Appeal No. CL/2015/0459

IN THE COURT OF APPEAL
CIVIL DIVISION

On appeal from the Divisional Court, Fulford LJ and Lang J [2015] EWHC 35 (Admin)

B E T W E E N:-

RIGHTS OF WOMEN

Appellant

-and-

THE LORD CHANCELLOR AND SECRETARY OF STATE FOR JUSTICE

Respondent

RESPONDENT'S SKELETON ARGUMENT

References to paragraphs of the Divisional Court's judgment are in the form [J/xx] and references to the Appellant's skeleton argument are in the form [A/xx]

1. This is the Respondent's skeleton argument in this appeal of the decision of the Divisional Court ("DC") to dismiss the Appellant's claim for judicial review. Permission to appeal was granted by Jackson LJ on 18 May 2015.

2. The essence of the DC's judgment is that the Respondent did have the power under section 12 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") to make regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012 ("the CLA(P) Regulations"), and that regulation 33 does not frustrate or undermine the statutory purpose of LASPO. The DC's key conclusions were set out by Lang J at [J/48 and 66]:

> *48. I accept the Claimant's submission that the evidential requirements in regulation 33, such as the time limit of 24 months, do impose conditions which have to be satisfied by the applicant before she can obtain legal aid, and those conditions are not found in the Act. I consider that the Defendant has express power to include such conditions in the Regulations under section 12(3)(e). In my view, these conditions are procedural in nature, because they relate to the provision of evidence. Procedural requirements, such as time limits, will frequently affect an applicant's ability to*

proceed with a substantive claim or, in this instance, obtain legal aid. But even if the Claimant is correct to characterise them as substantive, I consider that the Defendant had power to make them under section 12(2)…

…

66. Despite the justifiable criticisms of regulation 33, I do not consider that the Defendant's chosen method of establishing eligibility was an exercise of discretion that went so far as to thwart or frustrate the purpose of the Act. It was a legitimate means of giving effect to the Act's intention to take family law proceedings outside the scope of legal aid, whilst preserving legal aid for the exceptional category of victims of domestic violence in need of protection in family law proceedings. Whilst the evidence in this case indicates that it may not be operating effectively in practice, that is a matter for the Defendant, and ultimately Parliament, to address.

The Respondent submits that the analysis of the DC was correct and should be upheld.

3. The Appellant appears to contend that the DC made five errors of law. Two are in relation to the first ground of judicial review challenge, that regulation 33 was *ultra vires* section 12 of LASPO, and three relate to the second ground of challenge, that regulation 33 frustrates the statutory purpose of LASPO, as follows:

***Ultra vires* ground -**

a. The DC failed to address the Appellant's argument that the power conferred by section 12(2) to make regulations about the making and withdrawal of determinations under sections 9 and 10 only relates to the making of determinations as to qualification under section 11 [A/6e, 70].

b. The DC failed to appreciate and address the distinction between a procedural requirement and a substantive bar to obtaining legal aid [A/71].

Statutory purpose ground -

c. The DC adopted an erroneous view of the statutory purpose of LASPO and inappropriately placed reliance on Parliamentary materials in reaching such a view [A/8a, 80-88, 105-116].

d. The DC erred in approaching the Respondent's exercise of discretion in making regulation 33 on the basis of rationality, rather than by asking

whether the evidence requirements in regulation 33 do no more than necessary to achieve the purposes of LASPO [A/8b, 75-79].

e. There was a failure properly to address the Claimant's evidence as to the scale of the problem [A/8c, 91-104].

4. Each of these arguments is dealt with in turn below.

RELEVANT STATUTORY FRAMEWORK AND CASE-LAW

5. The relevant statutory provisions are set out clearly by the DC at [J/6-29] and will not be repeated here. However, the Respondent takes issue with the analysis of certain case-law principles identified in the Appellant's skeleton and so will address them here.

