



# Public Law Project

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Top legal aid and access to justice cases of recent years

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1. This paper considers some of the significant legal aid and access to justice cases since the entry into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') in April 2013. It is organised thematically, and does not seek to be comprehensive.

## **(1) Exceptional case funding**

2. One of the innovations of LASPO was the attempt to specify, in a Schedule to the Act, the categories or 'descriptions' of legal services for which civil legal aid would be available (subject to qualifying criteria such as means and merits), and to provide that otherwise, civil legal aid would only be available where that was necessary to prevent a breach of Convention<sup>1</sup> or European Union ('EU') law rights. Provision for this second category was by way of a human rights 'safety net' in s10 LASPO, enabling the grant of 'Exceptional Case Funding' ('ECF') where necessary to prevent a breach of rights, or appropriate because of the risk of such a breach.
3. Given that significant areas of social welfare law were removed from the scope of legal aid by LASPO, it was perhaps inevitable that this would be an early area of litigation. The key question was: in what circumstances, and what kinds of case, do Convention or EU law rights require legal aid to be granted?
4. Article 6 of the Convention protects the right to a fair trial but contains no express right to civil legal aid. However, the Strasbourg court had identified an implied right to legal aid where necessary to make the right to a fair hearing effective. This was accepted by the Government in statutory guidance published for the Legal Aid

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<sup>1</sup> i.e. rights protected by the Human Rights Act 1998 and found in the Schedule to that Act to give domestic effect to the European Convention on the Protection of Human Rights and Fundamental Freedoms.



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Agency, though that guidance sought to lay down a stringent threshold for granting legal aid.

5. However, Article 6 could only assist in cases which involved the determination of civil rights and obligations. That did not include all areas of social welfare law removed from scope and, in particular, it was well established that immigration cases do not generally involve the determination of civil rights and obligations. The Government's position was that there was no basis in the Strasbourg caselaw for considering that a right to legal aid could arise in out of scope immigration cases. In some cases, EU law would assist – for cases in the scope of EU law, Article 47 of the Charter of Fundamental Rights ('CFR') expressly requires legal aid to be made available where necessary to secure effective access to justice.
6. The first case to consider all of this was *R (Gudanaviciene & Ors) v Director of Legal Aid Casework & Lord Chancellor* [2014] EWCA Civ 1622; [2015] 1 W.L.R. 2247. This case was brought by six individuals who sought legal aid for an out-of-scope immigration cases: a refugee seeking family reunion with her husband and son; a victim of trafficking seeking advice before being referred into the National Referral Mechanism ('NRM'); two EU nationals resisting deportation; a woman appealing to the Court of Appeal in a case about long residence; and a mentally incapacitated man of uncertain immigration status whose status needed regularisation in order for him to access the support he needed.
7. All of the claims were allowed at first instance. The Government appealed. Shortly before the appeal hearing, it conceded one of the cases. In three of the remaining cases, its appeals were dismissed. Permission to appeal to the Supreme Court was refused.
8. The Court of Appeal's judgment authoritatively states the approach to be taken to determining when a right to legal aid arises under the Convention and EU law. The Government accepted in the Court of Appeal that in some circumstances, Article 8 of the Convention (which protects the right to private and family life) could require legal aid to be granted where necessary to ensure effective participation in the



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proceedings. The Court ruled that this concession was correct, gave detailed guidance on the circumstances when Article 8 would require legal aid to be granted, and found that the Lord Chancellor's existing guidance mis-stated the effect of the European Court of Human Rights case law in that there was no support for the "clear signal to the caseworkers and the Director that the refusal of legal aid will amount to a breach of article 6.1 only in rare and extreme cases" (para 45).

9. An effective right is one which is "*practical and effective, not theoretical and illusory in relation to the right of access to the courts*" and "*the question is whether the applicant's appearance before the court or tribunal in question without the assistance of a lawyer was effective, in the sense of whether he or she was able to present the case satisfactorily*" (paragraph 46).
10. In relation to fairness, the court said "*it is relevant whether the proceedings taken as a whole were fair*", "*the importance of the appearance of fairness is also relevant: simply because an applicant can struggle through 'in the teeth of all the difficulties' does not necessarily mean that the procedure was fair*" and "*equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent*" (paragraph 46).
11. The Court further explained that (para 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 United Kingdom we have an adversarial system of litigation, judges can and do provide assistance to litigants in person.



