

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Fifth Delegated Legislation Committee

CIVIL LEGAL AID (MERITS CRITERIA)
(AMENDMENT) REGULATIONS 2016

Thursday 20 October 2016

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The Committee consisted of the following Members:

Chair: MR ANDREW TURNER

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| † Afriyie, Adam (<i>Windsor</i>) (Con) | † Rees, Christina (<i>Neath</i>) (Lab/Co-op) |
| Cunningham, Alex (<i>Stockton North</i>) (Lab) | † Robinson, Mr Geoffrey (<i>Coventry North West</i>) (Lab) |
| Dowden, Oliver (<i>Hertsmere</i>) (Con) | † Smith, Nick (<i>Blaenau Gwent</i>) (Lab) |
| † Field, Mark (<i>Cities of London and Westminster</i>) (Con) | † Timms, Stephen (<i>East Ham</i>) (Lab) |
| † Fletcher, Colleen (<i>Coventry North East</i>) (Lab) | † Trevelyan, Mrs Anne-Marie (<i>Berwick-upon-Tweed</i>) (Con) |
| † Heald, Sir Oliver (<i>North East Hertfordshire</i>) (Con) | † Vara, Mr Shailesh (<i>North West Cambridgeshire</i>) (Con) |
| † Henderson, Gordon (<i>Sittingbourne and Sheppey</i>) (Con) | |
| † Jenrick, Robert (<i>Newark</i>) (Con) | Nehal Bradley-Depani, Katy Stout, <i>Committee Clerks</i> |
| † Opperman, Guy (<i>Lord Commissioner of Her Majesty's Treasury</i>) | |
| † Parish, Neil (<i>Tiverton and Honiton</i>) (Con) | † attended the Committee |

Fifth Delegated Legislation Committee

Thursday 20 October 2016

[MR ANDREW TURNER *in the Chair*]

Draft Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016

11.30 am

Sir Oliver Heald (North East Hertfordshire) (Con): I beg to move,

That the Committee has considered the draft Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016 (S.I. 2016, No. 781).

May I say what a pleasure it is to serve under your chairmanship, Mr Turner? I welcome the hon. Member for Neath (Christina Rees) to her new and also her former responsibilities. That is welcome, and I hope we can work together on this important area.

The statutory instrument amends the Civil Legal Aid (Merits Criteria) Regulations 2013, which I will refer to as the 2013 regulations and which broaden the availability of legal aid. The statutory instrument enables legal aid funding for certain cases where the prospects of succeeding are marginal—that is, below 50% but between 45% and 50%—or borderline, which means that it is not certain that the prospects can be quantified. In most instances, the case must be of overwhelming importance to the individual or of significant wider public interest.

The 2013 regulations set out the merits criteria to be applied by the director of legal aid casework at the Legal Aid Agency when deciding whether an applicant qualifies for civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, commonly known as LASPO. The criteria provide the basis for deciding whether it is justified to provide or to continue to provide public funds in an individual case. In some cases, that includes an assessment of the prospects for success in a case, and that is what we are talking about with this statutory instrument.

In July 2015, there was a judicial review. The High Court declared certain aspects of the 2013 regulations to be unlawful—specifically the requirement for a case to have a 50% or higher chance of succeeding to receive legal aid funding for full representation. The Ministry of Justice introduced interim regulations to comply with the High Court judgment pending appeal. That enabled funding for certain cases with a prospect of success below 50%. In May 2016, the Court of Appeal overturned the High Court decision and held that the 2013 regulations as they were prior to that decision were lawful.

The Legal Aid Agency announced that in light of the Court of Appeal's decision on the lawfulness of the 50% threshold, it would no longer provide funding for cases with less than a 50% chance of success. The Ministry of Justice agrees with the judgment of the Court of Appeal that it is a balanced and proportionate approach to the granting of legal aid and that it cannot be condemned in any way as being arbitrary.