6. The Appellant submits that this is a case where the regulation-making power in question has as its subject fundamental rights, specifically the right to access to justice, and thus its exercise should be more closely scrutinised. The reasoning at [A/35-38] appears to be as follows:

a. *R v. Lord Chancellor ex p. Witham* [1997] QB 575, *R v. SSHD ex p. Saleem* [2000] 1 WLR 443 and similar decisions are authority for the proposition that access to justice, whether at common law or under the ECHR, is a fundamental right.

b. There is a statutory right under LASPO to legal aid for victims of domestic violence.

c. This reflects the case of *Airey v. Ireland* (1979) 2 EHRR 305, which showed the importance of legal aid in domestic violence cases in ensuring access to justice.

d. The evidence before the DC in the present case shows that many domestic violence victims cannot access justice without legal aid.

e. So, the right to legal aid in LASPO can only be removed by specific statutory power or expressly authorised secondary legislation, and even then only to the extent necessary.

7. Apart from the first of these propositions, which the Respondent accepts, this reasoning is misconceived. The steps the Appellant invites this Court to take are not valid, nor do they in fact follow on one from another.

8. **First,** it is important to recognise that there is no freestanding right to legal aid either at common law or under the ECHR. The fundamental right of access to justice discussed in the *Witham* and *Saleem* line of case-law is <u>not</u> the same as the right to legal aid, as was made clear recently by the Divisional Court in *R(Howard League) v. SSHD* [2014] EWHC 709 (Admin) at [46]-[47] (and correctly identified by the DC at [70]):

> *The claimants contend that in denying prisoners advice and assistance under the criminal legal aid system the Regulations give rise to an unacceptable risk of interference with their rights of access to justice, guaranteed by the common law and article 6 ECHR. The submission is that the claimants will be simply unable to access a lawyer to bring their case in court. Judicial review is no substitute since the funding for it is not sufficient and in any event it acts retrospectively…*
>
> *This ground is not arguable. There is no corollary to the common law right of access to a court of a right to legal aid: R v Lord Chancellor ex parte Witham [1998] QB 575, 581. The Strasbourg article 6 ECHR jurisprudence is clear that the provision of legal aid of this character is not mandatory, except in exceptional cases: Airey v Ireland (1979-80) 2 EHRR 305; Hooper v United Kingdom [2005] 41 EHRR 1…"*

9. **Secondly,** LASPO does not provide anyone with a statutory 'right' to legal aid. The Appellant does not cite any authority at [A/36] for such a proposition.[1] Rather, the highest it can properly be put is that section 9 of LASPO imposes a duty on the Respondent to make legal aid available to those who are 'in scope' <u>and</u> who the Director of Legal Aid Casework determines qualify for legal aid [A/12]. The Director's determination, pursuant to section 11 LASPO, involves consideration of the means of the applicant, the merits of their case, and other tests (see [1/22-26]). This is in line with ECtHR jurisprudence, which makes it clear that Member States may impose conditions on the grant of legal aid (see *Steel and Morris v. United Kingdom* (2005) 41 EHRR 22 at [62]).. In any event, any 'right' under LASPO would be a qualified 'right' which is subject to the rest of the statutory scheme, including the effect of regulations (such as regulation 33) made under section 12.

[1] It is suggested by the Appellant at [A/78b] that Moses LJ in *R(PLP) v. SSJ* [2014] EWHC 2365 at [55] might provide some support, but read in context his comments go no further than the established principles set out in the following paragraphs of this skeleton argument.

10. **Thirdly,** *Airey v. Ireland* is not authority for the proposition that legal aid is necessary in all, or even most, family law cases involving domestic violence. Rather, it is authority for the much narrower principle that, on the particular facts of an individual case, a denial of legal aid might amount to a breach of Article 6 ECHR. The Strasbourg jurisprudence has consistently emphasised that the question of whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case (*Steel and Morris* at [61]).

11. **Fourthly**, it does not follow that because the Appellant has adduced generic statistical evidence, which purports to show some 60% of domestic violence victims do not access justice without legal aid, this means the principles in *Airey* or *Witham* are applicable to the CLA(P) Regulations.