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12. Having noted and approved the concession that Article 8 could require legal aid to be provided in immigration cases where necessary to enable effective participation in the decision-making process, the Court said that there would be little practical difference between the approach under Article 8 and Article 6. It observed:

71 As Ms Kaufmann submits, the significance of the cases lies not in their particular facts, but in the principles they establish, viz (i) decision-making processes by which article 8 rights are determined must be fair; (ii) fairness requires that individuals are involved in the decision-making process, viewed as a whole, to a degree that is sufficient to provide them with the requisite protection of their interests: this means that procedures for asserting or defending rights must be effectively accessible; and (iii) effective access may require the state to fund legal representation.

72 Whether legal aid is required will depend on the particular facts and circumstances of each case, including (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity. The following features of immigration proceedings are relevant: (i) there are statutory restrictions on the supply of advice and assistance (see section 84 of the Immigration and Asylum Act 1999); (ii) individuals may well have language difficulties; and (iii) the law is complex and rapidly evolving: see, for example, per Jackson LJ in *Sapkota v Secretary of State for the Home Department* [2012] Imm AR 254, para 127.

13. The judgment in *Gudanaviciene* is important not only for its recognition that the effective protection of Article 8 rights may require legal aid to be made available, but also for the broader acceptance of the importance of procedural fairness and effective participation in the decision-making procedures which exist to ensure protection of Article 8 rights. The requirement for effective procedures for the determination of Article 8 rights has subsequently been given further prominence by the judgment of the Supreme Court in *R (Kiarie & Byndloss) v SSHD* [2017] UKSC 42 [2017] 1 W.L.R. 2380 (concerning the need for Article 8 appeals against deportation from abroad to be effective); and see for example *R (AT & Ors) v SSHD* [2017] EWHC 2714 (Admin), holding that it had been unlawful to remove a Gambian man in circumstances where he had not had an effective opportunity to put forward his Article 8 case against removal.



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14. Although the judgment in *Gudanaviciene* meant that the Lord Chancellor had to accept that ECF might be required in immigration cases (and the majority of ECF applications in immigration cases are now successful), there were also very significant concerns about the system for applying for ECF. In *R (IS) v Lord Chancellor* [2016] EWCA Civ 464; [2016] 1 W.L.R. 4733, the Court considered a challenge to that system brought by the Official Solicitor acting on behalf of the mentally incapacitated man who had been one of the claimants in *Gudanaviciene*. The case was brought on the basis that the system which the Lord Chancellor and Legal Aid Agency ('LAA') had established for receiving and determining ECF applications was inherently unfair and therefore unlawful. It succeeded at first instance, and a number of changes were made to the scheme as a result of the litigation and the judgment. The Court of Appeal however allowed the Lord Chancellor's appeal (by a majority). Permission to appeal to the Supreme Court was refused, although that Court indicated that its refusal was based on its view that because of the changes which had been made to the scheme since IS commenced the proceedings, this was not the appropriate case in which to consider the lawfulness of the scheme as it now operated.
15. The lead judgment was given by Laws LJ, who, in finding that the scheme was '*not inherently or systemically unfair*' (and therefore that the high legal threshold for a finding of systemic unfairness was not met) observed that '*it is heavily dependent on the participation of providers, given the difficulties clearly faced by lay applicants and the absolute need of assistance for those with disabilities... Moreover, the website and helpline are, I think, of significant material assistance to potential applicants.*' He further observed that '*there have plainly been many difficulties, and the complexity of the ECF form has been common to many of them.*' Whilst Laws and Burnett LLJ found that the ECF scheme was not operating unlawfully, Briggs LJ disagreed, finding that it was '*the combination of those two features, namely an application process which is inaccessible to most [Litigants in Person] and the absence of an economic business model sufficient to encourage lawyers to apply on their behalf, which makes the ECF scheme inherently defective and therefore unfair.*'



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16. In response to the claims in *Gudanaviciene* and *I.S.*, the government made a number of changes to the ECF scheme. In particular:

- a. Revised ECF Guidance was published on 9 June 2015, which incorporated the test established in *Gudanaviciene* for granting ECF of ‘whether the withholding of legal aid would mean that the applicant is unable to present his case effectively and without obvious unfairness’. It also acknowledged that the procedural obligations imposed by Article 8 ECHR could require the provision of legal aid for immigration proceedings and applications.
- b. In November 2015 a new, shorter, application form was introduced which also allows for an application for funding to investigate whether a full ECF application could be made.
- c. In the course of the litigation, the guidance on urgency in the Provider Pack was amended to state that ‘*We will consider the information that you have provided including information as to how the urgent situation has arisen and why exceptional funding is needed to deal with the emergency situation and if we agree, then we will deal with your case ahead of non urgent applications and within 5 working days.*’

