Post LASPO Litigation: Where are we now?

Tuesday 17th April 2018 4.30 – 5.30pm
Committee Room 4 – Lords’ Corridor

Minutes

Speakers

Matthew Shelley, Deputy Director, Legal Support and Court Fees Policy, Ministry Of Justice

Olive Craig, Solicitor, Rights of Women on domestic violence evidence requirements (see here)

Simon Creighton, Founding Partner, Bhatt Murphy on legal aid for prisoners (see here)

Polly Brendon from Public Law Project on Exceptional Case Funding (see here)

Joanne Cecil, Criminal Barristers Association ( see here)

Parliamentarians

Karen Buck MP (Chair)

Andy Slaughter MP

Alex Chalk MP

Other attendees from stakeholder groups, representative bodies and practitioner sectors.

Ms Buck opened the meeting and thanked the speakers for giving up their time to address the meeting. She went on to thank Matthew Shelley, Deputy Director Legal Support and Court Fees Policy from the MOJ, explaining that he would address the meeting about his team’s work to date on the LASPO Post-Implementation Review.

Polly Brendon, Public Law Project, talked about the exceptional case funding litigation brought by the Public Law Project.

1) What was wrong with LASPO that demanded the litigation
The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (‘LASPO’) removed civil legal aid from many areas of law in April 2013. Examples of the areas affected include non-asylum immigration and private law family cases.

LASPO also introduced Exceptional Case Funding, which was supposed to operate as a safety net. ECF is available under section 10(3) for non-inquest cases which are not “in-scope” under LASPO if, without funding, there is a risk that an individual’s rights under the ECHR or EU law would be breached.

The problem was that, when the scheme was introduced, very few applications for ECF were made, and of those made, only a tiny proportion were successful.

- Pre-implementation estimate for the number of ECF applications for legal representation was 6,500, with more anticipated for legal help;
- In the first year of the scheme there were 1,315 applications for non-inquest ECF, less than 2% of which were granted.

2) The litigation in brief and what it achieved

PLP represented I.S. a man lacking litigation capacity who needed ECF for an immigration application. He was one of six claimants in Gudanavičiune and Ors v Director of Legal Aid Casework and the Lord Chancellor, all of whom needed ECF for immigration cases that engaged Article 8 ECHR.

Lord Chancellor/DLAC’s position:

- No right to legal aid arose under the procedural obligations inherent in Article 8 ECHR; and
- The test for whether ECF was required was whether it would be “practically impossible” for an individual to otherwise present their case.

The Court of Appeal judgment, handed down on 15 December 2014, is a pretty definitive explanation of the circumstances in which a right to ECF will arise. The Court confirmed that:

- a right to funding could arise under the procedural obligations inherent in the Convention rights, particularly Article 8 ECHR – important for immigration cases as generally do not engage Article 6 ECHR, but frequently engage Article 8;
- the test was whether ECF is necessary for an individual to “present their case effectively and without obvious unfairness”, with the test being basically the same for Article 6, Article 8 and article 47 of the EU Charter;
- The Court also found that the guidance was unlawful as it did not reflect the correct legal position as set out in the judgment.

I.S. also brought a broader challenge to the way in which the ECF scheme was being operated (I.S. v Director of Legal Aid Casework and the Lord Chancellor). Considered by the High Court and Court of Appeal.

I.S challenged:

- The operation of the scheme as creating a real risk that ECF would not be granted where necessary to avoid the risk of a breach of someone’s Convention and EU law rights:
Large volume of evidence filed showing practical barriers to people accessing ECF including:
- the complexity of the forms;
- the lack of a formal emergency procedure and difficulties in obtaining funding urgently;
- the way that applications were being determined;
- the lack of funding for providers to make applications, and time consuming process, so providers unwilling to make applications especially for people who were not already their clients.