12. **Fifthly and finally**, therefore, the appropriate questions for the Court are not, as the Appellant contends, whether there is a specific statutory power expressly authorised for the purpose of restricting a right to legal aid for domestic violence victims, and whether the regulations made under that specific power are no wider than necessary. Rather, the appropriate questions are, as in any normal *ultra vires* challenge, whether the Respondent's making of regulation 33 falls within the four corners of the powers given by Parliament, and whether his exercise of the discretion was reasonable and justifiable. These are the questions that the DC asked itself (see [J/40-41 and 57-66]).

13. The DC also correctly analysed and applied the case-law on access to justice at [J/67-72]. In doing so it left open the possibility, following *Airey*, that on the particular facts of an individual case, the failure to grant legal aid due to an applicant's inability to comply with regulation 33 might be a denial of the right of access to justice. However, the DC rightly held that this challenge is not such a case, since it has proceeded on the basis of statistical and anecdotal evidence of a general problem, not a specific and individual set of circumstances.

The nature of this claim and the threshold for intervention

14. The Appellant seeks to suggest that this case is one involving fundamental rights, and thus closer scrutiny by the Court, as the latest in a series of attempts to avoid the

fact that this claim has always in reality been a rationality challenge to regulation 33, disguised as an *ultra vires* or *Padfield* challenge.

15. From the start, the Appellant has accepted (see [155] of the original Grounds of Claim and repeated at [A/62]) that section 12 of LASPO confers on the Respondent a power to impose evidential requirements on applicants for legal aid. In essence, the Appellant disagrees with the precise formulation of the evidential requirements which the Respondent has chosen to impose in regulation 33 (most particularly, the '24-month rule'). This is a disagreement with the lines that have been drawn and judgments that have been made by the Respondent in carrying out a difficult balancing exercise between competing public policy considerations. The Appellant is clearly conscious of the fact that, for all it may disagree, the Respondent has a rational justification for adopting the requirements he did (as discussed by the DC at [J/58-67]). The Appellant is also conscious that the threshold for the Court to intervene is particularly high in a case such as this, since:

    a. The limitations on hypothetical challenges to legislation of this type have been repeatedly emphasised by the Court: see, for example, *R (Bibi) v Secretary of State for the Home Department* [2014] 1 WLR 208 at §§28-29. Where a challenge is brought on this basis it is necessary for the Claimant to show that the unlawfulness complained of is 'inherent in the system itself' rather than arising on the facts of a specific case on which the Court is being invited to adjudicate: see *R (Howard League for Penal Reform) v Lord Chancellor* [2014] EWHC 709 (Admin) at §44 and *R (Tabbakh) v The Staffordshire and West Midlands Probation Trust and The Secretary of State for Justice* [2014] EWCA Civ 827 at §34-45.

    b. Although LASPO itself did not set out the evidential requirements for victims of domestic violence, but rather left these for regulations, there was considerable debate by both Houses of Parliament about the nature of those requirements and the alleged shortcomings raised by this claim. Subsequently, both the 2012 and 2014 CLA(P) Regulations were subject to review by Parliament by way of the negative resolution procedure. The CLA(P) Regulations were debated by the House of Lords and although they were the subject of a motion of regret they were not the subject of a motion to

reject. The Supreme Court has emphasised that "*when a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This applies with special force to legislative instruments founded on considerations of general policy*" (*per* Lord Sumption at §44 of *Bank Mellat* [2013] 3 WLR 179). In *MA v Secretary of State for Work and Pensions* [2014] EWCA Civ, the Master of the Rolls, Lord Dyson, said that considerable weight should be given to this factor "*particularly because some of the alleged shortcomings in the scheme that have been canvassed before us were debated in Parliament*" (§57).

c. The courts have also emphasised that regulations with democratic legitimacy should be afforded the additional respect which is customarily afforded to judgments about social policy which find expression in legislation: see §28 of *JS v Secretary of State for Work and Pensions* [2014] EWCA Civ 156. In *JS*, Lord Dyson rejected the submission that little weight should be given to the fact of parliamentary endorsement because (as in this case) it had been repeatedly stated by the Government during the debates that the Bill was no more than a framework and that the details would be set out in the Regulations. This was partly because there had been "c*onsiderable debate on some of the detail of the Bill on points that are central to the issues raised on this appeal*", such as the failure of the Opposition to introduce certain amendments (§29). This observation applies with equal force here.

