

## **Briefing for the House of Lords' debate on 17 July 2013 Motion to Regret the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013**

These regulations contain the new means tests applicable to all cases from 1 April 2013 when the legal aid regime introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2013 came into force.

The Ministry of Justice's August 2012 Policy Statement on Financial Eligibility and Contributions indicated that the main contents of the current Community Legal Services (Financial) Regulations 2000 (SI 2000/516) would be expected to remain the same. This was not the case in practice because the Regulations now require a capital test to be applied as well as an income means test.

There are "passporting" provisions for those in receipt of asylum support under s95 of the Immigration and Asylum Act 1999 or support as failed asylum-seekers under section 4 of that Act<sup>1</sup>. But what of those who take State support but live with family or friends? Or others helped by family, friends, or the kindness of strangers?

Regulation 16 states:

- 16(5) *Where it appears to the Director that—*
- (a) another person is, has been or is likely to be substantially maintaining the individual or any person whose resources are to be treated as the individual's resources under this regulation; or*
  - (b) any of the resources of another person have been or are likely to be made available to the individual or any person whose resources are to be treated as the individual's resources under this regulation,*

*the Director may treat all or any part of the resources of that other person as the resources of the individual, and may assess or estimate the value of those resources as well as the Director is able.*

- (6) A reference to "individual" in regulations 21 to 36 and 40 to 43 is a reference to—*
- (a) the individual in respect of whom the determination about financial resources is being made; and*
  - (b) any person whose resources are to be treated as the individual's resources under this regulation.*

The language of the previous regulation was very similar and produced unfair "nil assessment" of files (i.e. cases where the lawyer was not paid at all for work on the case) by the then Legal Services Commission.

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<sup>1</sup> Regulation 6.

In members' experience one problem is that questions about means are often asked of third parties who have provided minimal support to the person applying for legal aid, friends and family members who are not necessarily wealthy and are only willing to support clients on a temporary basis. They are asked to provide documentary evidence of their income and capital. This they find intrusive.

As one solicitor member states

*"This often leads to those helping our clients not wishing to continue doing this, which can have the awful consequence of destitution etc."*

Another says

*"...our clients often have difficulty obtaining evidence from people, who are wary about such information in case it may affect them in some way. Even when you explain directly to people them what the purpose of it is, and why this information may be retained on file.*

...

*Sometimes people who are reliant on support are in effect exploited, expected to work for the people helping them, and providing a letter confirming support is being given, is almost traded. "*

Third party support is not infrequently given on an *ad hoc* basis, which is very difficult to evidence.

#### **Case of J**

A case under the old regulations, but the same in the material respects. J's file was "nil assessed" (i.e. the legal representatives told that they would be paid nothing) on the basis that J's father who was in receipt of Job Seekers Allowance, was expected to pay for his legal costs and or to provide evidence of his welfare benefits. J was an adult and did not live with his father. This caused a lot of friction between my father and son.

#### **Case of C**

This is also a case under the old rules, but which are the same in the material respects. C was granted bail. The Legal Aid Agency expected his surety – who was not someone personally known to him but a person from his community who knew of him because he was a well-known figure, to pay for his legal costs. The file was "nil assessed" (i.e. the legal representative told that they would receive no payment at all). The legal representative had to go to an internal review and then appeal against the Legal Services Commission's decision to the Independent Funding Adjudicator, as well as obtaining documentary evidence from the surety, before the Legal Services Commission agreed to pay the lawyer for the work on the bail application.

#### **Case of D**

This is a case under the regulations being debated. The client and her family are destitute due to the then UK Border Agency wrongly treating her application as out of time which meant that her employer dismissed her from her employment. Her mother who lives in the country of origin in Africa sent a one-off emergency payment but made it clear in the accompanying letter that that was all that she had the means to do. The Legal Aid Agency has requested further information about the mother's means.

While there is flexibility to include income, there is not the same flexibility to exclude income (or capital), even on the basis of a reasonableness test, which is notably absent from the wide-ranging and subjective inclusion rules set out above. The Regulations do not allow for flexibility in dealing with additional costs associated with disability, including mental incapacity. Regulation 24 only provides for very limited income to be disregarded. It is not flexible enough to allow disability and other special needs to be addressed.

A general discretion to disregard income and/or capital if it was equitable in all the circumstances to do so was in place in 2000<sup>2</sup> and should be reinstated to protect access to justice for those with special needs.

