this since the need for urgent assistance will be the same whether or not the case is within scope. The LAA says that if it agrees that the case is urgent it will be prioritised. The normal time for dealing with an application is 20 days but an urgent application will be put to the head of the queue.

158. I have already referred to the reference to urgent cases in heading B of the ECF form. Mr Bryant says that urgency is assessed in the round, taking into account matters such as the nature and importance of imminent hearings or deadlines and not just, for example, how soon a hearing may be. Since as I have said the needs of the applicant for ECF are the same as those for an applicant for in-scope legal aid in receiving urgent assistance, it seems to me that the absence of the possibility of obtaining an emergency certificate is not reasonable. The urgent procedure is not satisfactory since it requires in effect a full application to be approved rather then the possibility of

emergency funding. The provider will have to take the chance of appearing without payment.

159. I have not set out in any detail in this judgment the cases which have been referred to in the witness statements which have identified the difficulties to which I have referred. Mistakes have been made as the LAA accepts; mistakes do not of themselves show that the system is defective. To go through them all would be to extend this judgment unacceptably. The Scott schedule provides all the necessary information if anyone should wish to examine it. But I am entirely satisfied that the scheme is not, as it is operated, meeting its need to ensure that an unrepresented litigant can present his or her case effectively and without obvious unfairness. That extends to the need to ensure that he or she has access to assistance which may be needed, as in IS's case, to make representations to the relevant authority to achieve a particular purpose. The same need exists as for hearings before a court or tribunal.

160. The main problem lies in the forms which are prescribed. They are far too complicated and are not at all helpful to lay persons. Providers have difficulties with them and the small level of grant has unquestionably, on the evidence which has not shown to be erroneous, led to the unwillingness of providers to take on clients who need to apply for ECF. The scheme is not properly providing the safety net which s.10 is supposed to provide. It is to be noted that it was anticipated that some 5,000 to 7,000 applications would be made in a year. The actual rate was a fraction of that. The defendants say that the figures they relied on were only estimates for planning purposes. In a letter of 20 August 2013 the MoJ stated that the figures were based on the number of grants estimated in the LASPO consultation exercise, namely 3,700. It is significant that the scheme has not produced anything like that number of grants, let alone applications. Furthermore, as the OS has indicated and a number of applications dealt with in the statements confirm, the hurdle erected for those who lack capacity is far too high. Those who are unable to pay for legal assistance are suffering in a way that Parliament cannot have intended.

161. I have to consider the second ground relied on by Mr Hermer. This is in essence an attack on the manner in which merits are to be dealt with in accordance with the Merits Criteria Regulations. Section 11 of the Act identifies a list of factors and the Lord Chancellor must consider the extent to which the criteria to be set out in regulations should reflect those factors. He is given a discretion: it is not a question of necessarily applying each of the factors identified. The manner in which the factors are applied is also left to the regulations to set out. I have already set out the provisions of s11 in paragraph 8 above.

162. There is no doubt that in deciding whether or not to grant legal aid the State is entitled to apply merits criteria. This has been upheld by the ECtHR in a number of cases. It is clear that legal aid is not required to ensure that there is no breach of Article 6(1) or 8 of the Convention in all cases. Means and merits tests can be required. In addition, the ECtHR has upheld the imposition of a cost-benefit test. Mr Chamberlain has submitted that the ECtHR has gone so far as to uphold the application of a merits test even where to refuse legal aid would prevent the individual from access to a court as would arise, for example, for one who lacked capacity and could find no litigation friend prepared to act or the OS could not help unless legal aid were granted.

163.Mr Chamberlain in addition submitted that it was for the State to decide how the test should be applied providing only that arbitrariness was avoided. Further, there was no case before the ECtHR which decided that there must be discretion to disapply the merits test on a case by case basis. Either an individual qualified or he did not. Any system designed must involve a judgment to be made by the body which is able to grant or refuse legal aid and so there is a discretion to be exercised on the particular circumstances of a particular case, as the Guidance makes clear.

164.In Martin v. Legal Services Commission [2007] EWHC 1786 (Admin), Ouseley J helpfully summarised the ECtHR jurisprudence. That case challenged a refusal to grant legal aid for a negligence claim on the basis that the cost-benefit test was not met. The key conclusion is that a refusal of legal aid on the grounds that a case lacked reasonable prospect of success, through a fair and non-arbitrary decision making process would not be a denial of access to the courts, even though it would mean that a claimant would have to bring proceedings himself or seek other assistance which might not be available.