- Civil Legal Aid (Merits Criteria) Regulations
- Guidance:
  - I.S. maintained challenge to revised ECF guidance

High Court:
- ECF scheme was operating unlawfully:
  - Created an unacceptable risk that an individual would not obtain funding when it was needed to prevent a breach of their Convention or EU rights.
- Merits criteria regulations were unlawful
- Guidance was unlawful

Court of Appeal allowed the Lord Chancellor/DLAC’s appeal:
- Re the lawfulness of the scheme, in finding it was not inherently or systemically unfair:
  - Laws LJ “there have plainly been many difficulties, and the complexity of the ECF form has been common to many of them;”
  - Briggs LJ dissenting, it was “the combination of those two features, namely an application process which is inaccessible to most LiPs and the absence of an economic business model sufficient to encourage lawyers to apply on their behalf, which makes the ECF scheme inherently defective and therefore unfair.”
- All three Lord Justices allowed the LC/DLAC’s appeal re the merits criteria and guidance:
  - Re the lawfulness of the merits criteria:
    - Laws LJ: “balanced, proportionate, approach to the grant of legal aid which cannot be condemned as arbitrary” which was sufficient to make them lawful;
    - Re the guidance: dealt with shortly –lawful.

Supreme Court – I.S. sought permission to appeal on the grounds re the operation of the scheme and the merits criteria regulations:
- Refused December 2016: changes to the ECF application form and the merits test meant that the case was not a suitable one to consider the issues.

Outcomes:

In response to the judgments in Gudanaviciene and I.S. the Lord Chancellor/DLAC made a number of changes:

Merits regulations:
- Several changes to take into account the judgments;
• Current position from 22.07.16: full representation may be available for certain types of case where the prospects of success are borderline or just below 50%.

To the process of applying for ECF:

• Revised ECF Guidance published;
• New, shorter, application form introduced which allows for an application for funding to investigate whether a full ECF application could be made (don't know how many of these applications have been made);
• Guidance re urgency amended to cases accepted as urgent being decided in 5 working days;

There has been an increase in the number of people applying for non-inquest ECF; in 2016-2017 there were 1591 applications of which 816 were granted = grant rate of 51%.

3) What changes are still needed in this area of law

There is a lack of a proper procedure for funding to be granted in an emergency, and people struggling to get applications decided urgently.

There continue to be problems with providers having to re-submit applications when they are instructed by a person who has been granted ECF after making an application without the assistance of a provider (“direct client applicant”)

Difficulties in communicating with the ECF team

There remain questions re the accessibility of the scheme to people trying to make an application for ECF without assistance.

Our continuing concerns about the scheme are explained in PLP’s written evidence to the Joint Committee on Human Rights Attitudes to Enforcement Inquiry published on its website.

Olive Craig, Rights of Women (ROW)
LASPO brought in considerable changes for survivors of domestic abuse. Although immediate violence would still enable a person to apply for a protective injunction, anyone who wanted to apply for legal aid to deal with financial and children issues had provide documentary evidence to show that the abuse was recent and only a limited number of professionals could “certify” that someone had suffered domestic abuse, none of which were specialist domestic abuse support services. The list of evidence that would be accepted by the LAA was set out in Regulations and are what we refer to as “gateway evidence”.

The Regulations were amended to increase the list evidence slightly but ROW research found that even with the expanded list of evidence, 37% of survivors were still not able to get through the gateway.

ROW brought litigation arguing that the Regulations were unlawful as they introduced a more restrictive criteria for eligibility for legal aid than was found in LASPO or, alternately, the Regulations frustrated the statutory purpose of LASPO by prescribing the acceptable types of evidence too narrowly. In February 2016 the Court of Appeal agreed that the Regulations were invalid in so far as the 24 month time limit was concerned and the fact that financial abuse could not be evidenced at all.

Amended regulations came into force in January 2018. Although there are some problems with the amended regulations and ROW continues to monitor the effect of the regulations, anecdotally, there
are survivors who have been able to access legal aid that couldn’t before. Some of the key changes are:

- there is no time limit on evidence of domestic abuse;
- it is possible to provide evidence that someone is at risk of domestic abuse by providing evidence that the perpetrator has been abusive to someone else;
- domestic violence support organisations are able to provide evidence that someone is or has been the victim of domestic abuse or is at risk of being a victim of domestic abuse;
- there is a discretion for the Director of Legal Aid Casework to grant legal aid for victims of financial abuse

What further changes to LASPO would they like to see?

