CASE HISTORY:
Court of Appeal (Civil Division) decision
Queen's Bench Division (Administrative Court) decision

DIRECTOR OF LEGAL AID CASEWORK (2) LORD CHANCELLOR v IS (A PROTECTED PARTY BY HIS LITIGATION FRIEND THE OFFICIAL SOLICITOR) (2016)

[2016] EWCA Civ 464

CA (Civ Div) (Laws LJ, Briggs LJ, Burnett LJ) 20/05/2016

LEGAL ADVICE AND FUNDING - ADMINISTRATIVE LAW - ADMINISTRATION OF JUSTICE

ACCESS TO JUSTICE : CIVIL LEGAL AID : EXCEPTIONAL FUNDING : FAIRNESS : GUIDELINES : LITIGANTS IN PERSON : LORD CHANCELLOR : PROTECTED PARTIES : LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012 s.10, s.4(3)(b) : CIVIL LEGAL AID (MERITS CRITERIA) REGULATIONS 2013 : EUROPEAN CONVENTION ON HUMAN RIGHTS 1950 art.6, art.8

The exceptional case funding scheme for the administration of legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.10 was lawful. There had clearly been real difficulties with the scheme, and there was room for improvement, particularly concerning lay applicants and those with disabilities, but its operation was a learning curve and there had been improvements since its inception.

The Director of Legal Aid Casework and the Lord Chancellor appealed against a declaration ([2015] EWHC 1965 (Admin)) that the exceptional case funding scheme for the administration of legal aid pursuant to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.10 was unlawful.

The judge below had based his decision on two essential findings; first, that the application form was far too complex, certainly for a lay person and even for solicitors; and second that solicitors with the necessary legal aid contracts were unwilling to help complete the forms because no payment was available for work done on unsuccessful applications. He also found that the Civil Legal Aid (Merits Criteria) Regulations 2013 were unlawful because of the rigidity of the merits test and the manner in which it was applied. He found that parts of the Lord Chancellor's guidance issued under s.4(3)(b) of the Act were unlawful.

The appellants submitted that (1) the judge had failed to explain how his criticisms of the scheme condemned it as unlawful within the meaning of the test of inherent unfairness; the scheme was lawful and the judge's criticisms did not establish the contrary; (2) the Regulations did not impose a uniform set of merits criteria, as the outcome of an application to which they applied depended on the type of legal services required and the category of case for which funding was sought; (3) criticisms of the Lord Chancellor's guidance, particularly para.8 regarding prioritisation of resources and para.39 regarding the approach to be adopted to ECHR art.6 and art.8, was unjustified.

HELD: (1) (Briggs LJ dissenting on the issue of whether the scheme was fair and lawful). The scheme was not inherently or systematically unfair. The judge below had not made clear how it failed to meet the test of inherent unfairness. He had made individual exhortations to improvement, but had not produced a reasoned conclusion, R. (on the application of Refugee Legal Centre) v Secretary of State for the Home Department [2004] EWCA Civ 1481, [2005] 1 W.L.R. 2219 and R. (on the application of Tabbakh) v Staffordshire and West Midlands Probation Trust [2014] EWCA Civ 827, [2014] 1 W.L.R. 4620 applied. However, that failure could not carry the appeal on its own. The central issue was whether there was so great a deficiency of access to civil legal aid for those entitled to assistance that the scheme was to be condemned as unfair. The dividing line between multiple instances of individual unfairness and an inherent failure in the system was mainly a matter of degree, but the latter could not be established by proof of the former. The evidence did not justify an across-the-board conclusion that the scheme was so unfair as to lay outside the range of lawful choices open to the appellants as to the administration of s.10. There had clearly been real difficulties with the scheme, and their extent was troubling. An important part of the context rested on the fact that the scheme had been operated on a learning curve. There was room for improvement, particularly concerning lay applicants and those with disabilities. However, while the success rate remained low and the number of applications was modest, there had been an improvement since R. (on the application of Gudanaviciene) v Director of Legal Aid Casework [2014] EWCA Civ 1622, [2015] 1 W.L.R. 2247, Gudanaviciene considered (see paras 11, 14-18, 23-24, 31, 52-57 of judgment).

(2) The Regulations were lawful. They offered a balanced, proportionate approach to the grant of legal aid, which could not be condemned as arbitrary. The merits criteria were carefully specified and exceptions were carefully spelt out. There was an internal review procedure, and judicial review was also available and effectively deployed, Del Sol v France (46800/99) (2002) 35 E.H.R.R. 38, Ivison v United Kingdom (39030/97) (2002) 35 E.H.R.R. CD20 and Eckardt v Germany (23947/03) (Admissibility) (2007) 45 E.H.R.R. SE7 applied (paras 62-66).

(3) Paragraph 8 of the guidance, which referred to limited resources being refocused on the highest priority cases, did not restrict grants of legal aid to such cases. In any event, it was a legitimate purpose of the Act that the availability of civil legal services be confined to cases judged to be of the greatest need, R. (on the application of Rights of Women) v Lord Chancellor [2015] EWHC 35 (Admin), [2015] 2 F.L.R. 823 applied. Paragraph 39 of the guidance was not tainted by any legal error and was not limiting (paras 9, 68-71).

(4) (Per Briggs LJ) The defects in the scheme were systematic and inherent because of the combination of an inaccessible application process and the absence of an economic business model sufficient to encourage lawyers to help litigants in person. The fact that many solicitors worked pro bono to assist people in obtaining the funding did not rescue the scheme from inherent unlawfulness (paras 75, 78, 83-84).

Appeal allowed

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Solicitors:

For the appellants: Treasury Solicitor
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