"THE IMPACT OF THE LEGAL AID REFORMS AND THE RIGHT TO LEGAL AID"

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YOUNG LEGAL AID LAWYERS' TRAINING

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(1) Introduction: a brief history of legal aid pre-LASPO

1. The modern legal aid system was ushered in by the Legal Aid Act 1949. Introducing the Bill on its 2nd reading in the House of Commons on 15 December 1948 the Attorney-General, Sir Hartley Shawcross, said:

> "I should be inclined to call this Bill a Charter. It is a charter of the little man to the British courts of justice. It is a Bill which will open the doors of the courts freely to all persons who may wish to avail themselves of British justice without regard to the question of their wealth or ability to pay."

2. To a greater or lesser extent that principle underpinned the legal aid system for the following 60 years. To begin with the statement was a little over-optimistic, at least for the first twenty years of the legal aid scheme's existence during which, although covering 80% of the population, legal aid was limited to crime and family cases, mostly divorce. Legal aid was not, as some have suggested, a 'fifth pillar' of the welfare state to add to William Beveridge's four [of a national health service, universal housing, social security benefits and universal education]. Although that may have been the intention of Lord Rushcliffe, the barrister and former Conservative MP whose 1944 report formed the inspiration for the 1949 Act, it was not until the mid-1970s that it could be said to have been achieved. As Steve Hynes writes in his book 'Austerity Justice':

> 'If there was a golden age in the history of legal aid during which Rushcliffe's founding principles looked as if they might be adhered to, it is the period from 1973 to 1986'.

3. Although by 1973 the proportion of the population covered by legal aid had fallen to 40%, in 1979 the Labour Government increased this percentage to nearly 80% shortly before losing office. The introduction of the Green Form scheme, representation of criminal defendants at police stations and magistrates' courts and legal aid for immigration and social welfare law meant that by 1986 legal aid represented 11% of solicitors' incomes. But the system was a victim of its own success: by March 1986 there had been a 50% increase in legal aid expenditure within two years, prompting the Conservative government to announce an urgent review and, following their re-election in 1987, to introduce legislation in the form of the Legal Aid Act 1988, transferring responsibility for

the system from the Law Society to the newly formed Legal Aid Board. Legal aid had become a policy problem that required to be solved; on the naughty step it was placed, where it has sat ever since.

4. Further changes to the administration of legal aid were introduced by the Labour Government in the Access to Justice Act 1999, including the abolition of the LAB and the creation of the Legal Services Commission. Despite these changes, and successive reductions in eligibility for legal aid, by 2004 legal aid was costing over £2 billion a year. The Carter Review in 2006 suggested a solution: fixed or graduated fees and the introduction of price competitive tendering for legal aid contracts in both civil and criminal law. Fixed fees in many areas of civil law were implemented in October 2007 but the introduction of competitive tendering was delayed by successive judicial review challenges and by the time of the 2010 election had been all but abandoned for further cuts in lawyers' fees, although without any further reductions in the scope of legal aid.

(2) The Coalition Governemnt of 2010 and the Legal Aid and Sentencing and Punishment of Offenders Act 2012 (LASPO)

5. The incoming Coalition government of 2010 had an overwhelming priority: to reduce the cost of government. The Ministry of Justice was told its budget would be reduced from £9.3 to £7.3 billion over the course of the Parliament; it was up to Ken Clarke MP, the initial holder of the office of Lord Chancellor, to decide how. The MOJ's 'Proposals for the reform of legal aid' published in November 2010 announced that cuts to the legal aid budget of £350 million would be made, including £279 million from civil legal aid. This was to be achieved by removing from scope all forms of legal aid other than those necessary to meet the minimum needs of the most vulnerable and disadvantaged. Divorce and family law cases were to be taken out of the scope of legal aid altogether – an irony given that such cases had formed the vast majority of legal aid cases funded in the post-war period – along with cuts in non-family civil legal aid including immigration, housing, welfare benefits, debt and employment. According to the Government's own impact assessment, 550,000 people per annum would no longer receive advice and representation in civil cases; in the event, 447,500 fewer legal aid certificates were granted in 2013-2014 than in 2012-2013, a drop of about 60%[1].

6. The LASPO Act came into force on 1 April 2013. The Act abolished the Legal Services Commission. In its place the Lord Chancellor must appoint a civil servant as Director of Legal Aid Casework (the **Director**) to head the Legal Aid Agency, an executive agency

[1] National Audit Office, Implementing Legal Aid Reforms, p22

operating within the Ministry of Justice (the **LAA**). The LSC was a statutory corporation and an independent executive non-departmental public body (NDPB) which enabled it to perform its functions free from direct governmental control; the new scheme therefore lacks the same level of independence from the Minister.