17. According to the Legal Aid Agency’s published statistics, since the High Court’s judgment in *I.S.*, there has been an increase in the number of people applying for ECF in general, and for immigration claims in particular. The Legal Aid Agency statistics, published on 14 December 2017, show that in the financial year 2016/17 there were 1,591 applications for non-inquest ECF, 830 of which (52%) were granted. In the same period there were 1,008 applications for ECF in immigration cases of which 693 (71%) were granted. In the first two quarters of 2017/18 alone, there were 978 non-inquest applications, 55% of which were granted.

## **Access to justice**

18. The ECF scheme is at least intended to ensure protection for the right to legal aid where that is necessary to ensure effective protection of Convention and EU law rights. But the right of access to justice is also given important protection by the common law. In 2017, two cases gave renewed emphasis to that right.



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19. In *R (Howard League for Penal Reform and another) v Lord Chancellor (Equality and Human Rights Commission Intervening)* [2017] EWCA Civ 244 [2017] 4 WLR 292, the Howard League and the Prisoners' Advice Service challenged cuts to legal aid for prisoners which were introduced in December 2013 following the 'Transforming Legal Aid' consultation earlier that year. The December 2013 cuts removed criminal legal aid for advice and representation in connection with a range of procedures in prisons. The challenge was brought on the grounds that the absence of legal aid meant that the system was inherently or systemically unfair; the Lord Chancellor argued that there was adequate alternative provision including the prisoners complaints scheme (including access to the Prisons and Probation Ombudsman), the role played by Independent Monitoring Boards (IMBs) and HM Chief Inspector of Prisons and the availability of civil legal aid for judicial review proceedings to ensure fairness in proceedings concerning prisoners which did not directly determine their liberty.
20. During the course of proceedings, the Lord Chancellor accepted that ECF would in principle be available in cases concerning placement in mother and baby units, licence conditions, segregation, and resettlement cases in so far as they concern prisoners' accommodation or care following release (see §28). By the time of the hearing, therefore, the challenge was focused on five types of case where criminal legal aid was no longer available and the Lord Chancellor did not accept that ECF might be available. It was therefore squarely about the common law. The five categories were (i) pre-tariff parole reviews where the Parole Board had no power to direct release; (ii) category A reviews; (iii) access to offending behaviour programmes ("OBP"); (iv) disciplinary proceedings where no additional days could be awarded; and (v) placement in close supervision centres ("CSC").
21. The issue for the Court of Appeal was whether, in each of these five categories, "looking at the full run of cases in that category that go through the system, the other forms of assistance relied on by the Lord Chancellor are adequate and available to enable a prisoner to participate effectively" (at §51). In order to decide this question, the Court directed itself to consider "*the importance of the issues at*



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*stake, the complexity of the procedural, legal and evidential issues, and the ability of the individual to represent himself or herself without legal assistance having regard to age and mental capacity” (at §51). In doing so, it drew on both common law and ECHR/HRA authorities as to the requirements of fairness (notably, the *Gudanaviciene* case and *Osborn* [2014] AC 1115).*

22. The Court also identified three factors to be taken into account when considering in respect of each category whether the high threshold for demonstrating systemic or inherent unfairness had been shown: (i) the inherent difficulty in differentiating between systemic problems and individual failings, as to which it identified a need to “to distinguish examples which signal a systemic problem from others which, however numerous, remain cases of individual operational failure” (at §53); (ii) the need to approach with caution evidence which was anonymous, unparticularised, or “related to an individual response after something had gone wrong rather than to a systemic safeguard that was in place before that time” (at §54); and (iii) that although the threshold is a high one, that must not dilute the principle that in some contexts “only the highest standards of fairness will suffice”, and the Court is well placed to judge for itself whether the safeguards relied on are sufficient to make the system fair and just (at §55).

