

**Access to Justice, the right to free legal representation at common law and under the Convention and exceptional funding determinations under LASPO**

**Paul Bowen QC, Doughty Street Chambers  
Young Legal Aid Lawyers' Training  
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**(1) S 10 LASPO: the Director's power and duty to make exceptional case determinations**

1. This paper addresses the circumstances in which the European Convention on Human Rights creates rights to free legal assistance and representation and, therefore, an exceptional funding determination may be made under s 10 LASPO.
2. By s 10(3) LASPO the Director shall make an exceptional case determination where either it is "(a) ... necessary to make the services available to the individual under this Part because failure to do so would be a breach of the individual's Convention rights (within the meaning of the Human Rights Act 1998)" or "(b) it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach". In the former case the Director has no discretion; once satisfied that lack of funding would be a Convention breach then he must provide funding. In the latter case the Director has a much broader discretion; if there is a risk of a Convention breach then the Director must only provide funding if it would be 'appropriate to do so, in the particular circumstances of the case'.
3. Little guidance as to the interpretation of these provisions is currently available. The Explanatory Note to the Act provides, in relation to s 10(3)(a):

107. It will be necessary to make legal services available to an individual where the withholding of such services would clearly amount to a breach of Article 6 of the ECHR ('right to a fair trial'), Article 2 of the ECHR ('right to life') or any other provision of the Convention giving rise to an obligation to provide such services.

4. As regards s 10(3)(b) the Explanatory Note states:

108. Subsection (3)(b) provides that an exceptional case determination may also be made where the Director considers that the failure to provide legal services would not necessarily amount to a breach of an individual's rights, but that it is nevertheless appropriate for the services to be made available, having regard to the risk of such a breach occurring.

5. Further provision is made specifically in relation to funding of inquests, which I consider at para 37, below.

## **(2) The right of free legal assistance at common law**

6. The right of access to justice is a fundamental common law right (see e.g. *R v Lord Chancellor ex p Witham* [1998] QB 578). It has a number of components, one of which is a right of access to legal representation (*R v Secretary of State for the Home Department ex p Anderson* [1984] 1 QB 778; *R (Daly) v Secretary of State for Home Department* [2001] 2 AC 532, 537–538; *R (Medical Justice) v Ministry of Justice* [2010] EWHC 1925 (Admin), paras 43-45).
7. It is possible that in some circumstances the right to legal representation includes a right to free representation, paid for by the state. However no such right has yet been expressly articulated in the domestic case-law (at least not one that is free-standing of the statutory legal aid scheme) and, in any event, no provision in LASPO provides for the making of exceptional case determinations where necessary to fulfil fundamental common law or constitutional rights, so it is to the Convention we must turn.

## **(3) The right to free legal assistance under the Convention and HRA**

8. The right to free legal assistance is explicit under only one Convention article – Article 6(3)(c), as a component of the right to a fair criminal trial – but has been implied into a number of the Convention articles, notably Article 6(1) (in relation to civil trials), Article 5(4), Articles 2, 3 and 8; and Article 13. The ECHR reviewed the various contexts in which the right had been implied in App. No.38773/05 *Savitsky v Ukraine* (2012), at para 116:

116. The jurisprudence of the Court has addressed the matter of free legal representation in several contexts. Mostly, the issue has been examined under Article 6 § 3 (c) of the Convention, the provision which expressly requires free legal representation in criminal proceedings against the person concerned. The Court has also held that Article 6 § 1 of the Convention may in certain circumstances compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court (see *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32, and *Bertuzzi v. France*, no. 36378/97, §§ 23-32, ECHR 2003-III) or ensuring the principle of equality of arms (see *Steel and Morris v. the United Kingdom*, no. 68416/01, §§ 63-72, ECHR 2005-II). Also a lack of legal assistance may prevent an individual from effectively exercising his right under Article 5 § 4 of the Convention (see *Megyeri v. Germany*, 12 May 1992, §§ 23-27, Series A no. 237-A, and *A.A. v. Greece*, no. 12186/08, §§ 78-79, 22 July 2010). The considerations concerning access to legal aid may be relevant when assessing the adequacy of procedural protection under Article 8 of the Convention (see *Stewart-Brady v. the United Kingdom* (dec.), nos. 27436/95 and 28406/95, 2 July 1997). Lastly, the absence of free legal representation has been regarded as indication to the ineffectiveness of domestic remedies for the purposes of Article 13 of the Convention (see *Chahal v. the United Kingdom*, 15 November 1996, §154, *Reports of Judgments and Decisions* 1996-V, and *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, §§ 114-115, ECHR 2009-... (extracts)).