7. In simplest summary, the new scheme operates as follows. S 9 and Part 1 of Schedule 1 LASPO prescribe those areas of law which fall within the 'scope' of legal aid in a range of areas involving the most exceptionally vulnerable people; cases where life, liberty or home are at stake; and the most serious immigration cases such as those involving victims of trafficking or persons seeking asylum. Provided the means and merits tests are met, individuals with legal problems falling within one of these areas are entitled to legal aid. S 9(2) gives the Lord Chancellor power to remove and (in an important amendment added to the Bill in the House of Lords) to add to those areas that fall within scope of legal aid. Crucial groups – such as children generally, including more vulnerable sub-groups such as unaccompanied migrant children - remain outside of 'scope' in relation to many of the legal issues that they confront. A challenge brought by the Children's Society is seeking to challenge the Lord Chancellor's refusal to exercise his s 9(2) power to bring this group of children within scope.

8. In addition, a "safety net" provision is provided for by s 10, requiring the Director to provide legal aid ("exceptional case funding" or **ECF**) in circumstances where otherwise there would be a breach of human rights under the European Convention on Human Rights (the **Convention**) (protected by the Human Rights Act 1998) or a breach of EU law[2]. S 4 requires the Lord Chancellor to issue Guidance to which the Director must have regard in deciding whether to grant ECF. Two sets of guidance, one for inquest cases and one for other civil cases were issued.

9. The question of when denial of legal aid would breach either Convention or EU law rights, and the lawfulness of the Lord Chancellor's guidance, has stimulated a succession of legal challenges, most importantly the Court of Appeal decision in *R*

[2] By s 10(3) LASPO the Director of Legal Aid 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 (i) the individual's Convention rights (within the meaning of the Human Rights Act 1998) or (ii) any rights of the individual to the provision of legal services that are enforceable [European Union] rights," 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'.

(Gudanaviciene) v Lord Chancellor [2014] EWCA Civ 1622 which I will come to in a moment and which Ali will speak about in more detail.

(3) Transforming Legal Aid, April 2013

10. Shortly after LASPO came into force in April 2013 the new Lord Chancellor, Chris Grayling, announced a number of other changes to the legal aid scheme in a consultation paper, 'Transforming Legal Aid'. Three proposals in particular deserve mention: the so-called 'residence test', denying persons who were otherwise within scope of legal aid that right if they could not show a 'strong connection' with the UK of at least one year's lawful residence; the removal of all legal aid for prisoners; and a new condition for the payment of any legal aid that a judge must first satisfied that it raises an arguable point of law and so grant permission to apply for judicial review. None of these changes had been debated in Parliament during the passage of LASPO and none were to be introduced by way of further primary legislation but by secondary legislation.

11. The proposals were widely criticized, not least because of the shaky grasp of the relevant statistics displayed by the Lord Chancellor when he announced the changes on Radio 4 on the Today programme[3], and soon became the focus of further legal challenges. The 'residence test' was found to be unlawful by the High Court in a case brought by the PLP in July 2014[4] for reasons which Ali will again deal with in more detail. The 'no permission, no pay' rules were challenged in another case and, again, found to be unlawful in a case decided by the High Court in March 2015[5].

(4) The ECF scheme in practice

12. In introducing s 10 the Government stated that its intention was to "provide a safety net" (Lord McNally, sponsoring Minister in the House of Lords). At Committee Stage, Mr Djanogly MP stated: "I assure the Committee that the Government will implement

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[3] Stephen Sedley, former Lord Justice of Appeal, wrote in the London Review of Books in September 2013: "Chris Gralying introduced his reforms by claiming on the Today programme that in 2011 only 144 out of 11,359 applications for judicial review had succeeded. Since 144 was the number of judicial reviews which succeeded at a full hearing, the correct denominator was 356, the total number of judicial reviews that had got as far as a full hearing. The success rate in court was thus not, as Grayling claimed, less than 2 per cent (in his words 'virtually none'): it was more than 40 per cent – a very respectable rate compared with other litigation, and no token whatever of profligacy in the use of legal aid, which had funded about a third of the claims. Grayling's consultation paper appears not to comprehend that of the 11,000 odd judicial review claims which were initiated in 2011 but never came to trial, a substantial proportion will have been partly or wholly successful without need of adjudication." (Stephen Sedley reviews 'The British Constitution' by Martin Loughlin · LRB 12 September 2013)

[4] *R (PLP) v Lord Chancellor* [2015] 1 W.L.R. 251

[5] *R (Ben Hoare Bell) v Lord Chancellor* [2015] EWHC 523 (Admin)

appropriate procedures to ensure that those who require exceptional funding will, in practice, be able to access the scheme".