However, where an assessment of the prospects of success applies, there have always been certain exceptions to the 50% threshold. It is for those reasons that my hon. Friend the Member for North West Cambridgeshire decided that the Government should look at providing some flexibility. The Government have decided to make legal aid funding available for cases where the prospects of success are borderline—that is, very hard to quantify—or less than 50%, but at least 45%, which we call marginal. For most cases where a prospect of success test applies, the exception for cases with borderline or marginal prospects is subject to the case being of overwhelming importance to the individual or of significant wider public interest. In other cases, such as domestic violence cases, the amendments made by the statutory instrument will mean that legal aid is available in borderline and marginal cases without having to meet the additional criteria. Legal aid will also be available where the substance of the case relates to a breach of convention rights under the European convention on human rights.

The Government consider public funding to be justified in cases with marginal or borderline prospects of success, even though that is not legally required. To that end, the Ministry of Justice has introduced the amendments made by the statutory instrument. It must be remembered that the regulations do not impose a uniform set of merits criteria. The criteria depend on the type of legal services and the type of case for which funding is sought. There are areas, such as legal help, Court of Protection cases and public law children cases, where prospects of success do not have to be shown.

We introduced the amendments using the urgency procedure provided for under LASPO because we thought it important to give clarity to legal aid providers and to introduce new exceptions to allow the funding for borderline and marginal cases. That was over the summer, so I think hon. Members will accept that that was a reasonable approach.

The regulations introduce small but important changes to the 2013 regulations. I am pleased that they were examined without comment by the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee, and I commend them to the Committee.

11.36 am

Christina Rees (Neath) (Lab/Co-op): It is a pleasure to serve under your chairmanship, Mr Turner. I thank the Minister for his kind words and for his explanation of the statutory instrument. I confirm that we do not oppose it, but I should like to make some observations.

The Civil Legal Aid (Merits Criteria) Regulations 2013 for full representation were implemented in April of that year to give effect to the Legal Aid, Sentencing and Punishment of Offenders Act 2012. In April 2013, the Government consulted on further cuts to legal aid, in their consultation “Transforming Legal Aid”. When that consultation first proposed removing civil legal aid for borderline cases, there was widespread opposition. At the time, legal aid was granted for certain case types that were assessed as having borderline prospects of success. The consultation acknowledged that those were “high priority cases, for example cases which concern holding the State to account, public interest cases, or cases concerning housing.”

The regulations themselves were later amended to make the merits test less restrictive, following the July 2015 High Court judgment in the case of *IS v. Director of Legal Aid Casework*, which, among other things, found:

“The rigidity of the merits test...is...not reasonable.”

That case was a challenge to the exceptional funding arrangements, and the judge’s findings on the merits test were made in that context. The decision was subsequently overruled in the Court of Appeal, and the July 2016 amendments essentially see the merits test revert to the original 2013 position. The High Court’s decision meant that more people would potentially qualify for legal assistance under the revised regulations, and many lawyers working in the affected areas of practice would have been content for that position to remain unaltered. At the time of the “Transforming Legal Aid” consultation, given the significance of the cases described, many questioned why the “borderline” category was to be abolished.

Determining the prospects of success of a case is not a scientific process; it is a subjective exercise. Lawyers can attest to many cases to which the “borderline” description was attached, but that when funded went on to lead to changes in the law. The Law Society’s consultation response at the time warned that

“it can be particularly difficult in public law cases and test cases where often the prospects of success can only be assessed as borderline due to the uncertainty in the law the case is intended to clarify.”

We respect the Court of Appeal’s decision, however, and to that extent the reinclusion of some borderline cases is welcome. Labour remains concerned that the

reforms that became LASPO went too far in restricting the availability of civil legal aid. The Government have long said that they would conduct a review into the impact of the reforms and cuts to legal aid introduced by LASPO after three years. I should be grateful if the Minister did one very simple thing and told us when that review will be carried out. I thank him again for presenting the statutory instrument to the Committee, and I hope he will answer my question.

11.39 am

Sir Oliver Heald: I thank the hon. Lady for her remarks. We all agree that deciding where the borderline cases fall is not an easy exercise, but we have tried to go beyond the Court of Appeal judgment in order to give more flexibility. That is the right approach, and the regulations reflect that. In a sense we are at one on this: it will always be an area of difficulty.

It is true that it was said at the time that LASPO would be reviewed after three years and before five years had elapsed. I can confirm that that is what we intend; we have not yet announced the date of that review, and I am not tempted to do so today, but we do intend it and I hope that on that basis the Committee will support the regulations.

Question put and agreed to.

11.41 am

Committee rose.