d. As to the exercise of ministerial discretion, the courts have repeatedly emphasised the importance of judicial restraint when reviewing judgments of social and/or economic policy made by a democratically accountable executive, particularly where:

    i. the decision in question manifests the will of Parliament (*R (Sinclair Collins) v Secretary of State for Health* [2012] 2 WLR 304 (§23 and §28));

    ii. the decision reflects the views of a decision maker who is best placed to exercise the necessary judgment, whether because he has specific expertise, or because he has sources of expertise, information and advice to assist in striking the appropriate balance, or where extensive

consultation is likely to have provided the decision maker with knowledge and insight which would not be available to the Court (see *Huang v SSHD* [2007] UKHL 7 at §16; *R (Surayananda v Welsh Ministers* [2007] EWCA Civ 893 §103 and *R (BT & anr) v SSBIS* [2011] EWHC 1021 (Admin) §212).

e. Further, the Courts have consistently recognised that the implementation of policy, and the achievement of clear and consistent decision making, requires lines to be drawn and that such lines can sometimes constitute "blunt instruments" for achieving their objectives (*RJM v Secretary of State for Work & Pensions* [2009] 1 AC 311). However, that does not provide a sufficient justification for judicial intervention for the purposes of refining the manner in which the lines are drawn: see *RJM* at §57 where Lord Neuberger emphasised that "*the fact that there are grounds for criticising, or disagreeing with, these views does not mean that they must be rejected. Equally, the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified.*" Although *RJM* was (primarily) an Article 14 case, the approach of the Court in respecting the policy judgements of the democratically accountable decision maker is essentially consistent across the domestic and ECHR jurisprudence, as illustrated, for example, in *R (Bibi) v Secretary of State for the Home Department* [2014] 1 WLR 208 at §30 (Art.8). There is certainly no proper basis for applying a lower threshold of intervention in cases where ECHR rights are not at stake.

16. For these reasons, the Appellant wishes to construe this challenge as an *ultra vires* or *Padfield* challenge involving fundamental rights and apply a higher level of scrutiny than is appropriate. However, this is not a case involving a fundamental right and the DC's analysis of the relevant principles from case-law was correct.

GROUND 1: ***ULTRA VIRES***

17. The two supposed errors of law identified by the Appellant in the DC's decision in relation to ground 1 are closely intertwined and can be dealt with together. As an initial observation, it is difficult to see how the Appellant can suggest that the DC failed to address the relationship between sections 11 and 12 of LASPO [A/70], when the DC set out very clearly the interplay between the two sections at [J/18-24]. It is

similarly difficult to see how it can be suggested that the DC failed to appreciate the distinction the Appellant sought to draw between 'procedural' and 'substantive' requirements [A/71], when the point is clearly flagged at [J/39] and four paragraphs of the judgment are dedicated to this issue [J/45-48].

LASPO section 9 in its proper context

18. The Appellant's argument proceeds from the wrong starting point. **First**, the Appellant asserts that LASPO section 9 gives a 'right' to legal aid for those who are 'in scope' [A/58]. This is erroneous; for the reasons explained above there is no right to legal aid.

19. **Secondly**, the Appellant's analysis persists in the error of seeking to construe section 9 in isolation, and without reference to the rest of the statutory scheme. The scheme of LASPO, as correctly identified by the DC at [J/43], is that the framework for the provision of legal aid is set out in the statute, with the detailed provisions set out in regulations. The DC observed that this is consistent with the approach taken in previous statutes concerned with the provision of the legal aid, and noted the very wide and extensive regulation-making powers conferred under LASPO [J/44-45]. The Appellant does not attempt to identify any error with this starting point, which is the correct one.