13. In those areas where the effects of the cuts have been felt most keenly, in particular family cases and non-asylum immigration, the ECF scheme has proved to be not so much a 'safety net' as a 'fig leaf', according to one experienced Family Division judge[6]. Prior to the introduction of LASPO the Government estimated that there would be 6,500[7] non-inquest s 10 applications for legal representation (the highest category of legal aid) with 3,700 grants of funding[8]. In fact, in the first year there were 1,028 applications with 18 grants; in the second, 707 applications with 105 grants, the vast majority of which (89) only being made after the High Court decision in *Gudanaviciene* finding that the Director had been applying the wrong test for when legal aid was required to avoid a breach of the Convention and EU rights, which the Lord Chancellor then appealed.

14. Judgment is currently awaited from the High Court on another challenge to the whole ECF scheme in which the Claimant, a mentally incapacitated Nigerian man ('IS'), was refused ECF funding for his immigration application. The Court will consider evidence collected by the Public Law Project that demonstrates the scheme is not 'fit for purpose'. The application procedure is so complicated that many lay persons are unable to make effective applications without legal assistance and solicitors will not provide such assistance because they are so time-consuming and are either unpaid (in the case of unsuccessful applications) or paid at such a low rate (in the case of successful applications) that solicitors effectively make a loss. For example, in immigration cases a fixed fee of £234 is payable for initial advice and assistance. Any work spent on an ECF application must be taken from this fixed fee. Given that the average time spent on an ECF application by an experience adviser is 6-10 hours, sometimes longer, a solicitor making such an application can be making a loss in terms of chargeable time of hundreds of pounds. When combined with the excessively low proportion of applications that are actually granted, the Legal Aid Agency resembles nothing more than a modern Circumlocution Office first immortalized by Charles Dickens in 'Little Dorrit':[9]

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[6] Mostyn J in *MG & JG v JF & JFG* [2015] EWHC 564 (Fam) (para 14).
[7] Equality Impact Assessment, March 2012
[8] Ministry of Justice FOIA response, 23 January 2014
[9] Charles Dickens, 'Little Dorritt', 1855-57: "The Circumlocution Office was (as everybody knows without being told) the most important Department under Government. ....Whatever was required to be done, the Circumlocution Office was beforehand with all the public departments in the art of perceiving — HOW NOT TO DO IT. ... Numbers of people were lost in the Circumlocution Office. Unfortunates with wrongs, ... who in slow lapse of time and agony had passed safely through other public departments; who, according to rule, had been bullied in this, ... and evaded by the other; got referred at last to the Circumlocution Office, and never reappeared in the light of day. ... . In short, all

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15. The situation in the family courts has been so bad that the President of the Family Division has suggested that it may be necessary for the Courts to order that the cost of legal aid be paid for out of central funds in those cases where proceedings cannot continue with one or other party unrepresented without a breach of the Convention[10]. Although the Court of Appeal has recently ruled that such an alternative legal aid scheme would not be lawful, and found that it should be possible in most cases for a judge to avoid a breach of the Convention by adopting a more inquisitorial role than it is traditional for common law judges to take, it recognized that there will be cases when this is not the case, even with the existence ofthe ECF scheme. In such cases the Court recommended legislation be introduced to allow for the appointment of a legal representative to conduct cross-examination to be paid for out of central funds[11].

16. Other cases have successfully challenged refusals of ECF funding in other areas on Convention grounds, including crime[12] and inquests[13].

(5) <u>Other criticisms of the legal aid reforms post-implementation</u>

17. The Joint Committee on Human Rights ('JCHR'), the National Audit Office ('NAO') and the House of Commons Justice Committee[14] ('HoCJC') have between them produced six separate reports that are highly critical of aspects of the legal aid reforms.

18. In its report 'Implementing the Legal Aid Reforms' of 20 November 2014[15], the NAO was critical that the downstream costs of the legal aid changes had not been quantified. These costs included not only those associated with an increase in the number of litigants in person but also wider costs to society:

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[10] Q v Q [2014] EWFC 31

[11] Re K [2015] EWCA Civ 543

[12] R (M) v DLAC [2014] EWHC 1354 (Admin)

[13] R (Letts) v Lord Chancellor [2015] 2 Costs L.R. 217

[14] House of Commons Justice Committee, 'Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012' Eighth Report of Session 2014–15, HC 311, Published 12 March 2015

[15] National Audit Office, Report by the Comptroller and Auditor General, 'Implementing reforms to Legal Aid', HC 784, Session 2014-15, 20 November 2014, paras 1.17-1.35

> "1.34 Individuals who have civil legal issues may experience a range of adverse consequences if they cannot resolve their problem. The 2010 English and Welsh Civil and Social Justice Panel Survey found that 50% of respondents who were eligible for legal aid reported that their civil legal problem had a negative effect on their health and wellbeing. Where legal problems remain unresolved, the cost may be met by the taxpayer through additional costs to the NHS or welfare programmes."

