

8th July 2015

All Party Parliamentary Group on Legal Aid

Present:

Kier Starmer MP
Kate Green MP
Yvonne Fovargue MP
Andy Slaughter MP
Lord Bach
Lord Low

Apologies:

Henry Bellingham MP
Lord Carlile
Jo Stevens MP

The meeting was also attended by 39 interested persons from a range of organisations including: Magistrates Association, Ministry of Justice, Law Centres Network, CILEX, Citizens Advice, Bar Council, Law Society, Advice Services Alliance, Bar Pro Bono Unit, Rights of Women, Legal Action Group, London School of Economics, Legal Aid Practitioners Group, Equalities and Human Rights Commission and Young Legal Aid Lawyers. In addition several individual barristers and solicitors were present.

1. Election of officers

The following were elected unopposed:

Keir Starmer MP	Chair
Henry Bellingham MP	Vice-Chair
Lord Carlile	Vice-Chair
Yvonne Fovargue MP	Vice-Chair
Jo Stevens MP	Vice-Chair

Following his election as Chair, Keir Starmer MP said that he was looking forward to the role. He was concerned that the LASPOA cuts had led to a significant detrimental impact on access to justice. A number of other developments were also threatening to erode access to justice including the failures in the administration of the exceptional funding scheme, increasing court and tribunal fees and the tendering processes for criminal defence services.

2. Human Rights and Legal Aid

Kier Starmer then went on to introduce two speakers: Paul Bowen QC (Brick Court) and Alison Pickup (Doughty Street Chambers).

Paul Bowen QC opened by outlining the history of legal aid. The Legal Aid Act 1949 was described by the then Attorney General, Sir Hartley Shawcross, as “a charter of the little man”.

The 2010 Coalition government had wanted to reduce the cost of government and the Ministry of Justice set out to save nearly £300 million by reducing the scope and decreasing eligibility for civil legal aid.

However, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA) contains a “safety net” provision in s.10 which requires the Director of the Legal Aid Agency [LAA] to provide “exceptional case funding” (ECF) in circumstances where otherwise there would be a breach of human rights under the European Convention on Human Rights or EU law.

This provision has stimulated a series of legal challenges about when ECF should be granted. One judge had described the ECF scheme as not so much a “safety net” as a “fig leaf”. In the first year, there were 1,028 applications with only 18 accepted. The situation improved in the second year, but only after the High Court decision in *Gudanaviciane*¹ where the LAA Director was found to be applying the wrong test.

Judgment is awaited in a further case involving a mentally incapacitated Nigerian man refused ECF funding for his immigration application.²

The situation in the family courts has been so bad that the President of the Family Division had suggested that Courts may need to order that the cost of legal aid be paid out of central funds. The Court of Appeal 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. However, the Court of Appeal also recognised that there will be cases when this is not the case, even with the existence of the ECF scheme.

These cases illustrate the difference of view between the Lord Chancellor and those advising ordinary individuals as to when the Convention or EU law requires that legal aid be granted. On the whole, the Courts have tended to come down against the Lord Chancellor’s interpretation although, in fairness, there haven’t been a significant number of cases.

Alison Pickup referred to the *Gudanaviciane* case where the Court of Appeal had considered the operation of the ECF scheme in immigration cases. They significantly upheld the decision of Mr Justice Collins in the High Court to quash the decision of the Director of Legal Aid to refuse exceptional funding.

Alison identified 5 human rights issues which arose on the facts:

- The extent of the implied right to legal aid in cases concerned with civil rights and obligations under Article 6 ECHR which provides that everyone is entitled to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”
- Article 47(3) Charter of Fundamental Rights of the European Union which provides that, in relation to issues within the scope of EU law “legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”
- Article 8, ECHR – right to private and family life, which often arises in immigration cases, and whether a right to civil legal aid may be implied where necessary to ensure effective participation in a decision-making procedure which affects Article 8 rights
- The rights of victims of trafficking, and whether they may have an entitlement to legal aid beyond the circumstances which are set out in Para 32(1) of Sch 1 Part 1 LASPOA

¹ *R (Gudanaviciane) –v- Lord Chancellor [2014]*

² On the 15th July 2015, the High Court found that the Legal Aid Agency’s current operation of the Exceptional Case Funding (“ECF”) scheme is unlawful. See *IS v The Director of Legal Aid Casework & Anor [2015] EWHC 1965 (Admin)*

- Provisions in relation to refugee family reunion – and whether such cases are brought into scope by paragraph 30 of Pt 1 Sch 1 LASPOA

The Court of Appeal stated that “the critical question is whether an unrepresented litigant is able to present his case effectively and without obvious unfairness” (para 56).

Keir Starmer thanked the speakers and invited questions and comments from the floor.

- One contributor suggested that the speakers had made the case for restoration of legal aid and given people the confidence to argue for this. This led to a discussion about the importance of access to justice. Before going ahead with LASPOA, the MoJ should have conducted a proper financial analysis of the likely additional costs arising elsewhere in the system e.g. in Courts. Alison Pickup pointed out that there was also the invisible cost of people not exercising their rights.
- Lord Bach agreed that it was important to consider the cost of not giving advice – to the state, later on, as well as to the individual concerned.
- A contributor agreed, stating that he had seen cases where Litigants in Person were not able to go ahead and there had to be adjournments
- A contributor said that in addition to the cuts to legal aid, there had been other funding cuts in the advice sector and these had resulted in a reduction in the availability of preventative advice
- Kate Green MP said that she had found it almost impossible to find immigration advice for her constituents
- A contributor said that the speakers had given him some sense of hope
- Lord Low said that he felt that it was often more cost effective to give early advice rather than wait until people have, for example, lost their home. He had concerns about the future stability of the advice sector.

Keir Starmer closed the meeting by thanking the speakers again and suggesting that the next meeting (in September) might consider the challenges facing the advice sector.