9. From that line of authority the ECHR in *Savitsky* went on to hold that the right to legal assistance was also a component of Article 3 to enable the applicant to participate effectively in an investigation of any complaints of ill-treatment under Article 3:

117. Bearing in mind that the Convention is intended to guarantee rights that are “practical and effective” (see *Oluić v. Croatia*, no. 61260/08, § 47, 20 May 2010), the Court takes the approach that in the particular circumstances of the present case the State’s procedural obligations to ensure the effective participation of the victim in the investigation of his complaints of ill-treatment extended to the issues of providing effective access to free legal representation.

10. The right to free legal representation under any Convention right is a species of ‘positive obligation’ owed by the state. In determining whether there has been a violation of a positive obligation in any given case, the European Court of Human Rights (the ‘ECtHR’) carries out a two stage exercise. First, it considers whether the Convention right in question is ‘applicable’; if so, second, it determines whether there has been ‘compliance’ with the Article: see Karen Reid, ‘A Practitioner’s Guide to the European Convention on Human Rights’, 3rd Edition, para I-072). In this second stage the Court conducts a balancing exercise that is indistinguishable from that it carries out when deciding if an interference with a qualified right, such as Article 8, is justified (see Karen Reid, para I-067); that is to say, it considers whether the interference or restriction on the Convention right caused by the conduct complained of is in accordance with the law, pursues a legitimate objective and is a proportionate means of meeting that objective.
11. Three points may be made. First, the question of what is proportionate depends upon a number of factors including the powers of the relevant authorities, the resources available to them and any countervailing rights of other individuals: see, in the context of Article 6, *P, C and S v United Kingdom* (2002) 35 EHRR 1075, paras 88-91 (discussed at para 18, below). However, these factors will differ between states so what may be required in one state may differ from another: as Lord Bingham observed in *R (Pretty) v DPP* [2002] 1 AC 800, at para 15, “the steps appropriate or necessary to discharge a positive obligation will be more judgmental, more prone to variation from state to state”. For example, in the context of Article 3, in *Aleksanyan v Russia* (2011) 52 EHRR 18 the ECHR held that States owe a positive obligation to provide all medical treatment to those in custody “that their resources might permit” (para 148), which clearly differ from state to state. On this analysis, what may be required by way of funding for legal representation to comply with the Convention in the United Kingdom will be different from what is required in, say, Turkey.

12. Second, in determining whether there is a breach of a positive obligation any breach of procedural fairness will also be relevant. In *Bobrowski v Poland* (2008), for example, a decision refusing to provide legal representation to the applicant was found to breach Article 6 because no reasons were given for the decision (paras 50-51). By the same token, for example, a refusal to grant funding without giving the individual a chance to make representations may also breach the State's positive obligation under the relevant Convention article.

13. Third, under the existing legal aid Funding Code, exceptional funding may be available "... [where] it would be practically impossible for the client to bring or defend the proceedings, or the lack of public funding would lead to obvious unfairness in the proceedings". This criteria was added to the Funding Code following the decision in *R (Jarrett) v Legal Services Commission* [2001] EWHC Admin 389, 22 May 2001, later applied in *R (Viggers) v Legal Services Commission* [2011] EWHC 2221 (Admin) and hereafter referred to as the 'Jarrett criteria'. It is a moot point whether a case falling with the *Jarrett* criteria would also fall within the circumstances in which the Convention requires public funding to be provided, where a relevant Convention right is engaged. This will only be relevant post-LASPO which does not (at present) include a separate category to reflect the *Jarrett* criteria.

