

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Third Delegated Legislation Committee

CIVIL LEGAL AID (MERITS CRITERIA)
(AMENDMENT) (NO.2) REGULATIONS 2015

Thursday 29 October 2015

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STRICT ADHERENCE TO THIS ARRANGEMENT WILL GREATLY
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THE BOUND VOLUMES OF PROCEEDINGS
IN GENERAL COMMITTEES

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The Committee consisted of the following Members:

Chair: PHIL WILSON

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|--|---|
| † Borwick, Victoria (<i>Kensington</i>) (Con) | † Newton, Sarah (<i>Truro and Falmouth</i>) (Con) |
| † Bradshaw, Mr Ben (<i>Exeter</i>) (Lab) | † Rayner, Angela (<i>Ashton-under-Lyne</i>) (Lab) |
| Campbell, Mr Gregory (<i>East Londonderry</i>) (DUP) | † Rees, Christina (<i>Neath</i>) (Lab) |
| † Caulfield, Maria (<i>Lewes</i>) (Con) | Robinson, Gavin (<i>Belfast East</i>) (DUP) |
| † Farrelly, Paul (<i>Newcastle-under-Lyme</i>) (Lab) | † Turner, Karl (<i>Kingston upon Hull East</i>) (Lab) |
| † Fernandes, Suella (<i>Fareham</i>) (Con) | † Vara, Mr Shailesh (<i>Parliamentary Under-Secretary of State for Justice</i>) |
| † Haselhurst, Sir Alan (<i>Saffron Walden</i>) (Con) | † Whately, Helen (<i>Faversham and Mid Kent</i>) (Con) |
| † Howarth, Sir Gerald (<i>Aldershot</i>) (Con) | |
| Lammy, Mr David (<i>Tottenham</i>) (Lab) | Katy Stout, <i>Committee Clerk</i> |
| † Mak, Mr Alan (<i>Havant</i>) (Con) | |
| † Milling, Amanda (<i>Cannock Chase</i>) (Con) | † attended the Committee |

Third Delegated Legislation Committee

Thursday 29 October 2015

[PHIL WILSON *in the Chair*]

Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2015

11.30 am

The Parliamentary Under-Secretary of State for Justice (Mr Shailesh Vara): I beg to move,

That the Committee has considered the Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2015 (S.I., 2015, No. 1571).

It is a pleasure to serve under your chairmanship this morning, Mr Wilson. This statutory instrument amends the Civil Legal Aid (Merits Criteria) Regulations 2013—which I will refer to hereafter as the merits criteria regulations—so that legal aid funding can be provided in some cases where the prospects of succeeding are below 50%, but where legal aid funding is required under the European convention on human rights or EU law.

The changes have been made to reflect the findings on the legal aid merits test made by the High Court in the recent case of *IS*. While the judgment is under appeal, the Government considered it important that these amendments were brought into force without delay to provide a means by which the Legal Aid Agency could comply with the judgment in the interim. Failure to make such a change promptly would have resulted in an extended period in which the Legal Aid Agency might, in some cases, either have taken an unlawful decision or, indeed, have been unable to take a decision.

For those reasons, and owing to limited parliamentary time, this statutory instrument was made and brought into force using the urgency procedure provided for under the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

The merits criteria regulations set out the criteria that must be applied by the director of legal aid casework at the Legal Aid Agency when determining whether an applicant qualifies for civil legal services under part 1 of schedule 1 to LASPO. Broadly speaking, those criteria provide the basis for deciding whether it is justified to provide or to continue to provide public funds in an individual case. The factors to be considered are similar to those that would influence a privately paying client of moderate means when considering whether to become involved in proceedings.

The merits criteria regulations include a number of different requirements, including a prospects of success test for an application for full representation. When the prospects of success test applies, the regulations generally prevent the Legal Aid Agency from funding any case where the prospects of success are below 50%. Had the merits criteria regulations remained unamended, the director would therefore have been placed in a bind. Refusing legal aid in some cases would have been an

unlawful decision, as, on the High Court's findings, it might have resulted in a convention breach. Although the Legal Aid Agency could have sought to delay non-urgent decisions, we did not think that it would be reasonable to await the outcome of the Government's appeal in this matter, which may not be known for some time.

