

Challenge to legal aid exceptional case funding for legal aid

R (Gudanaviciene et Ors) v The Director of Legal Aid Casework et anor [2014] WLR(D) 547 (15 December 2014) On appeal from *R (Gudanaviciene et Ors) v The Director of Legal Aid Casework et anor* [2014] WLR(D) 266, [2014] EWHC 1840 (Admin) (13 June 2014)

Alison Harvey, Legal Director, Immigration Law Practitioners' Association

Summary

Judgment of the Court of Appeal on appeals by the Director of Legal Aid Casework and the Lord Chancellor in six joined immigration cases about exceptional case funding under section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Held that the Guidance issued by the Director of Legal Aid Casework about the operation of the scheme was unlawful and misstated the law. Also addresses the scope of Schedule 1 to the Legal Aid Sentencing and Punishment of Offenders Act 2014 in respect of refugee family reunion and human trafficking. While the Director of Legal Aid casework did succeed in his appeal in two of the six cases, these turn very much on their facts and the reasoning supports the findings of the unlawfulness of the guidance.

Proceedings and Facts

This case, which is being appealed to the Supreme Court, concerns challenges to decisions about exceptional case funding under section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

The Director of Legal Aid Casework and the Lord Chancellor appealed to the Court of Appeal against the judgment of Mr Justice Collins in the High Court in six immigration cases, which had been joined, challenging the operation of the exceptional funding scheme. The cases:

- Ms Gudanaviciene, a mother with a young child, convicted of wounding her abusive partner with intent, challenging the decision to deport her;
- Mr Reiss, a EEA national facing deportation whose appeal turned on the calculation of his length of residence in the UK under EU law for the purpose of determining whether he benefited from enhanced protection against deportation;
- Ms Edgehill who was appealing to the Court of Appeal against her deportation;
- IS who lacked capacity and was blind and was applying for leave to remain.
- B a refugee who sought reunion with family members overseas; and
- LS, a trafficked person.

Two points raised by IS: that the practical operation of the exceptional cases scheme frustrates the legislative intention and breaches the Equality Act 2010, i.e. systemic challenges to the exceptional funding scheme, were severed from the direct challenge to the individual refusal of funding in the case of IS. These parts of IS's case will be heard after Easter 2015.

The judgment of Mr Justice Collins in the High Court

Mr Justice Collins had held that the Lord Chancellor's Guidance on exceptional funding was unlawful and failed correctly to state the law. He quashed the refusals of exceptional funding in all six cases and directed the Director of Legal Aid Casework to fund four of them and make fresh decisions in the other two.

He held that paragraph 30 (Asylum) of Part 1 of Schedule 1 to the Legal Aid Sentencing and Punishment of Offenders Act 2012 covered refugee family reunion because, in the words of that paragraph, family reunion is a matter "arising from" the Refugee Convention. He held that this wording was not ambiguous and therefore declined to look at the parliamentary record (see *Pepper v Hart* 3 WLR 1032).

Finally, he held that the UK's obligations toward a trafficked person do not give rise to an obligation to provide legal aid for a trafficked person's immigration case prior to a decision under the National Referral Mechanism that there are reasonable grounds for thinking that the person is a victim of trafficking.

Stays were granted on the individual grants of exceptional funding, but the Director of Legal Aid Casework and the Lord Chancellor agreed that in giving effect to the judgment as far as refugee family reunion was concerned, they would undertake not seek to claw back funding granted were the judgment overturned in the Court of Appeal. In the event it took a long time for the Director of Legal Aid Casework to issue detailed guidance on refugee family reunion cases and some lawyers remained hesitant to take them on for a long time after the judgment.

Before the Court of Appeal heard the cases, the Director of Legal Aid Casework and the Lord Chancellor conceded IS's application for exceptional funding.

The judgment of the Court of Appeal

The Court of Appeal held that the Lord Chancellor's Guidance on exceptional funding was unlawful and failed accurately to state the law, including the effect of Articles 6 and 8 of the European Convention on Human Rights and Article 47 of the EU Charter of Fundamental Rights. The question under Article 6(1) of the Convention and under Article 47 of the Charter is whether the applicant's

appearance before the court or tribunal in question is effective; whether he or she is able to present the case properly and satisfactorily without the assistance of a lawyer. The appearance of fairness is also relevant. Equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis à vis their opponent. The Home Office conceded that the procedural protections of Article 8 of the European Convention on Human Rights apply in immigration cases and the standards are in practice the same as those under Article 6. Whether legal aid is required to avoid a breach of Article 8 will depend on the facts of the case including the importance of the issues at stake and complexity.

The guidance sent a signal that the refusal of legal aid would amount to a breach of Article 6(1) of the European Convention on Human Rights only in rare and extreme cases. This was wrong. The question for the Director of Legal Aid Casework in making a decision under s 10 was whether there would be a risk of a breach of a person's human rights, applying principles derived from case law. There was no gloss on the phrase "would be a breach" and insofar as Mr Justice Collins had added one, of a "high level of probability" of a breach, his judgment was not upheld. If the Director of Legal Aid Casework considers that there would be a breach, then the Director must grant legal aid. If the Director is unsure whether there would be a breach, all the circumstances of the case must be considered, including but not limited to, the seriousness of the breach. "Exceptionality" is not a test; it does not require that grants be rare.

The Court of Appeal overturned Mr Justice Collins on the question of whether legal aid for family reunion was within the scope of paragraph 30, although the individual challenge on Article 8 grounds to the refusal of exceptional funding in the case of B succeeded and the appeal of the Director of Legal Aid Casework on Article 8 was dismissed. The Court considered that the parliamentary debates were "...not just the *executive* expressing a view about the meaning of the legislation. It was *Parliament's* understanding of that meaning." [emphasis in original] The judgment has profound implications for the application of *Pepper v Hart*. If a parliamentarian sees that the Government's wording is flawed to the advantage of individuals, and keeps quiet about that rather than point it out and give the Government it a chance to change it, the Court of Appeal's approach is to treat that parliamentarian as having agreed with the Government. The effect of this aspect of the judgment if upheld would be to consolidate the power of the executive over parliament.

The Court upheld Mr Justice Collins' finding that there is not an enforceable right to legal aid prior to a "reasonable grounds decision," under Directive 2011/36/EC on trafficking interpreted in the light of the Charter. It allowed the appeal in the case of LS.

The Court of Appeal dismissed the appeals of the Director of Legal Aid Casework in the cases of Ms Gudavicene and Mr Reis. It allowed the appeal in the case of Ms Edgehill because her case had been joined in the Court of Appeal with that of a case, HB, raising the same legal point and therefore it was not a breach of her rights that she did not benefit from separate representation.

The Lord Chancellor has so far failed to issue revised guidance on the operation of the scheme. Ministry of Justice officials told the author in a meeting on 10 February 2015 that the issuing of revised guidance was a matter of “weeks or months, not days.”

While the amount of work that needs to be done at risk to make an exceptional funding application, and the poor success rate in such applications to date, make many practitioners reluctant to apply for exceptional funding, the full effect of the Court of Appeal judgment has yet to be felt. It is likely to be important both to the appeal before the Supreme Court and to the systemic challenge in the case of IS that applications for exceptional case funding have continued to be made so that the way in which such applications are being dealt with can be examined. It is of particular importance that pro bono efforts in appropriate cases outside the scope of legal aid are directed at securing exceptional case funding to respect the requirement that pro bono be work where public and alternative means of funding are not available.