New Regulations under the Legal Aid, Sentencing and Punishment of Offenders Act 2012

A Parliamentary Briefing from the Legal Aid Practitioners' Group (LAPG) and Young Legal Aid Lawyers (YLAL)

Debate – House of Commons 29 November and House of Lords 3 December 2012

This updated Briefing follows from the All Party Group on Legal Aid on 7 November 2012 and concerns the published Regulations under the Legal Aid, Sentencing and Punishment of Offenders Act. Further updates will be provided when the remaining Regulations are published.

This Briefing covers Judicial Review and Welfare benefits provisions. In summary we believe that

- the Regulations will make it virtually impossible for anyone to be granted legal aid for a Judicial Review application because the test is so restrictive. The addition of the word 'reasonable' to both limbs of the test in Regulation 53(b) would solve the problem. The change to Regulation 53 appears to be a completely new test for legal aid for Judicial Review. The Government's comments in the original consultation and during the passage of the Act about the changes to legal aid, giving reassurances that legal aid would remain available for Judicial Review are not reflected in these Regulations which have the opposite effect.

- regarding Welfare Benefits, we are concerned because the assurances given in Parliament are not, as we understand them, matched in the Regulations. Again the Regulations would severely restrict the legal aid available, well beyond what was said in Parliament.

Introduction

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 made radical changes to the provision of civil legal aid. Around 600,000 people per year will no longer have access to legal aid once the Act comes into force on 1 April 2013.

Several draft Regulations are currently being laid which will refine the scope of some elements of the 2012 Act. We are deeply concerned about a number of aspects of these Regulations. A list of the Regulations and links to them is included at the end of this briefing although we have been informed by the Legal Services Commission that up to 42 sets of Regulations may be published before April 2013.

Civil Legal Aid (Merits Criteria) Regulations 2012: Regulation 53 – *criteria for public law claims (Judicial Review)*

We are particularly concerned by the wording of Regulation 53(b) which applies a significantly different and more stringent test for access to legal aid for all Judicial Review claims. These cases concern the legality of decision making by public bodies and it is particularly important that the test for access to the Court (via publicly funded legal representation) is fair, does not create an artificial barrier to a challenge by an individual and is lawful.

It is our view that the current Regulations will have the effect of preventing access to a Court by a citizen challenging a decision of a public body in circumstances which are directly contrary to assurances made during the passage of the Bill during the Parliamentary process. Assurances were given that legal aid for Judicial Review would remain within the scope of legal aid and no warning was given that the scope would be drastically changed. However the effect of the new Regulations is to render Judicial Review out of scope of most cases. This is a complete change from the current position and will deny justice to those seeking to challenge acts or omissions of public bodies in all but the rarest situations.

Judicial Review is a vital means of challenging the failures or decisions of public bodies in the following areas (list not exhaustive) - mental health, mental capacity, community care, housing/homelessness, immigration, the environment etc.

Judicial Review is part of the UK's delicate constitutional framework. It is an important element of the system of checks and balances through which citizens can hold the executive to account. Government should be slow to restrict access to Judicial Review because of the implications this may have for democracy.

Judicial Review is concerned with the law; generally speaking it does not engage with the merits of a decision and thus its primary focus is not the facts of a case. With complaints procedures the position is reversed. These systems may be complementary, but more often they are not. The point is that the two sets of remedies available through Judicial Review and complaints procedures may be mutually exclusive options rather than part of a single continuum. This is recognised expressly by the Local Government Ombudsman. In these circumstances it is crucial that an individual has the option of pursuing both <u>or either</u> remedy. To force individuals to always pursue a complaints procedure may not only be inappropriate but it may actually be harmful to their prospects of obtaining a proper remedy.

Judicial Review is not most often concerned with the big, high profile decisions of government but with the allocation of scarce resources and services to individuals, e.g. the provision of a meals service to a disabled person. Most of those who are forced to seek a remedy through Judicial Review are the poorest and most vulnerable. A restriction on legal aid is a restriction on the ability of this group of people to access justice. For the reasons set out above, access to complaints procedures does not provide an answer.