20. It follows that section 9 and section 12 must be construed together as complementary parts of the statutory scheme. Section 9 (together with paragraph 12 in Part 1 of Schedule 1) serves to identify a category of persons to whom civil legal services are to be provided. Section 12 empowers the Respondent to make regulations governing the identification of those persons and the conditions that will attach to any applications for legal aid that they may choose to make.

21. Just as the statutory scheme must be construed as a whole, so must the statutory intention be identified by reference to the whole of the statutory scheme (per Lord Bingham in *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd* [2001] 2 AC 349 at 381B). Accordingly the 'framework' provided by section 9, which identifies a category of persons to whom legal aid will be provided, must be read together with section 11 which imposes requirements as to

qualifications (merits and financial requirements), and section 12 which imposes (*inter alia*) conditions which must be satisfied by applicants.

22. The Appellant's approach, which is to treat section 9 as creating an inviolate 'right' to legal aid for a certain category of persons into which the other parts of the statutory scheme must not be permitted to encroach, is wrong. Section 9 forms part of an broader scheme in which it is expressly provided that the detail as to entitlement to civil legal services identified under section 9 will be subject to regulations made under sections 11 and 12, and that those regulations will impose conditions on any such entitlement.

23. As the DC correctly found at [J/34] the intention of LASPO was not to require that every individual who falls within the statutory definition of domestic violence must be granted legal aid, but more narrowly that legal aid should be available for those victims of domestic violence who require assistance because they will be intimidated or otherwise materially disadvantaged by having to face their abuser in court. The evidential requirements imposed by the CLA(P) Regulations are one means of giving effect to that statutory intention.

24. Thus it is simply incorrect to say that regulation 33 is *ultra vires* because section 12 of LASPO contains no express power to 'remove the right to legal aid' or impose substantive conditions that restrict the scope of legal aid for domestic violence victims as a broad category.

'Substantive' and 'procedural'

25. Moreover, the distinction the Claimant attempts to draw between 'substantive' and 'procedural' is a false one, and the DC was right to reject it. A requirement that certain types of evidence be provided to support an applicant's contention that they fall within scope may be described as a 'procedural' but it will clearly have a 'substantive' effect, a very real and practical impact, i.e. if the applicant does not provide the specified evidence they will not be entitled to legal aid. As the DC pointed out, it is often the case that 'procedural' requirements such as time limits operate as a bar to an applicant's ability to proceed with a substantive claim [J/48].

26. As noted above, the Appellant has acknowledged that section 12 envisages regulations will impose evidential requirements on applicants for the purpose of demonstrating that they are a victim or potential victim of domestic violence. That being so, it must also be accepted that the requirements imposed will not be met by all applicants, and that those who fail to meet them will fail to establish their entitlement to legal aid. Otherwise anyone who falls within the definition of a victim of domestic violence must be entitled to legal aid, regardless of whether or not they fulfil the evidential requirements, and the evidential requirements are pointless.

27. At [A/64-65] the Appellant suggests that this argument, which was put forward by the Respondent before the DC, is to misunderstand how the legal aid scheme under LASPO works. However, the alternative proffered by the Appellant seems to be that the role of evidential requirements under section 12 is merely to assist the exercise of the Director's role in making determinations under section 11 in some vague and unspecified way, which does not exclude anyone. This does not make sense. The proposition at the heart of the Appellant's argument would appear to be that the Respondent can impose 'procedural' evidential requirements as long as these do not have any 'substantive' effect on an applicant's entitlement. However, it is impossible to imagine how such a procedural requirement might be framed. Any evidential requirement, no matter how trivial, would potentially exclude some applicants who could not satisfy it and thus would fall foul of the Claimant's analysis.

28. In any event, these grounds of appeal are moot because the DC held that, even if the Appellant were right to characterise the requirements in regulation 33 as 'substantive', section 12(2) of LASPO is wide enough to confer a power to impose substantive requirements by way of regulations [J/45].