165.I should refer to a few of the ECtHR cases since the court has not always been entirely consistent in its formulation of the merits test. In Mak v. UK (2010) 54 EHRR 14 the applicant had originally been granted legal aid for a claim for damages against a local authority which had taken custody of his child on the basis of what was said to have been a false allegation of child abuse. Legal aid was withdrawn because the likely costs were disproportionate to the value of the claim. The merits test then in force was set by s.15(2) of the Legal Aid Act 1988 which required an applicant to have reasonable grounds for taking, defending or being a party to legal proceedings. The test set out in the Merits Regulations is far more prescriptive than that under the 1988 Act. The court said at paragraph 45:-

> 166. "The Court further observes that the legal aid system in the UK offers individuals substantial guarantees to protect them from arbitrariness. In particular, the Court has regard to the fact that applicants who are refused legal aid or whose certificates are discharged or withdrawn can appeal to an Independent Funding Review Committee. If they are not satisfied with the Committee's decision, they can apply for judicial review."

167.Accordingly, the court decided that even if the withdrawal of legal aid constituted a restriction on the applicant's access to the court, it was legitimate and proportionate. Applicants for ECF have no right of appeal, albeit judicial review is a possible remedy. One concern raised by Mr Hermer was the number of cases in which legal aid was eventually granted but only after threat of a claim for judicial review. That is an increase in cost, particularly as the claimant may receive legal aid to challenge the refusal of ECF. While I do not suggest that the changes made by the LASPO Act produce arbitrariness, the situation is less satisfactory than that considered in Mak under the 1988 Act.

168.In Aerts v. Belguim (2000) 29 EHRR 50, the Legal Aid Board of the Court of Cassation had refused to grant legal aid to the applicant, a mental patient, who sought to challenge the lawfulness of his detention on the ground that his appeal was not well-founded. Belgian law required that there be representation by counsel before the Court of Cassation. The right to liberty which was at stake was a civil right so that Article 6(1) applied. The court concluded (paragraph 60):-

169. "It was not for the Legal Aid Board to assess the proposed appeal's prospect of success; it was for the Court of Cassation to determine the issue. By refusing the application on the ground that the appeal did not that time (sic) appear to be well-founded, the Legal Aid Board impaired the very essence of Mr Aert's right to a tribunal. There has accordingly been a breach of Article 6(1)."

170. The court thus did not accept that a merits test applied by a body, albeit in the Court of Cassation, which was not judicial could properly refuse legal aid when the effect of refusal was to disable the applicant from appearing before the court.

171. In Gnahore v. France (2002) 34 EHRR 967 a similar application to that in Aerts was made following refusal of legal aid for an appeal to the French Court of Cassation. The relevant procedural rules did not require that an appellant must be represented by counsel and so the court distinguished Aerts because "there is no doubt that the fact that M.Aerts had to be represented by counsel was decisive." Apart from this, the French system provided for a simplified process for litigants in person. The general rule that funds for legal aid should only be allocated to those whose appeals had a reasonable chance of success was reiterated. It is also important to keep in mind the system which the court set out in paragraph 41. It said:-

172. "Furthermore, the system instituted by the French legislature provides substantial guarantees for individuals of a kind to protect them from arbitrary action. On the one hand, the Legal Aid Office established within the Cour de Cassation is presided over by a magistrate from the court and also includes its chief registrar, two members chosen by the court, two officials, and two advocates before the Council of State and the Cour de Cassation, as well as a member appointed in the name of litigants; on the other hand, rejection decisions can be the object of an application to the First President of the Cour de Cassation."

173. Thus there was ample protection provided by means of a judicial decision if legal aid was to be refused.

174. Mr Chamberlain relied on Del Sol v. France (2002) 35 EHRR 1281 which, he submitted, showed a departure from Aerts. The applicant in Del Sol was alleging a breach of Article 6(1) in a refusal to grant her legal aid for an appeal to the Court of Cassation. The court by a majority again distinguished Aerts because of the French system the details of which I have already referred to as set out in Gnahore. Mr Chamberlain relied on observations of the minority judges who pointed out that, unlike Gnahore, in Del Sol the applicant was not permitted to appear in person before the Cour de Cassation so that the very essence of the right was infringed. The two dissentients said at paragraph 0-12:-

175. "The Court's finding that there has been no violation of Article 6 of the Convention therefore quite clearly marks a departure from its previous case law. We find it surprising that a Chamber should thus decline to follow two previous decisions; as such a major change to case law is within the sole province of the Grand Chamber."