#### Article 6 - crime

14. The right to free legal representation is expressly provided for by Article 6 in its criminal aspect. Article 6(3)(c) provides:

Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

15. Although under Article 6(3)(c) the right is expressly provided for, it is a qualified right: free legal representation is only required when the individual lacks the means to pay for it and 'the interests of justice so require'. The ECHR has held that whether the 'interests of justice' require legal representation to be granted depends upon the **seriousness of the offence** and **severity of the sentence at stake**, along with the **complexity of the proceedings** and the **capacity of the accused to represent himself**: *Twalib v Greece* (2001) 33 E.H.R.R. 24, paras 52-53.

Article 6 - civil

16. Although there is no express right to free legal representation under Article 6 in its civil aspect, the ECHR has implied the existence of such a right in circumstances where it determines that the absence of such representation has or would deprive the individual of a fair hearing in the determination of his or 'civil rights or obligations'. The circumstances in which 'civil rights' are being determined is a subject fraught with difficulty: questions relating to a foreign national's right to reside in the United Kingdom or a person's entitlement to welfare benefits are among those where the difficulty is particularly acute.
17. Where Article 6 is engaged, the factors that are relevant in determining whether free legal assistance is necessary are analogous to those in the context of criminal proceedings, namely '**the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively**': *Steel & Morris v United Kingdom* (2005) 41 EHRR 22, para 61. Another relevant factor is where national law requires that the applicant have a legal representative, in which case the failure to provide legal aid for that purpose will breach Article 6: *Gnahoré v France* (2002) 34 E.H.R.R. 38, para 38, 41; *Aerts v. Belgium* (2000) 29 E.H.R.R. 50.
18. The right to legal representation in civil proceedings is, as in criminal proceedings, a qualified one. The grant of legal aid may therefore be means-tested or conditional upon the case having **sufficient prospects of success**, see *Steel & Morris*, para 62. There will not be a breach of Article 6 only if the absence of legal representation "did not impair the very essence of the right and where it pursued a legitimate aim, and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (see *P, C and S v United Kingdom* (2002) 35 EHRR 1075, paras 88-91; *Tinnelly & Sons Ltd and McElduff and others v United Kingdom* (1999) 27 E.H.R.R. 249, para 72 and *Aerts v Belgium*, *ibid*, para 60). In assessing the proportionality of the measure the limited public funds available, the need for expedition and the rights of others will all be relevant, provided the tripartite test set out above, at para 17, is satisfied (*P, C & S*, *ibid*, para 90: and see para 11, above).
19. Two recent examples of these provisions in practice can be found from Scotland. In *SK v Paterson* [2009] CSIH 76, the Scottish Court of Session, Inner House (Court of Appeal) held that the failure to provide a learning disabled adult, SK, with legal aid in relation to contact proceedings concerning her child had breached her rights under Article 6. On the other hand, in *Watson v Scottish Ministers* [2011] CSOH 131, the Scottish Court of

Session, Outer House (High Court) rejected a claim that W's Article 6 or 8 rights had been breached by the failure to provide them with free legal representation at a public inquiry into the feasibility of a road project that would affect the enjoyment of the applicant's farm. At para 111 Lord Tyre gave his reasons:

The point that construction of the Fastlink in proximity to the appellants' farm would cause a loss of amenity is a short one which was, in my opinion, capable of being placed before the inquiry by the appellants without the need for legal knowledge or experience. As I have already noted, it was in fact addressed in submissions made by the appellants before, during and at the close of the inquiry. It is also worth emphasising, as Circular 17/1998 (mentioned earlier) makes clear, that planning inquiries are not intended to operate as formally as a court of law. Loss of amenity is the type of issue that inquiry Reporters are well capable of assessing without the need for legal input.