The Test for Funding

The current test. The current position, under paragraphs 7.2.3 and 7.3.3 of the Funding Code, provides that legal aid "*<u>may</u> be refused if there are administrative appeals or other procedures <u>which</u>*

should be pursued before proceedings are considered" [emphasis]. This test involves a degree of judgment as to whether it is necessary or appropriate to make use of any alternative procedures.

The new test. The new Regulation requires that, for determinations for legal representation in relation to public law claims, funding will be refused unless:

> *"The individual has exhausted all administrative appeals and other alternative procedures which are available to challenge the act, omission or other matter before bringing a public law claim."*

The requirement to exhaust 'all administrative appeals and other alternative procedures' is not qualified in any way by the term 'reasonable' or 'appropriate' so as to take account of the particular circumstances of the case.

The proposed new test is materially different from the current provision in the Funding Code and also from the test applied by the Courts as to whether Judicial Review is appropriate. It cannot be right that the test for legal aid is more restrictive than the test applied by the Courts themselves because this would be to deny access altogether. Judicial Review is a means of challenge of last resort; however there are cases where it would clearly not be appropriate for all conceivable (or 'available') review or appeal mechanisms to be exhausted first.

The (different) test in Regulation 39. The test is also different from the Standard Criteria for legal representation in the new Regulations which, at Regulation 39, states that an individual may qualify for legal representation if the Director is satisfied that

> *"the individual has exhausted all **reasonable** alternatives to bringing proceedings including any complaints system, ombudsman scheme or other form of alternative dispute resolution". **[Emphasis applied].***

The (different) test in Regulation 53 for 'legal persons'. The wording of Regulation 53 is also markedly different to the test for access to legal aid for public law in the case of 'legal persons' under Regulation 75(1)(b) which also includes the term 'reasonable' in the same way as Regulation 39.

We see no logical explanation why in other areas of law the applicant need only have exhausted all "reasonable alternatives" to proceedings but in public law the applicant needs to have "exhausted all administrative appeals and other alternative procedures which are available" without any qualification as to whether it is reasonable to expect this in all cases. Further, what does "exhausted" mean and how will it be interpreted and applied?

If the Regulation had been intended to require the person only to exhaust all administrative appeals (as opposed to requiring the person to exhaust all other complaints processes as 'alternatives') then the words 'and other alternative procedures' would be otiose and unnecessary.

Moreover there are some statutory appeal mechanisms which still may be inappropriate as an alternative to Judicial Review in some cases, as the Courts have recognised. These cases may be exceptional however they do exist but the Regulation does not recognise this.

We are concerned that in the second limb of Regulation 53(b) 'alternative' procedures are not defined. However they would appear, from Regulation 39 to include complaints and Ombudsman processes.

Examples

Urgent cases. Many cases of Judicial Review concern urgent cases where the person may suffer harm or other prejudice if emergency proceedings are not started to protect the person. An example might be where a decision has been taken by a public body and where that body refuses to delay implementation of the decision pending any review or appeal process being undertaken. An interim injunction may be required in these circumstances to protect the client on an interim basis yet on the current drafting this would not be possible because legal aid would not be available to obtain that injunction. That injunction would currently be sought in proceedings for Judicial Review via legal aid so as to preserve the status quo. However the wording of the Regulation would change the situation and prevent that person from accessing legal aid to bring proceedings for the injunction until all other processes (however inappropriate) were exhausted.

Points of law. Complaints and Ombudsman procedures will not be able to determine disputes on points of law or statutory interpretation (see below).

Homelessness. In cases of homelessness, or provision of essential community care services and other urgent cases this is plainly unacceptable and amounts to effective removal of a person's right to access the Court.

Time limits for Judicial Review. Another example is that protective proceedings may need to be issued in cases where the time limit for bringing a Judicial Review is nearing the maximum deadline of 3 months; otherwise the client will be prevented from bringing a claim for Judicial Review at all on the basis of delay.