176. In Eckardt v. Germany (2007) 54 EHRR 52 the applicant, a serving prisoner, sought to complain to the Constitutional Court that he had been the subject of a wrong decision

by the Thuringia Court of Appeal in the rejection of his claim for damages for being kept in conditions which in essence breached Article 3 of the ECHR. The relevant provision of the Code of Civil Procedure stated that if a party could not afford representation he was to be granted legal aid 'if the intended legal action offers sufficient prospects of success and does not appear wanton". Representation by counsel may in certain cases be compulsory, and "it is the Court having jurisdiction to deal with the intended action itself which will be called to decide on matters for legal aid. An appeal lies against a decision refusing legal aid". (Paragraph 3 on page 55).

177. The court (p56) stated that the correct approach was as follows:-

> 178. "The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case. It will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure, the question whether legal representation is compulsory and the applicant's capacity to represent himself effectively. The right of access to court is, however, not absolute and may be subject to restrictions, provided that those pursue a legitimate aim and are proportionate. It may notably be acceptable to impose conditions on the grant of legal aid based, inter alia, on the financial situation of the litigant or his or her prospects of success in the proceedings….provided that the legal aid system offers individuals substantial guarantees to protect them from arbitrariness (compare Gnahore, Del Sol)."

179. As the court observed on p58, the German legal aid system offered individuals substantial guarantees to protect them from arbitrariness. It said:-

> 180. "It is the Court having jurisdiction to deal with the planned action itself which decides on motions for legal aid and an appeal lies against its decision refusing legal aid."

181. The system for ECF does not contain the guarantees referred to in Eckardt. The court was able to distinguish Aerts in Del Sol because of the involvement of judges of the court in considering the grant of legal aid and a right of appeal to a judicial body against a refusal. I see no reason to distinguish Aerts where, as here, there is no judicial input into the decision making process and no right of appeal. This applies only if there would be an infringement of the very essence of the right of access to a court or tribunal. That would be the position in the case if an individual who lacked capacity, could find no litigation friend willing to act and the OS could not himself act as litigation friend unless legal aid were granted.

182. The right to seek judicial review (which is in scope) is not an entirely satisfactory remedy since it is only possible to quash a refusal if an error of law is established. Essentially, in most cases it would be necessary to show that the decision was irrational in Wednesbury terms. In my view, the system is defective in failing to provide for a right of appeal to a judicial person against a refusal where the result would be an infringement of the very essence of the right of access to a court.

183. It is important to bear in mind that whether the prospects of success are better than borderline is not the only material consideration nor can it always prevail. The case of Reis, one of those dealt with in R(G), is in point: Mr Reis was a Portuguese national

who was to be deported. The issue turned on whether he was entitled to enhanced protection because of his length of residence here. There was considerable complexity in that issue albeit chances of success were prima facie not better than even. Mr Hermer gave the example of a father who was being deprived of access to his children because of an allegation of physical abuse. Assuming he had learning difficulties and could not reasonably be expected to conduct his case in person, the overwhelming importance of the case for him and for his children could not properly justify refusal of legal aid simply because the chances of success were believed to be less than even.

184. Even if refusal of legal aid meant that a person lacking capacity would not be able to conduct his case, merits would not be irrelevant. As Mr Chamberlain submitted, a manifestly unwinnable case should justify refusal of legal aid.

185. There are in my view two difficulties in the way the merits test has been applied. First, the requirement that in all cases there must be a even or greater than even chance of success is unreasonable. Secondly, the manner in which the LAA has assessed the prospects of success has been erroneous. The whole point of representation is that it will produce the chance of success which without representation will not exist. If a case involves issues of fact which will depending on the court's findings determine the outcome, it must be obvious that the ability to challenge apparently unfavourable material and to cross examine adverse witnesses effectively may turn the case in a party's favour. Accordingly, what has to be assessed is not what the present material when untested may indicate but whether if competent cross examination or legal submissions are made the result may be favourable. It is not for the LAA to carry out the exercise which the court will carry out, in effect prejudging the very issue which will be determined by the court. I recognise that there will be cases which it will be possible to say that whatever may be achieved by competent representation the result is likely to be unfavourable. The lengthy and detailed refusals which have been exhibited by the various witnesses have tended to carry out what I regard as the impermissible approach. The removal of the borderline cases from those that can succeed on merits grounds seems to me to be unreasonable.

186. Mr Chamberlain has relied on the observation of the court in R(G) that "the cases demonstrate that Article 6.1 does not require civil legal aid in most or even many cases. It all depends on the circumstances". That may be true of the cases in which a breach of Article 6(1) or the procedural requirements of Article 8 were considered. But I do not think the court was making a judgment which would apply to all applications. As was said, the circumstances of each case will be determinative and there can in my view be no doubt that the way in which merits have been approached has been flawed.

187. Ground 3 alleges that there was a breach of s149 of the Equality Act 2010. Section 149(1)(b) requires a public authority in the exercise of its functions to "have due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it".