20. While the key to Article 6 is actual fairness, the appearance of fairness is also relevant. Thus (*Bobrowski v Poland* (2008)):

46. The key principle governing the application of Article 6 is fairness. In cases where an applicant appears in court notwithstanding lack of assistance by a lawyer and manages to conduct his or her case in spite of all the difficulties, the question may nonetheless arise as to whether this procedure was fair (see *McVicar v. the United Kingdom*, no. 46311/99, § 50-51, ECHR 2002-III). It is important to ensure the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, *inter alia*, by being able to put forward the matters in support of his or her claims (*Laskowska v. Poland*, no. 77765/01, § 54, 13 March 2007).

#### Art 5 (4) generally

21. Article 5(4) provides:

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

22. The procedural guarantees required by Article 5(4) for a review of detention under Article 5(1) need not always be the same as those required by Article 6 in its criminal or civil aspect (*Megyeri v Germany* (1992) 15 EHRR 584, para 22(c)). Moreover, the particular requirement of speediness of the review under Article 5(4) compared to Article 6 may outweigh other procedural guarantees, including any right to legal representation: see *Lebedev v Russia* (2008) 47 EHRR 34

84 The Court reiterates that detention proceedings require special expedition and Art.5 does not contain any explicit mention of a right to legal assistance in this respect. The difference of aims explains why Art.5 contains more flexible procedural requirements than Art.6 while being much more stringent as regards speediness. Therefore, as a rule, the judge may decide not to wait until a detainee avails himself

of legal assistance, and the authorities are not obliged to provide him with free legal aid in the context of the detention proceedings.

23. However, the ECHR in *Lebedev* went on to find certain features of the case meant that the exclusion of the applicant's legal representative did give rise to a breach of Article 5(4): while there was a presumption against legal representation in such cases, that presumption could be rebutted. Moreover *Lebedev* involved a relatively short period of detention following arrest. Where longer periods of detention are concerned the position is different. The ECHR has consistently held that where the individual faces a lengthy or indefinite period of detention, so that what is at stake is of a similar order to that in criminal proceedings, then Article 5(4) "must import substantially the same fair trial guarantees as art. 6(1) in its criminal aspect": *A v United Kingdom* [GC] (2009) 49 EHRR 29, para 217; *SSHD v AF* [2009] 3 WLR 74, 57. That will include a right to free legal representation where it is necessary in the interests of justice, given what is at stake for the individual: "where deprivation of liberty is at stake, the interests of justice in principle call for legal representation" (*Benham v United Kingdom* (1996) 22 EHRR 293, para 61).

24. Thus in *Chahal v United Kingdom* (1996) 23 EHRR 413, para 430, one of the factors relevant to the ECHR's decision that the procedure for determining the lawfulness of the applicant's immigration detention failed to satisfy Article 5(4) was the absence of any legal representation. In the context of a life sentence prisoner's recall on life licence following serious allegations the ECHR has held that the individual is entitled to an oral hearing, represented by counsel, with an opportunity to cross-examine witnesses: *Waite v United Kingdom* (2003) 36 EHRR 54, para 59.

59 ... In matters of such crucial importance as the deprivation of liberty and where questions arise involving, for example, an assessment of the applicant's character or mental state, the Court's case law indicates that it may be essential to the fairness of the proceedings that the applicant be present at an oral hearing. In such a case as the present, where characteristics pertaining to the applicant's personality and level of maturity and reliability are of importance in deciding on his dangerousness, Art.5(4) requires an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses.

25. As can be seen from this extract, also relevant will be the complexity of the law and procedure and the individual's capacity to represent him or herself, as in Article 6. Where these factors are present then it will usually be necessary for legal representation to be provided free of charge, except where very short periods of detention are involved. These factors are particularly relevant in cases of psychiatric detention, to which I now turn.