23. The Court of Appeal went on to consider each of the five areas in light of these factors and concluded that in three, the system was inherently unfair, namely: (i) pre-tariff Parole Board reviews (at §92); (ii) category A reviews (at §109); and (iii) placement in CSCs (at §126). In relation to decisions about OBPs, the Court found that the issues at stake were less important, the issues less complex, and offender managers able to offer adequate support to mean that the absence of legal aid did not render the system inherently unfair (at §137). With respect to disciplinary proceedings, where legal aid is not available the availability of judicial review to challenge the incorrect application of the Tarrant criteria was a key factor in the Court’s conclusion that the absence of legal aid did not make the system inherently unfair (at §143).





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24. The second key case, *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission and another intervening) (Nos 1 and 2)* [2017] UKSC 51 [2017] 3 WLR 409, was not about legal aid as such, but about Tribunal fees. However it is arguably the most important case on the right of access to justice in recent history and so cannot go without a mention. There are many who think that the emphasis which it places on practical access to justice, and affordability, sits uneasily with earlier cases which adopted a more restrictive approach (e.g. *ex p Witham* [1998] Q.B. 575; and the Court of Appeal's judgment on the discrimination ground in *R (PLP) v Lord Chancellor* [2015] EWCA Civ 1193; [2016] 2 W.L.R. 995). It may also cast doubt on the high threshold applied by the Court of Appeal in *I.S.* to the question of whether the ECF scheme was inherently or systemically unfair and therefore unlawful.
25. UNISON, supported by the Equality and Human Rights Commission ("EHRC") and the Independent Workers Union of Great Britain (IWGB) as interveners, challenged the vires of the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 ('the Fees Order') which, for the first time, introduced fees for proceedings in the Employment Tribunal ('ET') and the Employment Appeals Tribunal ('EAT'). The Fees Order prescribed issue and hearing fees, and fees for various types of application. ET claims were divided into two 'types' broadly based on complexity and the amount of time disputes typically take to resolve. Type B claims were unfair dismissal claims, equal pay claims and discrimination claims, and the fees for type B claims were higher. As the Supreme Court noted, '*Counsel for the Lord Chancellor were unable to explain how any of the fees had been arrived at*' (at §19). There was a fee remission scheme which aimed to ensure that '*those who could not afford to pay fees were not financially prevented from making a claim*' (at §14). As with the fees, there was '*no explanation of how [the disposable capital limit], or any of the other figures relating to remission, were arrived at*' (at §21).
26. The Supreme Court unanimously allowed UNISON's appeal, holding that the Fees Order was unlawful from the outset because it constituted an unlawful and disproportionate restriction on the common law right of access to the courts, as



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well as being contrary to EU law, and (probably) unjustifiably indirectly discriminatory. The judgment of Lord Reed JSC (with whom all other members of the Court agreed) is an important statement of key principles underpinning the constitutional right of access to the courts, which he emphasised is inherent in the rule of law (at §66). He was highly critical of the assumption underpinning the Government's consultation documents and reports, that *'the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the 'users' who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings'* (at §66). The extent to which this assumption appeared to have gained currency in the Government's thinking led him to set out a detailed exposition of the importance of court proceedings in upholding the rule of law, enabling disputes to be resolved, and ensuring that the laws passed by Parliament are worth more than the paper that they are written on. As he explained, without the right of unimpeded access to the courts, *'laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade'* (at §68).

27. Lord Reed JSC's judgment accordingly contains a number of significant statements about the scope and importance of the common law right of access to the courts, including the following:

(1) *'the right of access to justice, both under domestic law and under EU law, is not restricted to the ability to bring claims which are successful'* (at §29);

(2) *'impediments to the right of access to the courts can constitute a serious hindrance even if they do not make access completely impossible'* (at §78);

(3) *'any hindrance or impediment [of the right of access to the courts] by the executive requires clear authorisation by Parliament'* (at §78);



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(4) *'Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question'* (at §80).

28. Applying these principles and after an extensive recitation of the authorities, Lord Reed JSC directed himself that the Fees Order would be ultra vires 'if there is a real risk that persons will effectively be prevented from having access to justice' (at §87) and that *'the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve'* (at §88). Thus even if the interference in access to courts resulting from the Fees Order was not 'insurmountable', it *'will be unlawful unless it can be justified as reasonably necessary to meet a legitimate objective'* (at §89). Applying these principles to the specific context, he held that in order to be lawful, the fees *'have to be set at a level that everyone can afford, taking into account the availability of full or partial remission'* (at §91) (emphasis added). Further, the fees had to be *'affordable not in a theoretical sense, but in the sense that they can reasonably be afforded'* (at §94). The Fees Order failed those tests on the evidence before the Court: *'Where households on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable'* (at §94).