During the passage of the Bill clear statements were made by the Minister and the Secretary of State that the scope of legal aid for Judicial Review would not change under the legal aid reforms and that legal aid would be available for all cases, because

'*an individual's ability to hold the state to account is an important principle….'*

(Please note that this is a different issue to the Justice Secretary's recently announced review of the Judicial Review process. The Regulations are about access to legal aid to bring a claim.)

Solution

The wording of the test in Regulation 53 needs to be amended to include the word "reasonable" before both 'administrative appeals' and also 'alternative procedures' such that it is similar to the wording in Regulations 39 and 75. Otherwise this Regulation will form a practical bar to a Judicial Review of a public body, a matter of constitutional importance.

Interpreted narrowly, this provision could even be read to prevent immigration detention Judicial Reviews on the basis that the detainee had a right to a fresh bail hearing. The word "reasonable" is necessary, otherwise it enables Defendants to evade Judicial Review by pointing to a redundant or wholly unsuitable appeal/complaint mechanism and then sitting on the complaint.

Practical Implications

In the context of public law claims (Judicial Review) it may be that there are very good reasons (around delay and prejudice to the client) which might mean that it is not only unreasonable but actually prejudicial to a client's case to be forced to exhaust all administrative appeals and other alternative procedures first. Such procedures (for example the Ombudsman schemes), and complaints procedures (often internal to a public body such as a social services department) can take months and in some cases years to complete. These processes are not designed to resolve questions of legality of conduct of a public body, which the Court needs to determine. The Ombudsman's role is to consider maladministration or injustice to an individual, and not to determine a question of law which is the function of the Court in Judicial Review.

More Litigation?

Suppose the regulations are interpreted literally as they stand (rather than subject to a caveat that it must be reasonable to exhaust alternative avenues, or that they have to be capable of resolving the dispute such that they are a genuine alternative to Judicial Review). If that happens, then would-be litigants with perfectly good cases will not only be denied (or at best delayed access to) a remedy in the Administrative Court, but they will also be forced to use procedures which are inherently incapable of dealing with the subject matter of what is in dispute. That does not serve the interests of public bodies, or public spending, because time and resources will be used in considering and processing things which have one inevitable unhelpful outcome. It will also mean that the Administrative Court list will be clogged up with protective claims which have to be issued to preserve people's positions while the supposed alternative avenues are explored, pointlessly. Of course, most people will lose the opportunity to make a claim because solicitors will be unwilling to act in litigation without funding, even to the extent of issuing claims protectively.

The Government may seek to argue that rather than amending the Regulations, a "practical approach" should be adopted in the application of regulation 53 by the civil servants who deal with funding applications, whereby funding for Judicial Review would not <u>in practice</u> be refused where it was unreasonable to pursue alternative procedures. This would not be sufficient. The Regulations do not appear to permit funding to be granted unless all alternative procedures have been exhausted. If this is not the intention behind the Regulations then the wording should make this absolutely clear.

Lack of Consultation

These Regulations have not been consulted upon. These Regulations replace what is known under the current legislation as the Funding Code. The Access to Justice Act 1999 allowed for consultation on the Funding Code where the Legal Services Commission considered it appropriate. Changes to the Funding Code were always subject to consultation suggesting that Government and the Legal Services Commission always considered it appropriate to consult. Whilst LASPO is silent on the issue of consultation it is unclear why the Ministry of Justice (MoJ) now considers it inappropriate to consult on the substance of these Regulations or indeed to explain or set out the reasons for making changes to tests already well-established under the outgoing Funding Code. This lack of consultation has weakened these Regulations and has caused significant difficulties in preparing this briefing as we have no statement from MoJ officials setting out what they are seeking to achieve through changing the tests for legal aid and the policy justifications for doing so.

Some Regulations are subject to an affirmative resolution and some are subject to a negative resolution. No decision making guidance has been published and it is understood that any guidance will not be the subject of consultation.