19. The HoCJC, in its report of 12 March 2015, was also critical of the Government's failure to carry out adequate research prior to implementation of the reforms (Report, para 11). In the context of the impact of the legal aid changes on children the HoCJC said:

> "62. Children are inevitably at a disadvantage in asserting their legal rights, even in matters which can have serious long-term consequences for them. We are particularly concerned by evidence that trafficked and separated children are struggling to access immigration advice and assistance. *We recommend that the Ministry of Justice review the impact on children's rights of the legal aid changes and consider how to ensure separated and trafficked children in particular are able to access legal assistance. …*"

20. The JCHR has produced four reports on the impact of the legal aid reforms. In its fourth report, published on 24 March 2015[16], the JCHR found that the legal aid reforms have been a "significant black mark on [the government's] human rights record" and urged the incoming government to look again at thee reforms and "to undo some of the harm they have caused", to children in particular.

(6) <u>When is legal aid necessary to avoid a breach of Convention or EU law rights?</u>

21. Many of these cases demonstrate a significant difference of view between the Lord Chancellor, on the one hand, and those advising and representing ordinary individuals, on the other, as to when the Convention or EU law requires that legal aid be granted. So far the Courts have tended to come down against the Lord Chancellor's interpretation. In fairness to him, there have not been a particularly significant number of cases detailing the circumstances in which legal aid is required. However the cases that have been heard have developed a number of principles. Before turning to these, however, it is instructive to consider the approach that the common law has taken to these issues.

a) <u>The right of free legal assistance at common law</u>

22. 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*

[16] Joint Committee on Human Rights The UK's compliance with the UN Convention on the Rights of the Child Eighth Report of Session 2014–15, HL Paper 144, HC 1016

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). Can this common law right also include a right to free legal representation, paid for by the State?

23. The right of access to justice has ancient roots: the 1297 version of Magna Carta – issued by Edward III in 1297 and the first statute in English history (the 1215 version sealed by King John having never attained that status) – states:

> NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor **[** condemn him **]** [1] but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

24. The concept of 'the law of the land' was later developed into 'due process of law' in two later statutes issued by Edward III that sought to clarify the meaning of some of the provisions of Magna Carta. The first, the Liberty of the Subject Act 1354, extended the rights of 'freeman' in Magna Carta (which at the time would have only included about 5% of the population) to all people and provided:

> That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.

25. The Observance of Due Process Act 1368 provided:

> It is assented and accorded, for the good Governance of the Commons, that no Man be put to answer without Presentment before Justices, or Matter of Record, *or by due Process and Writ original*, according to the old Law of the Land: And if any Thing from henceforth be done to the contrary, it shall be void in the Law, and holden for Error.

26. This use of the term 'due process' was directly incorporated into the later Fifth Amendment to the American Constitution in 1789, which provides that "no person shall be … deprived of life, liberty, or property, without due process of law", later extended by the Fourteenth Amendment to require individual States to safeguard the same right. The US Supreme Court has interpreted the due process clause as requiring that "no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense": *Powell v. Alabama*, (1932) 287 U.S. 45; *Scott v. Illinois* (1979) 440 US 367.

27. However, the common law courts in those jurisdictions that lack a written constitution – namely Australia (see Dietrich v R [1992] HCA 57) and the United Kingdom (*R v Lord*

Chancellor ex p Witham [1998] QB 578) - have yet to develop the right of access to a court as including a right to free representation paid for by the state (at least not one that is free-standing of the statutory legal aid scheme). 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.

a) <u>The right to free legal assistance under the Convention and HRA</u>

28. 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 *Savitskyy 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)).

29. From that line of authority the ECHR in *Savitskyy* 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.

30. In a series of post-LASPO cases the Courts have now confirmed the right to legal aid arising under Article 6 in its criminal aspect (including a defendant in committal proceedings), Article 6 in its civil aspect (including a party to family proceedings and an appellant in immigration appeal tribunal), Article 8 (including a victim of crime and witness in criminal proceedings seeking to restrain disclosure of her medical records, and applicants for entry clearance in a refugee reunion claim), Article 2 (in inquest proceedings), among others. I will now hand over to Ali to discuss the relevant principles, and more detail of the situations covered in practice by reference to the case of *Gudanaviciene*.

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