Regulation 16(4) states:

*16 (4) Where the individual is a child, the resources of a parent, guardian or any other person who is responsible for maintaining the child, or who usually contributes substantially to the child's maintenance, must be treated as the child's resources, unless, having regard to all the circumstances, including the age and resources of the child and any conflict of interest, it appears inequitable to do so.*

See also the Standard Civil Contract Specification 2013<sup>3</sup>:

*3.27 When assessing the means of a Child or Protected Party, the appropriate means which you must take into account are:*

- (a) those of the Child/Protected Party; and*
- (b) in all cases other than applications for Legal Representation in non-family proceedings, those persons who are liable to maintain the Child/Protected Party or usually contribute substantially to his/her maintenance, subject to the exception provided for by the Financial Regulations.*

*3.28 When assessing means where you accept an application for Controlled Work directly from a Child you must consider whether it is just and equitable not to aggregate the Child's means with those of the person liable to maintain him/her. The presumption is that there should be aggregation but you can decide not to aggregate (and assess only the Child's means) if, having regard to all the circumstances, including the age and resources of the Child (and any conflict of interest), you reasonably consider it just and equitable to do so. Non-aggregation is more likely to be justified where there is a conflict between the Child and the person liable to maintain him/her.*

There is a clear risk of a conflict where the child is in the care of a local authority because the local authority must bear the costs of supporting the child.

In asylum cases, where the child is receiving support from the local authority under the Children's Act 1989, the Legal Aid Agency's *Controlled work: Guide to Determining Financial Eligibility for Controlled Work and Family Mediation April 2013 v1*<sup>4</sup> provides

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<sup>2</sup> Community Legal Services (Financial) Regulations 2000 SI 2000/516.

<sup>3</sup> Paragraphs 3.27-3.28.

*Where a child is a 'looked after' child i.e. the responsibility of the local authority, it would usually be inequitable for his or her foster carer's/social worker's income and capital to be aggregated with that of the child.*

Contrast this approach to the means test with the approach to scope. In immigration, as opposed to asylum cases separated children are outside the scope of legal aid. There is no specific provision for legal aid for separated children, in the UK without a parent or guardian. During the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 the then Minister, Mr Djanogly, suggested that social workers could be exempted from the general prohibition on giving immigration advice and advise these children. Representatives of ILPA, of the Local Government Association, of the Office of the Immigration Services Commissioner and of other NGOs met Ministry of Justice and Home Office officials to discuss Mr Djanogly's suggestion on 1 October 2012. The agreed note of the meeting records the Association of Local Government as saying:

*... These are complex matters and involve very difficult legal concepts but they are only one component, one strand of what is going on in a child's life. This is why social workers ask experts to come in and to provide legal advice. ...giving legal advice is not what social workers do. ...Social workers are not qualified to complete that form. Conflicts of interest arise. ...There is a question of the independence of the social worker, of the need to act in the best interests of the child. Legal advice is needed and that is not the role of the social worker, there are practice issues. There is also a risk that local authorities will face legal challenges if poor advice is given."*

The Office of the Immigration Services Commissioner said in its 15 October 2012 letter subsequent to the meeting

*Whether the social workers become covered by the OISC regulatory scheme via Ministerial Order or direct regulation, please note that under Sch. 5 paragraph 3 (3) of the Act, they will still have to comply with the Commissioner's Code of Standards. The requirements of the Code include:*

- *Professional Indemnity Insurance*
- *Continuous Professional Development*
- *Acting the Best Interests of the Client*
- *Not acting where there is a potential conflict of interests*

*The Commissioner will be required to take regulatory action against those social work advisers that are found to be failing. This may include seeking to have individuals excluded from continuing to give immigration advice and services.*

In the light of this, on 23 January ILPA asked Lord McNally to consider using powers under section 9(2) of the Act to bring these children back within scope on the basis that during the passage of the Act the views expressed by Ministers as to why these children could be denied legal aid were based on a misunderstanding of the nature of the claims the children were making (assuming that those who had claimed asylum in the past would continue to make asylum claims), of the role of social workers and of

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<sup>4</sup> Available at <http://www.justice.gov.uk/downloads/legal-aid/eligibility/guide-to-determine-eligibility-controlled-work-and-mediation.pdf> (Accessed 17 July 2013).

the regulatory regime run by the Office of the Immigration Services Commissioner. On 12 February Lord McNally replied, declining to bring these children back within scope and saying that they “receive the full range of support and services” from local authorities. The result is that Local Authorities, with no compensation from central Government, are expected to meet these children’s legal bills (at private rates which are higher than legal aid rates) despite recognition that it would be inequitable to take their means into account in assessing financial eligibility for legal aid in cases within scope. Government must rethink this.

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