The relationship between LASPO sections 11 and 12

29. Finally, in relation to the statutory scheme, there is nothing in the terms of the material provisions which would restrict the scope of any regulations made under section 12 only to determinations as to qualification under section 11. The Appellant asserts repeatedly [A/60, 62, 66] that the only permissible purpose of regulations made under section 12(2) is to 'assist the Director in making his determination under s.11'. This is inconsistent with the acceptance by the Appellant in its original grounds, which was made without any such qualification, that section 12 conferred a

power on the Respondent to impose evidential requirements on applicants for legal aid, and would appear to reflect the Appellant's inability now to reconcile that acceptance with the argument it wishes to advance.

30. In any event, the Appellant's analysis simply does not run as an interpretation of the statutory scheme. **First**, section 11 contains its own regulation-making power in section 11(1)(b) in relation to merits; and, in relation to financial requirements, makes express reference to regulations made under section 21 in that regard.

31. **Secondly**, there is nothing in section 12 which expressly limits its application, or the application of regulations made under the power it confers, to the assessment of qualification under section 11.

32. **Thirdly**, the Appellant's analysis would provide no answer to the DC's conclusion as to the proper construction of section 12(3)(e). This provision was held by the DC to confer power on the Respondent to impose conditions of the type imposed by regulation 33. It provides that regulations may be made by the Respondent which include: "*provision about conditions which must be satisfied by an applicant before a determination is made*." It cannot be said that this power is restricted only to determinations as to qualification made by the Director under section 11. On the contrary, it expressly envisaged the imposition of conditions that must be satisfied before the Director comes to make a determination as to qualification. That is clearly apt to cover the issue of whether the individual applicant falls within the category of individuals identified as falling within scope pursuant to section 9.

33. Accordingly, there was no failure on the part of the DC to address the Appellant's section 11 analysis. The DC clearly explained why, on the proper interpretation of the statutory scheme when read as a whole, the CLA(P) regulations fell within the scope of the power conferred by section 12. Further, and in any event, any failure to address the Appellant's current section 11 analysis was not a material error as the Appellant's analysis is clearly incorrect.

GROUND 2: THWARTING STATUTORY PURPOSE/*PADFIELD*

34. The fundamental problem with the Appellant's arguments in relation to ground 2 is that they proceed on the basis that the correct test is whether the evidential

requirements in regulation 33 do no more than necessary to achieve the statutory purpose. For the reasons outlined above, this is not the correct test, and thus the whole of the Appellant's submission under this head starts from an incorrect premise.

35. In particular, the second error of law which the Appellant says the DC made was not, in fact, an error at all, but simply the application of the correct legal principles to this case. That leaves the first and third alleged errors of law: identification of the wrong statutory purpose and inadequate consideration of the evidence.

Wrong statutory purpose

36. The first error of law which the Appellant says the DC made is to have adopted an erroneous view of the statutory purpose of LASPO and inappropriately placed reliance on Parliamentary materials in reaching such a view.

37. The Appellant fails to recognise that the DC clearly identified the relevant statutory intention at [J/34]. It is simply that the Appellant's characterisation was not accepted:

> *"The Claimant has failed accurately to characterise the statutory intention expressed by LASPO 2012. The Act does not require that every individual who falls within the statutory definition of a victim of domestic violence must be granted legal aid, nor does it express any such intention. The legislative intention is to provide legal aid to those victims of domestic violence who require assistance because they will be intimidated or otherwise materially disadvantaged by having to face their abuser in court. The logical corollary of that intention is that those who do not require legal aid for this purpose do not receive it."*

38. The DC was not under the mistaken impression that 'domestic violence', for the purposes of this statutory intention, referred to physical harm only, as the Appellant suggests [A/88]. Although there is a reference at [A/58] to a more limited definition, the court was clearly working with the correct, wider, definition contained in paragraph 12(9) of Schedule 1 to LASPO, cited at [J/12].

39. The Appellant's interpretation of the statutory purpose was artificial and unrealistic, and the DC was correct to reject it. The Appellant's assertion was that the statutory purpose revealed by section 9 of LASPO (read in isolation) was that there should be an inalienable 'right' to legal aid conferred on any person who fell within the wide definition of a victim (or potential victim) of domestic violence, and who met the qualification requirements imposed by section 11. That interpretation expressly

excluded any reference to the purpose for which the domestic violence category had been created, and took no account of whether the individual concerned might genuinely need legal aid in order effectively to participate in the relevant legal proceedings.