There are various drafting changes in these Regulations - so, for instance, the definition of "Legal Representation" has been narrowed and the definition of "likely costs" has been changed. Both are material to the tests for accessing legal aid and what action can be taken under the legal aid scheme. Neither change (and there are others too) has been explained by the MoJ and neither will have happened by accident. They must have happened for a purpose and it would be helpful if the MoJ would consult on the Regulations.

We would ask the MoJ to revert to its current practice of consulting and producing a paper setting out the changes and why they are being proposed. This transparent process is an essential part of the democratic process. However this transparency seems to be completely lacking in the current process.

The Draft Legal Aid, Sentencing & Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2012

Welfare Benefits

It is our understanding that the Government's intended changes to the scope of legal aid for advice and assistance and representation in relation to welfare benefits will also be debated in the House of Commons on 29 November and in the House of Lords on 3 December.

The Government's intention in the Bill was to remove all advice and assistance via legal aid from all welfare benefits cases.

However, during the passage of the Bill, significant concerns were raised and on 17 April 2012 a concession was made.

In the final stages of the Bill, an amendment was passed to bring into the scope of legal aid advice and assistance for welfare benefits appeals on a point of law in the Upper Tribunal and higher courts, and representation for welfare benefits appeals in the higher courts. After further representations, the Lord Chancellor conceded that the same principle on legal aid advice and assistance in points of law cases should also apply to the First Tier Tribunal, and that a statutory instrument would be brought before Parliament to implement a scheme to ensure that the First Tier Tribunal is covered by legal aid entitlement for these purposes [REF: Hansard April 17th, Columns 225-230]

http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120417/debtext/120417-0002.htm#12041733000002

However, despite these assurances the precise wording of the Order does not reflect that which was promised in April 2012.

It now appears that legal aid will only be available when the first tier tribunal:

(a) Quashes its own decision on the basis that it has made an error of law or
(b) Invites representations regarding the legality of its decision from a person before deciding whether it has made an error of law.

The number of cases where this situation will arise is negligible. Indeed the Order is so restrictive that in practice very few if any cases will meet the criteria for legally aided advice. This is because the first tier tribunal rarely quashes its own decision on the basis that it has erred in law without an appeal first being submitted. No legal aid will be available for advising a person or drafting the appeal, and therefore this situation is unlikely to arise in practice.

Statements were made during the passage of the Bill that legal aid would be available in welfare benefits cases which involve an error of law. However the effect of the Order as drafted is to limit legal advice to situations where an appeal has been drafted and submitted (without the person accessing any legal advice to do so) and the Tribunal has either accepted that it has made an error of law or it is inviting representations.

If legal advice is not available via legal aid for considering whether an error of law has been made, and to help with preparing the appeal, then in practice this Order does not extend the scope of legal aid at all to people in need of advice. This is entirely contrary to the statements made during the passage of the Bill.

23 November 2012

Contact details

Carol Storer (Director, LAPG): 020 7833 7431/07432 104088 carol.storer@lapg.co.uk

Nicola Mackintosh (Co-Chair LAPG): 0207 357 6464 nicola.mackintosh@macklaw.co.uk

Links to Regulations

The Civil Legal Aid (Merits Criteria) Regulations 2012: **http://www.legislation.gov.uk/ukdsi/2012?title=Merits**

Draft: The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2012: **http://www.legislation.gov.uk/ukdsi/2012/9780111530030/contents**

NB The following Regulations were laid at the same time as the Merits regulations

1). The Civil Legal Aid (Family Relationship) Regulations 2012:
http://www.legislation.gov.uk/uksi/2012/2684/contents/made

2). The Civil Legal Aid (Immigration Interviews) (Exceptions) Regulations 2012:
http://www.legislation.gov.uk/uksi/2012/2683/contents/made

3). The Civil Legal Aid (Prescribed Types of Pollution of the Environment) Regulations 2012:
http://www.legislation.gov.uk/uksi/2012/2687/contents/made

.