29. Lord Reed JSC also found the Fees Order to be unlawful on the following grounds:

(1) The level at which fees were set, difficulty in predicting the outcome of claims, and absence of certainty that fees would be recovered if successful rendered it in many cases "futile or irrational to bring a claim", particularly where the primary objective of any proceedings was a non-monetary or modest value remedy (at §96);

(2) The interference was disproportionate because it had not been shown that a lower level of fees, or a more generous system of fee remission, would not be effective in achieving the objective of shifting the cost burden to tribunal users (at §100);



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(3) The Fees Order had also not been shown to be necessary to achieve its secondary aims of disincentivising unmeritorious claims or encouraging earlier settlement (at §101);

(4) There had been a failure to “to consider the public benefits flowing from the enforcement of rights which Parliament had conferred, either by direct enactment, or indirectly via the European Communities Act 1972” (at §102).

30. The claim also succeeded under EU law, on essentially the same grounds, namely that the fees constituted a disproportionate interference with EU law rights, in particular the right to an effective remedy (at §117).

31. In a concurring judgment, with which Lord Reed JSC also agreed, Lady Hale [then] DPSC considered whether the Fees Order was also unlawful for being indirectly discriminatory contrary to the Equality Act 2010 and EU law. She emphasised the importance of considering whether the provision, criterion or practice (“PCP”) being challenged was justified as being proportionate to a legitimate aim, rather than its effects (at §126). The PCP here was the distinction drawn between ‘Type A’ and ‘Type B’ claims which disproportionately affected women (and others with protected characteristics), who were substantially more likely to bring Type B claims (at §125). She concluded that charging higher fees for type B claims had not been shown to be a proportionate means of achieving any of the three aims identified by the Government in introducing the Fees Order (at §§129-131).

## **Interpretation of delegated legislation made under LASPO**

32. One of the changes that resulted from LASPO was that much of what had previously been contained in LSC Codes and Guidance or the contract was now to be set out in delegated legislation. This has required the courts to consider the correct approach to interpreting the delegated powers granted to the Lord Chancellor under LASPO and the ways that he has sought to use those to affect the circumstances in which legal aid is available.

33. In the *Transforming Legal Aid* proposals, published in April 2013, the Lord Chancellor also proposed introducing a ‘residence test’ for civil legal aid in England



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and Wales. The effect of the residence test, subject (by the time the draft statutory instrument was published) to a range of exceptions, would have been to require those seeking civil legal aid to demonstrate that they were lawfully resident in the UK, and had been lawfully resident for a continuous 12 month period at any time in the past. This would have excluded many people who would otherwise be entitled to legal aid to protect the legal rights conferred on them by Parliament.

34. In *R (Public Law Project) v Lord Chancellor* [2015] EWCA Civ 1193 [2016] UKSC 39 [2016] A.C. 1531, the Supreme Court unanimously held that the introduction of such a test through delegated legislation would be unlawful. The Lord Chancellor intended to use his statutory powers to amend Schedule 1 of LASPO in order to introduce the test. The Divisional Court had accepted PLP's arguments that this would (1) be *ultra vires* LASPO and (2) in any event be unjustifiably discriminatory. The Court of Appeal upheld the Lord Chancellor's appeal on both grounds. The Supreme Court only considered the first ground which succeeded before it. As that was enough to allow PLP's appeal, it did not consider the discrimination ground.
35. The Supreme Court accepted PLP's argument that the power to amend Schedule 1, being a 'Henry VIII' power, had to be interpreted restrictively. As Lord Neuberger PSC explained (giving the unanimous judgment of the Court): '*When a court is considering the validity of a statutory instrument made under a Henry VIII power, its role in upholding Parliamentary supremacy is particularly striking, as the statutory instrument will be purporting to vary primary legislation passed into law by Parliament.*' (para 25)
36. He went on to explain his reasons for accepting that the proposed residence test was *ultra vires*, accepting in particular PLP's argument that:
- The exclusion of a specific group of people from the right to receive civil legal services in relation to an issue, on the ground of personal circumstances or characteristics (namely those not lawfully resident in the UK, Crown Dependencies or British Overseas Territories) which have nothing to do with the nature of the issue or services involved or the individual's need, or ability to pay, for the services, is simply not within the scope of the power accorded to the Lord Chancellor by section 9(2)(b) of LASPO, and nothing in section 41 undermines that contention.