- The means test for family cases and indeed other legal aid areas is far too complex and there are some very easy ways that it could be simplified, for example, if people are means tested for a benefit they should not also have to satisfy a capital test. People on benefits can be outside the financial limit for legal aid. The Law Society has recently published a report showing that the means test is too restrictive and there are people who are not eligible for legal aid but who could not afford to pay for a solicitor.

- Early Advice in private family law is essential to address issues before they spiral into litigation. There has been a considerable decrease in mediation because solicitors were the main pathway to mediation prior to LASPO – there needs to be a way of increasing mediation and early legal advice would drive that

- The scope of legal aid should be expanded so that legal aid is available in cases involving children. The issues are too important to leave people unrepresented.

- There are growing advice deserts. These arise for many reasons but need to be addressed. It is not good enough for there to be parts of the country where survivors who are currently eligible for legal aid are not able to find a solicitor to take on the case. These survivors end up representing themselves or not taking the important legal steps they need to take to protect themselves and their children.

Simon Creighton, Bhatt Murphy

When LASPO came in the then Lord Chancellor brought in Regulations to restrict when prisoners could get legal advice, limiting advice to parole hearings, to prisoners facing extra days on their sentence and cases about the correct calculation of sentencing. The Howard League for Penal Reform and the Prisoners’ Advice Service brought the litigation. The Lord Chancellor’s (Chris Grayling) evidence to the Select Committee was considered. The case was argued not on Human Rights grounds but on breach of common law standards of fairness i.e. there are difficult procedural procedures for people with low literacy rates, and/or mental health issues and the procedures are very difficult for children in prison. It is particularly hard for them to engage in the processes. The Court of Appeal granted permission. The challenge was focused by charities bringing the case rather than individuals in order to show that the system could not guarantee fairness across the full run of cases, particularly bearing in mind the importance of the issues at stake and the complexity of the decision making processes.
The Lord Chancellor accepted that where there was a convention right engaged, exceptional case funding could be available e.g. access to mother and baby units and solitary confinement so the Court of Appeal did not have to rule on those.

The Court of Appeal found that the system could not guarantee fairness in three areas: pre-tariff parole hearings, Category A decisions and selection for Close Supervision Centres.

System has to be able to be fair so MOJ sensibly thought legal aid funding was the most cost effective way forward and they reintroduced funding for these three areas through the prison law legal aid contract which allows the lawyers to assess the merits of cases and grant legal aid under devolved powers.

It was disappointing that where there were concessions, those cases have been left in the exceptional case funding system even though it is accepted that they engage fundamental human rights. Prisoners cannot meaningfully apply for ECF – they have no access to internet or to the forms. It is difficult to understand why there is a different and less accessible system for these cases.

Simon has not seen figures for uptake of work recently. He echoed the fear about advice deserts. If there is no funding for types of work or inadequate funding then lawyers will not continue to practise in that area of law.

[Jo Cecil, Barrister at Garden Court Chambers and executive member Criminal Bar Association]

Jo was asked to speak about the CBA’s action as many of its members are refusing to take work under a new fees scheme introduced on the 1 April 2018 (the Advocates Graduated Fees Scheme).

The Criminal Justice System is in a state of crisis. This is due to cuts and lack of investment.

Some miscarriages of justice have been averted at the last minute and recent well publicised cases have been about the consideration of unused material.

The problems are throughout the system – the criminal bar, criminal defence solicitors, the police, the CPS and some courts are literally crumbling.

Recent research by the Law Society has revealed that the average age of duty solicitors to be over 50.

The criminal bar is no career for young people. Many feel that they cannot recommend going into criminal defence work paid under the legal aid scheme. This affects diversity which the criminal bar used to be good at. £50 in court for a day is not unusual. With tuition fees and living costs the level of remuneration is impossible. That £50 fee will include travel and barrister’ costs have to be taken out of it.

New fees were brought in on 1 April 2018 so they won’t act in post 1 April cases – so where the legal aid Representation Order is dated 1 April or any date after that.

There may be escalation. The barristers participating feel that they need to make a stand now as otherwise they are complicit in the destruction of the Criminal Justice System.]