Article 5 (4) – detention on grounds of mental disorder

26. The ECHR has long held that Article 5(4) may require free legal representation where individuals are detained on the grounds of ‘unsoundness of mind’ under Article 5(1)(e): see *Winterwerp v Netherlands* (1979) 2 EHRR 387, para 60. Detention under Art 5(1)(e) by definition concerns detainees who are less likely to be capable of representing themselves and which will usually entail complex medical issues requiring specialist expertise. In view of this the ECHR has reversed the usual presumption under Article 5(4) referred to in *Lebedev* (above), requiring legal representation in such cases unless there are ‘special circumstances’ justifying its absence. In *Megyeri v Germany* (1992) 15 EHRR 584 the applicant was detained in a psychiatric institution following proceedings in which he had been found to have committed acts that would have amounted to criminal offences, but due to his mental illness he could not be held responsible for them. Under German law he was entitled to have the lawfulness of his continuing detention reviewed by a court at regular intervals. In two sets of such proceedings the applicant failed to request legal representation and the courts did not appoint a lawyer to represent him. In finding that the applicant’s rights under Article 5(4) had been violated the ECHR held:

23. It follows from the foregoing that where a person is confined in a psychiatric institution on the ground of the commission of acts which constituted criminal offences but for which he could not be held responsible on account of mental illness, *he should - unless there are special circumstances - receive legal assistance in subsequent proceedings relating to the continuation, suspension or termination of his detention.* The importance of what is at stake for him - personal liberty - taken together with the very nature of his affliction - diminished mental capacity - compel this conclusion.

27. The ECHR in *Megyeri* went on to find that there were no ‘special circumstances’ justifying a departure from that presumption, noting in particular that the applicant lacked the expertise to challenge either the medical expertise upon which his detention was based or the legal basis of his detention, namely that his confinement was proportionate given the risk that he presented:

25. One of the issues falling to be determined in the 1986 review was whether, if Mr Megyeri were released on probation, he would be likely to commit illegal acts similar to those that had occasioned the original confinement order. In this connection, the Aachen Regional Court not only considered a report by three experts but also heard the applicant in person, in order to form its own impression of him (see paragraph 10 above). It is doubtful, to say the least, whether Mr Megyeri, acting on his own, was able to marshal and present adequately points in his favour on this issue, involving as it did matters of medical knowledge and expertise. Again, it is even more doubtful whether, on his own, he was in a position to address adequately the legal issue arising: would his continued confinement be proportionate to the aim pursued (the protection of the public), in the sense contemplated in the Federal



Constitutional Court's leading judgment of 8 October 1985 (see paragraph 17 above)?

28. *Megyeri* was followed by the ECHR in the case of *Magalhães Pereira v Portugal* (2003) 36 E.H.R.R. 49 where the presumption in favour of legal representation, absent special circumstances, was restated (see para 57). *Pereira*, like *Megyeri*, involved a detainee who had originally been detained following criminal proceedings in which he had been found to have committed the act necessary for a criminal offence, but could not be held responsible due to his mental disorder. However, in my view the presumption of effective, free legal representation in such cases applies to *all* cases of psychiatric detention, both civil and criminal. All such cases will involve, as in *Megyeri* and *Pereira*, the deprivation of liberty, diminished mental capacity and complex issues of medical expertise law (whether detention is a necessary and proportionate measure given the patient's disorder).
29. What 'special circumstances' will rebut the presumption of free legal representation in such circumstances? One such circumstance may be where there is a relatively short period of detention, where the requirement of 'speediness' may outweigh the need for other procedural guarantees, as in *Lebedev*. Thus a Mental Health Review may be justified in refusing to adjourn to allow a patient to be represented if to do so would mean the review of the detention would not take place until the end of the period of detention, if at all.
30. It would appear, however, that the following do *not*, amount to 'special circumstances' justifying a departure from the presumption in favour of free legal assistance:
- a) The fact that a lawyer is available but the detainee did not wish to be represented or did not take the initiative in appointing one. The ECHR has held that it is not enough that a detained psychiatric patient has access to a lawyer: it is incumbent on the state to ensure that the individual is actually represented, if necessary by appointing a suitably qualified lawyer: *Winterwerp v Netherlands* (1979) 2 EHRR 387, para 60; *Megyeri*, para 22(d), 27. In such cases, unless the patient has made a competent and informed decision not to be represented, it is likely that there will be a breach of Article 5(4).
  - b) The fact that the prospects of release are poor. Legal representation is required regardless of the individual's prospects of release, as the ECHR made clear in *Waite v United Kingdom*:

