

The Queen on the Application of the Public Law Project and

The Secretary of State for Justice

SUMMARY

Lord Justice Moses:

1. Part 1 of Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 identified those cases most in need of public funding. They are not cases in respect of which the United Kingdom is, by virtue of the Human Rights Act 1998 or under the common law right of effective access to the court, obliged to provide legal assistance. Such cases fall within Section 10 of LASPO. The Lord Chancellor now proposes by statutory instrument (the LASPO Act 2012 (Amendment of Schedule 1 (Order 2014)) to introduce a residence test. All those who fail that test will be, subject to exceptions, removed from the scope of Part 1, although they remain eligible if they fall within Section 10.
2. Under Section 10 there is an obligation to make available civil legal aid where a failure to do so would in any individual case breach, or amount to a substantial interference with, the procedural safeguards guaranteed by Article 6 of the Convention, and has discretion to do so where a risk of such breach arises.
3. PLP contends, on two bases, that the proposed amendment is unlawful: first, the Lord Chancellor has no power to introduce such an amendment by way of delegated legislation and, second, such a discriminatory provision is contrary to common law or breaches Art. 6 read with Art. 14 of the Convention.
4. It is not difficult to identify those on whom the application of the residence test would have a direct impact. A concrete example given by Coram Children's Legal Centre in its response to the consultation paper is the case of L, who had recently arrived in the UK for the purposes of refugee family reunion with her husband, and who would be unable to access legal advice in relation to the failure of the local authority to assess the needs of her autistic eight year old son because she had only been in the UK for three months.
5. Ms Nicola Mackintosh QC of Mackintosh Law gives the example of P, a severely learning disabled adult, who had been "forced to live in a dog kennel outside the house, had been beaten regularly by his brother and mother, and starved over an extensive period of time". With the benefit of legal aid and the involvement of the Official Solicitor, proceedings in the Court of Protection resulted in a determination that it was in P's best interests to live separately from his family in a small group home with his friends and peers

and 24-hour care. Yet, as Ms Mackintosh explains, it would have been impossible to ascertain whether P met the residence test

6. If the introduction of a residence test by secondary legislation exceeds the power to make delegated legislation conferred by the statute, it will be ineffective. Analysis of Part 1 of Schedule 1 shows that the statute seeks to confine civil legal services which the Lord Chancellor must secure to cases which are judged to be of the greatest need. Parliament has chosen to exercise a judgement according to the criteria of need and not on any other basis.
7. The Ministry of Justice described LASPO, before the introduction of the residence test, as “targeting legal aid at the most serious cases which have sufficient priority to justify the use of public funds”.
8. No one can pretend that removing legal aid from non-residents is a means of targeting legal aid at those most in need. Non-residents who fall within those cases identified as being of greatest need are not in any less need by reason of their status as non-residents. There is no dispute as to the purpose of the introduction of the residence test. It is designed to ensure that those on whom civil legal aid is conferred “have a strong connection with the UK”. This test has nothing to do with need or an order of priority of need. It is, entirely, focussed on reducing the cost of legal aid.
9. The Lord Chancellor now asserts a power to introduce secondary legislation which excludes, from those adjudged to have the highest priority need, those whose need is just as great, but whose connection with the United Kingdom is weaker.
10. The introduction of the secondary legislation, restricting the provision of those services to residents, maintains and preserves such services as the Lord Chancellor considers demonstrate the greatest need, but merely deprives non-residents of the opportunity to take advantage of them
11. The court concluded that the proposed amendment by secondary legislation instrument is *ultra vires* and unlawful; that LASPO does not permit the residence criterion to be introduced by secondary legislation. The secondary legislation extends the scope and purpose of the statute and is, accordingly, outwith the power conferred by s.9 as supplemented by s.41
12. PLP’s essential complaint relating to discrimination is that, by introducing the residence test, the Lord Chancellor has unlawfully discriminated between those whose cases fall within Schedule 1 categories. This, PLP contends, amounts to unlawful discrimination in the context of three key constitutional values: access to justice, equal treatment before the law and the rule of law itself.
13. The real question raised by the instant case is whether, once the United Kingdom has chosen to provide legal assistance in cases where it was under no duty to do so, it may refuse such assistance to those who would otherwise qualify save for the fact that they do not meet a residence test.

14. The focus of this application is on cases where, in recognition of need, the United Kingdom is prepared to provide legal assistance without being under any obligation to do so. If legal assistance which a state chooses to provide may be regarded as analogous to social welfare benefits, as the Lord Chancellor contended, then the legality of a residence test is more easily established. These cases are different from the distribution of welfare benefits because the Government has already reached the conclusion that certain categories of case demonstrate such a high priority of need as to merit litigation supported by taxpayers' subsidy.
15. What must be justified is not the denial of legal aid but discrimination in cases of equal need between those who are eligible and those who are not. If the Lord Chancellor had wished he could have denied all civil legal assistance to anyone save in respect of those where he was under a legal duty to provide such assistance. But he has not chosen to restrict legal assistance to cases falling within s.10. He has chosen to go further and must, therefore, act lawfully in the manner in which he makes his choices.
16. *Ex hypothesi*, the 'foreign' claimants' cases have merit but they cannot afford to pay for advice or representation. Their cases are of the claimant's greatest importance, as judged by the Lord Chancellor, otherwise they would not have found their way into Schedule 1. As the Lord Chancellor said "Fundamental rights to access to justice...are protected". Absent legal assistance litigants will be substantially hampered in vindicating their rights. But "he who is subject to English law is entitled to its protection" (Lord Scarman). The consequence of the residence test is to hamper a non-resident claimant, when compared to a resident claimant, in seeking to vindicate domestic rights which domestic public authorities are under a domestic legal obligation to secure.
17. In such a context, when what is at stake is the protection which domestic law affords to all who fall within its jurisdiction, it seems to me that the provision of legal assistance is far from analogous to the distribution of welfare benefits. The mere saving of cost cannot justify discrimination.
18. The vital distinction in this case lies between the making of a choice by the State as to whether to provide legal assistance in some cases, and discrimination between those eligible once a choice to provide legal assistance in those cases has been made. Within the system provided in Schedule 1 of LASPO, the United Kingdom is not permitted to discriminate against non-residents on the grounds that to do so might save costs.
19. The other justification advanced is public confidence in the legal aid system. The Lord Chancellor had previously justified the restrictions on legal assistance by reference to commanding public confidence and ensuring credibility by targeting those people and cases where "funding is most needed". In the context of a discriminatory provision relating to legal assistance, invoking public confidence amounts to little more than reliance on public prejudice.