[Section to be confirmed]

Matthew Shelley, Deputy Director, Legal Support and Court Fees Policy, Ministry Of Justice

Matt has worked in both policy and operational areas in legal aid and is now leading on the LASPO Post Implementation Review. Others from the Review team are in the meeting and taking notes.
They want to hear from those involved. The Lord Chancellor announced a few weeks ago that the engagement process would start. The first consultative group meeting took place yesterday when they met with crime consultative group.

The engagement process will be wide ranging. There will be group meetings and 1-1s and the parties will include parliamentarians, judiciary, academics and those using the system as well as practitioners.

Terms of reference are here. The PIR will focus on the 34 changes made by the LASPO Act as well as changes made through LASPO secondary legislation AND how do we go forward. Matt highlighted that the proposition must not simply be that the reforms should be reversed.

Consultative Groups – the four groups are meeting this week. The crime meeting took place yesterday. Two further meetings - advice sector and family law - will be held on Wednesday and civil (non family) will be on Friday.

There will be another round of meetings for these groups before summer recess and then in September/October.

The Review team is keen to get meetings under way.

Those invited to the Consultative Groups were agreed in discussion with Ministers and Special Advisers. It will be an iterative process.

Timescale? By the end of the year they want to prepare an assessment to Ministers including next steps.

Crime Consultative Group meeting yesterday covered some of the points made by Simon and Jo. What else was covered? The means test for magistrates’ court matters was discussed as was the impact of the 8.75% fee cut on litigators, (there was a discussion at the CG meeting on its effect on good faith and extra work), the remuneration of experts and high cost cases.

Andy Slaughter MP asked for more detail on the timing and if the team will consult with Lords Low and Lord Bach who carried out extensive work on the post LASPO scenario? He asked for clarity – more cuts in MoJ budget are proposed so those engaged with the Review need to be clear about parameters so don’t waste time.

Matt answered that they would be gathering evidence (and NB dedicated email address) until by end September and then report to Lord Chancellor. As per the Lord Chancellor’s commitment to the Justice Select Committee, the team aims to complete the review by the end of the year but cannot commit to the precise date of publication. He confirmed that they do already have over 100 items of literature but please provide anything relevant to ensure that they have seen it.

Matt did not say that they were aiming for cost neutrality. They are open to the idea that there may be other sources of support – it may be that the answer is legal aid but there may be other sources.

Questions

Nicola Mackintosh QC (Hon) co-chair of LAPG raised the LAPG Manifesto – this contains constructive suggestions on improvements. Her concern is that as regards the non-family civil CG: there is not enough time to cover all of civil as too many areas (includes mental heath, mental capacity, welfare
benefits, housing, immigration and asylum, etc.) so would be too broad brush. Each area has its own complexities.

Jenny Beck co-chair of LAPG stressed that the Review team needs to consider the effect of the cuts on other parts of the MoJ and other departments. Look at other costs. She gave an example of an ECF case where legal aid has not been granted to a disabled dad who has a five day fact finding. Adjournment likely but unjust that he has to deal unaided.

Paul from Both Parents Matter. They would like to be part of discussion. Be careful to engage with litigants not just lawyers. Pre LASPO 40% men but now 15% funded. Look at why that is.

James Sandbach asked what role is Justice Committee to play?

Matt Shelley’s replies:
- Will have read and will read again LAGP’s Manifesto – they have copies
- Can have separate meetings on different areas of law.
- Timetable – there is a team working on the PIR. Fiona Rutherford formerly of HMCTS is involved. They do have capacity to meet.
- As per one of the four objectives of LASPO, the team is looking at the overall cost to the taxpayer
- Litigants will be engaged, not just those representing lawyers
- Role of Justice Committee - very keen to meet. JSC want to be kept informed so will keep meeting with them.
- How to engage? They have published terms of reference. Team marshalling replies to the LASPO email address which is: LASPOReviewMOJ@justice.gsi.gov.uk

Karen Buck MP thanked everyone for coming to the meeting and thanked the speakers for their succinct and very helpful contributions.

Carol Storer, Director of LAPG flagged up that with James Sandbach and others a meeting was being organised for the sector to feed into the LASPO Review – probably Friday 8 June. The LASPO PIR team are invited and more details will be available soon.