The amendments made by this instrument mean that in cases where an application for full representation is subject to an assessment of its prospects of success, legal aid may now be provided for some cases assessed as having borderline or poor prospects of success. The director will need to be satisfied that it is necessary to determine, or, in the case of a risk of a breach, appropriate to determine that the prospects of success test is met, to prevent a breach or the risk of a breach of the legal aid applicant's rights under the convention or enforceable EU rights.

The Joint Committee on Statutory Instruments has expressed its views on the clarity of the transitional provisions in this SI. I apologise to Members of both Houses with an interest for any confusion this may have caused. We acknowledge that Committee's views, and the Department intends to develop a revised drafting approach to be used in the future that is more closely targeted at solely those cases that begin before commencement. However, we consider that the transitional provisions in this instrument still operate to achieve the policy intention.

This instrument makes important and necessary amendments to the merits criteria regulations to make sure that legal aid will continue to be provided in any case where refusal to grant it would be unlawful. It does so while maintaining the underlying purpose of the civil legal aid eligibility criteria and the legal aid scheme: to make sure that the limited legal aid budget is directed at the cases that most justify public funding.

I commend the statutory instrument to the Committee.

11.34 am

Karl Turner (Kingston upon Hull East) (Lab): It is a privilege to serve under your chairmanship, Mr Wilson. The Opposition welcome the widening of the merits test for civil legal aid, but the judgment of Mr Justice Collins in the *IS* case provides further evidence—if it is needed; frankly, it probably is not—that the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is an unmitigated disaster. This really ought to be an opportunity for the Government to review the Act and have a look at it, rather than waiting two years for the review they have promised in 2017. They should do the review early.

The Government's own figures show that the take-up of exceptional case funding has been woeful compared with their own predictions. The Ministry of Justice estimated that 7,000 applications for exceptional case funding would be made, with around 3,700 applications being granted funding. In fact, from April 2013 to September 2014, only 151 cases were granted funding. Figures from July 2014 to June 2015 show only a marginal increase, with just 308 cases given legal aid out of only 1,250 applications. There is a real problem, because the advice is not being given. I suspect the reality is that clients are litigants in person. They are not receiving legal advice from a solicitor or counsel, and they are clearly not being pointed in the right direction to receive support and advice.

It has always been obvious that this would happen, and the Government were warned about it by most commentators. Of the four objectives the Government planned to achieve, they have achieved only one. I will put on record what those objectives were. They aimed “to discourage unnecessary and adversarial litigation at public expense; to target legal aid to those who need it most; to make substantial savings to the cost of the scheme; and to deliver better value for money for the taxpayer.”

Significant savings to the cost of the scheme have been achieved, but at what expense? What is the knock-on effect?

What assessment have the Government made of all these judicial reviews? I have not checked the figures, but in terms of part 1 of LASPO, the Government have been judicially reviewed more times than on any other legislation in the previous Parliament. It is an unmitigated disaster, and the review must be brought forward now—never mind waiting. This is my only question for the Minister: will the Government bring forward the review, so that we can see objectively what the failings of the Act are? People are desperate for legal advice. The door has been slammed in their faces, and they are suffering as a result of this provision.

11.39 am

Mr Vara: I thank the hon. Gentleman for his comments. Mr Wilson, you will of course appreciate that this is a discussion about not legal aid generally but specifically

amending the merits criteria. With your permission, I will stick to the criteria of the debate, rather than broadening it. I will, however, make one or two general comments. LASPO does provide for a review, and we intend to have that review, but we will do it in the time schedule set out in the Act.

Coming back to the issue at hand, I simply say that the criteria for exceptional case funding are specific, and the giveaway is in the name—such cases are meant to be exceptional. I appreciate that some people have regarded it as a discretionary route to be pursued if a legal aid application is not granted, but it was supposed to be exceptional case funding, granted under specific circumstances, such as a breach of an individual’s ECHR rights or EU rights.

On numbers, we have granted more and more applications each quarter. There were 121 grants in the most recent quarter, which is a grant rate of 35%. That was the highest number since the scheme began, and compares with 38 grants made in the same quarter of last year. We have provided additional funds for litigants in person.

The regulations are a good measure, and I am pleased that the Opposition agree with them.

Question put and agreed to.

11.41 am

Committee rose.