40. The DC undertook a careful and thorough assessment of the whole legislative scheme in assessing whether the Appellant's interpretation of the statutory purpose was sustainable. It had regard to the recent judgment of the Divisional Court in *R (Public Law Project) v Secretary of State for Justice* [2014] EWHC 2365 (Admin) [J/52] and the Court's finding that the purpose lying behind Part 1 of Schedule 1 was to provide legal aid to cases judged to be of greatest need; it considered the witness evidence of Joe Parsons as to the policy intention behind the Act and the desire to ensure that those who needed legal aid should receive it, and those that did not should not be accorded a share of scarce resources [J/53]; and it had regard to the overriding purpose of LASPO which was to make substantial reductions to legal aid expenditure whilst continuing to target resources at areas of greatest need [J/54].

41. In light of those considerations the DC identified the central statutory purpose, on a proper construction of the whole statute, as being to provide legal aid to those individuals who could establish, by objective evidence, a genuine and current need for legal aid provision. The Appellant does not identify an error of law in the DC's consideration of the factors identified in §40 above (at [J/52-54]). Nor does it seek to explain why the DC was not entitled to conclude that Parliament intended legal aid to be reserved to those cases in which it was genuinely needed [J/55-59]. The Appellant's ground of appeal amounts to no more than a complaint that the DC decided not to accept its interpretation of the statutory purpose.

Parliamentary material

42. Moreover, it was not erroneous for the DC to consider Parliamentary material for the purpose of establishing factual background, without questioning the content. It is important to trace the references to Parliamentary material through the submissions made by both parties. The Appellant first raised the motion of regret passed by the House of Lords and a report by the All-Party Parliamentary Group on Domestic and Sexual Violence in its original Grounds of Claim (see [31] and [34-35]) as evidence of recognition that there were problems with regulation 33. In response to this the

Respondent's primary position was that the question of 'legislative intent' did not arise on a proper analysis and that it was illegitimate to look at Parliamentary material. However, because the Appellant had placed its assertion as to the intention of Parliament at the centre of its case, the Respondent considered it was important for the court to have the full picture and so further details were provided (see Summary Grounds of Defence at [14-34] and Detailed Grounds of Defence at [19-31]).

43. The Respondent remains of the view that it was unnecessary and inappropriate to have recourse to Parliamentary material in this case for the purpose initially advanced by the Appellant.

44. However, the DC did not refer to the Parliamentary material for the purpose originally advanced by the Appellant; it referred to it for the limited purpose of satisfying itself that the aspects of the legislation under challenge had been expressly considered by Parliament before being enacted. That is plainly a legitimate exercise. It is merely a consideration of the simple background facts and did not involve any questioning of the content of the material. Indeed, unless it is conducted, the risk clearly exists of the Court proceeding on an erroneous presumption as to the weight to give to the fact that Parliament had endorsed the measures in question [J/81].

45. Indeed, as the DC noted, there is clear recent authority for the limited review of the Parliamentary materials it undertook in this case. Precisely the same exercise was undertaken by Lord Dyson MR in *R (MA) v Secretary of State for Work and Pensions* [2014] PTSR 584, at §57:

> *"When a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful: see Bank Mellat v HM Treasury [2013] 3 WLR 179 at para 44 per Lord Sumption and Black v Wilkinson [2013] EWCA Civ 820, [2013] 1 WLR 2490 at paras 46 to 49. In my view, considerable weight should be given to this factor, particularly* ***because some of the alleged shortcomings in the scheme that have been canvassed before us were debated in Parliament****. The effect of the 2012 Regulations (as amended) in conjunction with the DHP scheme on the position of disabled persons was well understood by Parliament."* (emphasis added)

46. In any event, to the extent that it was in any way erroneous for the DC to take into account Parliamentary material, consideration of such material merely 'fortified' the view which the DC had already reached that regulation 33 does not frustrate the

statutory purpose of LASPO [J/73]; it did not form a key part of the reasoning behind that conclusion. Thus any error of law is immaterial.