The Court is not persuaded by the Government's argument which appears to be based on the speculative assumption that whatever might have occurred at an oral hearing the Board would not have exercised its power to release. Art.5(4) is first and foremost a guarantee of a fair procedure for reviewing the lawfulness of detention— an applicant is not required, as a precondition to enjoying that protection, to show that on the facts of his case he stands any particular chance of success in obtaining his release.

This is by contrast with the position under Article 6 in its civil aspect: as we have seen, the state may restrict access to legal aid in civil cases based on the prospects of success: see above, para 18.

- c) The applicant's means. We have seen, above paras 6 and 8, that the state is not obliged under Article 6 in either its criminal aspect (6(3)(c)) or its civil aspect to provide free legal representation to detainees who have the means to afford it. It is not clear what the position is under Article 5(4), but I would suggest that legal representation cannot be denied solely on the grounds of the patient's means without more, at least in cases of psychiatric detention. That conclusion follows from the fact the state is bound to ensure the detainee is actually represented, not just that the detainee could have been represented if he had taken the initiative to appoint a lawyer (above, para 17(1)). It may be that if the applicant has the means, the capacity and the opportunity to instruct his own lawyers but fails to do so, it may be no breach of Article 5(4) if the state does not provide him with one free of charge.

### Articles 2 & 3

31. Under Article 2 the State owes a positive obligation to establish and operate an effective independent judicial system so that the cause of *any* death can be determined and those responsible made accountable (*Vo v France*, (2005) 40 EHRR 12, paras 90-91). This duty is generally discharged by the availability of civil proceedings and ordinary inquest proceedings. In addition, in more limited circumstances the State owes a duty to set in train, of its own motion, an enhanced investigation (hereafter the 'enhanced investigative obligation') into certain deaths. In such cases, free legal assistance may be necessary to enable the family of the victim to participate effectively in the investigation: *R (Khan) v Secretary of State for Health* [2004] 1 WLR 971; *R (Humberstone) v. Legal Services Commission* [2010] EWCA Civ 1479, para 75. The same principle has been applied in relation to investigations required under Article 3 (see App. No.38773/05 *Savitskyy v Ukraine* (2012)).

32. The cases where the enhanced investigative obligation is engaged are threefold: killings by state agents; deaths in 'suspicious circumstances' and, third, deaths that occur where the state is, or may be, in breach of a substantive positive obligation to protect life. A breach of a substantive obligation may arise in two situations: first, a breach of the state's primary obligation to have in place legal and administrative systems for the protection of life wherever any activity giving rise to risks to life is conducted; and, second, a breach of the operational obligation to take steps to protect an individual from specific risks to life that are 'real and immediate' and of which the state is, or ought to be, aware (first recognized in *Osman v UK* (2000) 29 EHRR 245).
33. Where an enhanced Article 2 investigative obligation is owed, the means by which it is discharged will generally be by way of a Coroner's inquest, although some adaptations are required to the traditional inquest to enable a wider inquiry into the circumstances of the death and greater involvement of the family and the wider public (*R (Middleton) v West Somerset Coroner* [2004] 2 AC 182). To ensure that the relatives of the deceased are effectively involved legal aid must usually be available for representation at the inquest: *Khan* etc., *ibid*.
34. Although funding for representation at a coroner's inquest is not currently generally available, the Lord Chancellor has authorized the Commission to grant exceptional funding for such representation under s 6(8) Access to Justice Act 1999 where the death has occurred in custody or at the hands of the police. The LSC has produced guidance (the Funding Code Guidance') in which it states funding will be authorized where the inquest engages Article 2, which has been held to mean when the enhanced investigative obligation is engaged and a *Middleton*-type inquest is to be heard (*Humberstone*, para 73). This test has been effectively codified by LASPO, s 10.
35. Not every Article 2 inquest will require public funding to comply with Article 2. For example, in *R (Main) v Minister for Legal Aid* [2007] EWCA Civ 1147 (the Ufton Nervet rail crash case) the Court of Appeal held that there was no requirement to provide families of the deceased with public funding in circumstances which included the fact that there had already been substantial investigations (by the police and the HSE), the Court did not conclude Article 2 was engaged and the Court had concluded that it was not necessary for the family to have full legal representation at the inquest. However, where the inquest is the primary means of discharging the Article 2 obligation then there must be a presumption of legal aid funding. It should be noted, however, that the fact that the family was represented *pro bono* at the inquest meant that there was no breach