188. It is important to bear in mind that the obligation in s.149 is not to achieve a result but to have due regard to the material need. While the duty is continuing, as Elias LJ observed in R(Greenwich Community Law Centre) v. LB Greenwich [2012] EWCA Civ 496, at paragraph 35:-

> 189. "The purpose of the duty is to require consideration of equality implications at the time the policy is drafted. The fact that it is a continuing duty does not mean that there has to be a further detailed consideration when the general framework is made concrete or whenever there are minor changes of detail. It would make administration intolerable and grossly inefficient if every aspect of policy left to an officer's discretion had automatically to be returned for further consideration of the equality implications."

190. In Bracking v. Secretary of State for Work and Pensions [2013] EWCA (Civ) 1345 McCombe LJ helpfully set out the points which are required by s.149. All I think I need say is that provided the court is satisfied that there has been a rigorous consideration of the duty so that there is a proper appreciation of the potential impact of the policy on equality objectives and the desirability of protecting them, it is for the decision maker to decide how much weight should be given to various factors informing the policy.

191. The second defendant produced an Equality Impact Assessment (EIA) in May 2012. It is thus clear that the necessary due regard was had. Insofar as the primary legislation set up the scheme and the various criteria were set out in Regulations, the EIA had to take that into account. But the claimant's case focuses on what is said to be an error in the EIA which renders its assessment unreliable. The paragraph which is relied on reads as follows:-

> 192. "Any risk that providers might as a matter of policy decline to take on applications by people with protected characteristics as a result of perceived increased burdens potentially associated with such applications should in our view be mitigated by the existing legal duties on providers with regard to equality, for example the requirement under section 29 of the Equality Act 2010 that a service provider must not discriminate in the provision of services".

193. Mr Hermer submits that this is a fundamental error and a fatal one. But it is necessary to put the paragraph in context. In the summary to the EIA, the risk of providers failing to take a case which would have been granted ECF because of the extra cost to be incurred was referred to. Consideration was given to whether payment should be made for additional work required for making an application when the client had a protected status. This was rejected on the basis that "for the most part providers will make correct judgments in terms of putting forward applications on behalf of clients with a strong case for ECF and refusing to do so for those that would not be granted it". It was believed that the risk would reduce over time as providers became aware of which cases were likely to succeed. To allow payment for unsuccessful applications would, it was said, encourage applications as a matter of routine.

194. As the evidence in this case demonstrates, the expectation set out has not materialised. The opposite is the case due to the very small number of successful applications. The refusal to take on clients because of an inability to take the risk of not being paid cannot amount to a breach of the s.29 duty. But a policy decision independently of any good reason for it not to take on clients who were disabled would not be lawful. Thus the suggestion that the s.29 duty would mitigate the risk of a failure by providers to take on disabled clients has not applied in the circumstances which resulted from the manner in which the LAA has dealt with ECF applications. I do not regard it as in any way fatal to the defendants as Mr Hermer submitted.

195.In any event, it seems to me to be clear that due regard was had as required by s.149. Whether the conclusions were all correct and wrong weight was given to particular factors is nothing to the point. Mr Hermer recognised that this ground would not on its own lead to a favourable decision. In my view it does not prevail.

196.As will become apparent, I think that there must be changes to the scheme. The ECF application forms are far too complex for applicants in person. Separate forms should be provided. Indeed, overall the test set out in R(G) can be set out in the form and applicants or providers can then be required to give full details of the need for legal assistance by producing all existing material relevant to the application. As I indicated, what is put on the website can surely be put on a form. Consideration must be given to provision of Legal Help to enable providers to do work to see whether a client has a case which should be granted legal assistance because it qualifies within s.10 of the Act. No doubt the LAA will be entitled to decide whether any such application is reasonable since a provider must satisfy himself that there is a possible need for legal assistance on the basis of preliminary information given by the client and any relevant documents provided. Legal Help does not require a prospect of success test.

197.The rigidity of the merits test and the manner in which it is applied are in my judgment wholly unsatisfactory. They are not reasonable.

198.As will be clear, I am satisfied that the scheme as operated is not providing the safety net promised by Ministers and is not in accordance with s.10 in that it does not ensure that applicants' human rights are not breached or are not likely to be breached. There is a further defect in the failure to have any right of appeal to a judicial body where an individual who lacks capacity will otherwise be unable to access a court or tribunal.

199.I am conscious that I have not gone through the enormous quantity of evidence in great detail. To have done so would have resulted in a judgment which is more unwieldy than this. I have of course considered it all and have, as I said, been assisted by the Scott schedules. I am immensely grateful to counsel on both sides for their assistance.

200.I shall hear counsel on what form of relief I should grant.