The Appellant's evidence

47. The third error of law that the made by the DC, as asserted by the Appellant, was a failure properly to address the Appellant's evidence as to the scale of the problem with regulation 33 in practice. The DC did deal with the evidence at [J/36-38], and it is submitted that its approach was an appropriate one. In particular, the DC actually dealt in more detail with some of the specific matters complained of by the Appellant, such as the fact that the Home Office accepts wider categories of evidence of domestic violence in immigration cases [A/103, J/62].

48. The Respondent makes the following general points about the large quantity of evidence adduced by the Appellant in this claim, which were argued in greater detail below.

49. **First**, it was not possible or appropriate for the Respondent to respond to much of the evidence provided relating to various anonymised applicants; there is simply not the necessary detail and this is not a claim brought by any of those individuals. However, such response as could properly be made was found in the witness statements of Joe Parsons.

50. **Secondly**, this is a *vires* or *Padfield* challenge, brought on the basis that it is impermissible for a 'procedural' regulation under s.12 to have any 'substantive' effect on entitlement to legal aid. The relationship of this argument to the evidence provided by the Appellant is as follows:

    a. If the argument is right then the <u>extent</u> or <u>size</u> of the group that qualifies for legal aid under section 9 or section 11 LASPO but is then excluded by operation of section 12 and regulation 33 is not relevant to the lawfulness of the CLA(P) Regulations.

    b. Thus, on the Appellant's analysis it would be sufficient for a <u>single</u> such applicant to be refused legal aid to render regulation 33 *ultra vires*. It is the fact that regulation 33 is capable of affecting substantive entitlement to legal aid <u>at all</u> that makes it unlawful, according to the Appellant.

c. That being so, the Appellant's persistent focus on the scale of the problem (as they perceive it to be) is a further indication of how this claim is in reality a rationality challenge masquerading as a *vires/Padfield* challenge.[2] The implication of the Appellant's evidence demonstrating how many victims of domestic violence are affected would seem to be that if the problem was a smaller one (and it was only a few applicants who were unable to satisfy the requirements of regulation 33) then it would not be unlawful.

d. Therefore, on a proper analysis the scale of the problem is immaterial to the *vires* argument. If it is accepted (as the Respondent submits it must be) that section 12 envisages there will be some applicants who might fall within scope but nevertheless fail to establish their entitlement to legal aid because they do not meet the evidential requirements, then the extent or size of that group can only go to rationality and the debate about where precisely the lines in regulation 33 are drawn.

51. **Thirdly**, the large mass of evidence put in by the Appellant essentially goes only to three issues:

a. The scale of the problem, which for the reasons set out above is a rationality issue and does not go to *vires*.

b. The efficacy of the section 10 LASPO 'safety valve' system (or lack thereof). This may have a variety of explanations. However, whatever the reasons, this is an issue properly to be addressed in the section 10 judicial review cases (such as *Gudanaviciene* [2014] EWCA Civ 1622), not in the present challenge, as it does not go to the *vires* of regulation 33.

c. The difference between the expectations pre-LASPO coming into force of the number of grants of legal aid in domestic violence cases and the reality afterwards. However, whilst this may say something about the ability accurately to forecast or predict what would happen in this difficult area, it does not go to *vires.* Moreover, as with the 'scale of the problem' evidence, the implication seems to be that if the numbers were closer to the estimates then

[2] It is notable how the Appellant occasionally lapses into 'rationality' language at several points at this stage in its skeleton argument ([A/94] – 'no sensible analysis', [A/95] – 'no rational relationship'), as had indeed happened in the Grounds of Claim and skeleton for the DC as well.

regulation 33 would be lawful, which once more belies the fact that this is in reality a rationality challenge.

CONCLUSION

52. For all the above reasons, this appeal should be dismissed and the decision of the DC upheld.

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