of this aspect of the Article 2 duty in *Bubbins v United Kingdom* (2005) 41 EHRR 458 (para 163) and *Rowley v United Kingdom*.

36. The existing Funding Code provides that funding may also be available in non-Article 2 inquests where the case raises issues of substantial wider public importance or otherwise in 'an extremely unusual case'. This last factor was considered by the Court of Appeal in *Humberstone* which held that the particular educational and social difficulties of an interested party might justify the grant of public funding on those grounds (paras 82-84). This echoes the circumstances in which the Courts have held that public funding is required for the purposes of Article 6, namely 'the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively': *Steel & Morris v United Kingdom* (2005) 41 EHRR 22, para 61.
37. Under LASPO there remains some scope for funding of legal representation at inquests that do not engage Article 2 where the Director has made a "wider public interest determination", namely where he is satisfied it is likely to produce significant benefits for a class of person, other than the individual and the members of the individual's family. Further guidance on the circumstances in which that test will be satisfied will follow.

#### Article 8

38. The ECHR in App. No.38773/05 *Savitsky v Ukraine* (2012) also suggested that a right to free legal representation may arise when "assessing the adequacy of procedural protection under Article 8 of the Convention", referring to the case of *Stewart-Brady v. the United Kingdom* (dec.), nos. 27436/95 and 28406/95, 2 July 1997. The reference to the Brady case is interesting as, while Ian Brady did complain that the lack of legal aid to sue for defamation arising out of a number of newspaper articles had breached his right to private life under Article 8, the European Commission dismissed that claim as being manifestly ill-founded. While the right to procedural fairness as a component of the rights under Article 8 have been recognized and developed in a number of other cases (e.g. *TP v United Kingdom* (2002) 34 E.H.R.R. 2, para 72), I am not aware of any case in which the Court or Commission has suggested that these procedural obligations bring with them a right to free legal assistance. This very recent suggestion in *Savitsky* must therefore be handled with caution. It seems to me, however, that it represents a new departure which is likely to be built upon by the Court in future which may extend the circumstances in which free legal representation must be made available.

Article 13

39. Again, before App. No.38773/05 *Savitskyy v Ukraine* (2012) there was very little suggestion in the Strasbourg case-law that the right to an effective remedy in respect of a violation of one of the Convention rights brought with it a right to legal representation. The cases mentioned in para 116 (i.e. *Chahal* and *Abdolkhani*, see para 8 above) provide some support for the implication, but it is much stronger when read together with *Savitskyy*. This, again, has potential for widening the circumstances in which public funding must be available to comply with the Convention, but it is of limited utility domestically because Article 13 is not one of the rights given effect by the Human Rights Act 1998.
40. This is not as problematic as it might be given the approach of the ECHR has been to incorporate the principle that rights be 'effective, not illusory' when implying and developing positive obligations arising under specific Convention articles, rather than by recourse to the specific 'effective remedy' provision of Article 13. The Convention articles effectively embody their own 'effective remedy' provision.

**PAUL BOWEN QC**

**10 OCTOBER 2012**