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37. He further rejected the Lord Chancellor's argument that the order was legitimate because one of the main purposes of LASPO was to 'reduce the availability of legal aid' generally and that would be the effect of the order. He observed that:

... As is apparent from sections 9 and 11 themselves, and from the Ministry of Justice's June 2011 paper referred to in para 2 above, the purpose of Part 1 of LASPO was, in very summary terms, to channel civil legal aid on the basis of the nature and importance of the issue, an individual's need for financial support, the availability of other funding, and the availability of other forms of dispute resolution. The exclusion of individuals from the scope of most areas of civil legal aid on the ground that they do not satisfy the residence requirements of the proposed order involves a wholly different sort of criterion from those embodied in LASPO and articulated in the 2011 paper.

38. The *Transforming Legal Aid* proposals also sought to restrict the availability of legal aid for judicial review proceedings. They introduced a rule that providers would not be paid for work done in applying for permission to apply for judicial review unless permission was granted. In *R (Ben Hoare Bell Solicitors & Others) v Lord Chancellor* [2015] EWHC 523 (Admin) [2015] 1 W.L.R. 4175, the Divisional Court quashed the original Regulations which implemented those proposals. Although the Divisional Court held that it was lawful for the Lord Chancellor to use his delegated powers to remove an entitlement to payment for some civil legal services, he had to do so in a way which was proportionate to a legitimate aim. Because the Regulations removed an entitlement to payment in circumstances which were outside the providers' control, they were disproportionate.

39. Subsequent to the judgment, further amendment Regulations were laid (Civil Legal Aid (Remuneration) (Amendment) Regulations 2015/898) which increased the range of circumstances in which, despite permission not being granted, providers would be entitled to payment for their work. Regulation 5A now provides for payment to be made where:

- (a) the court gives permission to bring judicial review proceedings;
- (b) the court neither refuses nor gives permission to bring judicial review proceedings and the Lord Chancellor considers that it is reasonable to pay remuneration in the circumstances of the case...
- (c) the defendant withdraws the decision to which the application for judicial review relates and the withdrawal results in the court—
  - (i) refusing permission to bring judicial review proceedings, or



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- (ii) neither refusing nor giving permission;
- (d) the court orders an oral hearing to consider—
  - (i) whether to give permission to bring judicial review proceedings;
  - (ii) whether to give permission to bring a relevant appeal, or
  - (iii) a relevant appeal, or
- (e) the court orders a rolled-up hearing.

40. In *R (Rights of Women) v Lord Chancellor* [2016] EWCA Civ 91 [2016] 1 W.L.R. 2543, a challenge to the Civil Legal Aid (Procedure) Regulations 2012/3098 succeeded in relation to the evidence requirements for victims of domestic violence. Under Schedule 1 of LASPO, legal aid is available for some family proceedings to those who are victims of domestic violence. The Procedure Regulations laid down evidential requirements in order for an application for legal aid in these categories to be granted. Rights of Women ('ROW') challenged these on the ground that they were unduly restrictive and resulted in many people whom Parliament had intended should receive legal aid in fact being refused it.

41. The Court of Appeal concluded that, by requiring evidence to be dated within 24 months of the application for legal aid, and by making no provision for evidence of financial abuse, the Regulations frustrated the statutory purpose. Longmore LJ observed that:

There is, as Ms Lieven submits, no obvious correlation between the passage of such a comparatively short period of time as 24 months and the harm to the victim of domestic violence disappearing or even significantly diminishing. No doubt the 24-month requirement serves the purposes of the statute as the Divisional Court considered them to be but as I have said those purposes are not the only purposes of the statute. Once it is accepted that part of the statutory purpose is to ensure that legal aid is available to (at any rate the great majority of) sufferers from domestic violence, one has to ask why it is that so many of them are excluded by virtue of the 24-month rule. Mr Parsons's assertion that "the time limit provides a test of the on-going relevance of the abuse" does not justify the many excluded instances or the lack of any opportunity for victims of domestic violence to explain why it would be unjust to apply the time limit to their particular case. It operates in a completely arbitrary manner.

42. The Regulations were subsequently amended to make provision for evidence of financial abuse, and to extend the time limit to 5 years; following further advocacy work by ROW and others, the time limit was lifted altogether.