Neutral Citation Number: [2020] EWHC 3140 (Admin)

Case No: CO/700/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 November 2020

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- -

Between :

THE QUEEN
on the application of G.R.

Claimant

- and -

DIRECTOR OF LEGAL AID CASEWORK

Defendant

- and -

THE LORD CHANCELLOR

Interested Party

- -

Chris Buttler and **Emma Foubister** (instructed by **Public Law Project**) for the **Claimant**
Malcolm Birdling (instructed by the **Government Legal Department**) for the **Defendant**
Imogen Proud (instructed by the **Government Legal Department**) for the **Interested Party**

Hearing date: 9 June 2020

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. Public money spent upon civil legal aid is rationed so that it is targeted upon those in greatest need. It is not available in some areas of work at all and, where it is available in principle, it is for the most part subject to merits and means testing. The issue in this case is whether the effect of the *Civil Legal Aid (Financial Resources & Payment for Services) Regulations 2013 ("the Means Regulations")* is that the Director of Legal Aid Casework must refuse legal aid where an applicant has an interest in land, the value of which after the application of various statutory disregards exceeds £8,000, even if he or she cannot sell or use the property to fund legal representation.

2. Most homeowners will not be eligible for legal aid because unless they have an income well in excess of the thresholds set by the *Means Regulations* (a gross monthly income of £2,657 and a disposable monthly income of £733), they are unlikely to be offered a mortgage. Some will, however, lose their once lucrative employment or find that their pension was not what they expected. Even in these cases, most homeowners will not be eligible because they will have disposable capital in excess of £8,000. Many of these relatively cash-poor but asset-rich homeowners will be able to sell their homes or at least borrow against the asset in order to fund legal representation. Others, however, may find themselves unable to do so. One obvious group in this invidious position is those with negative or very little equity in their homes. Another is those on very low incomes who have joint interests in property bought principally on the basis of their former partners' more substantial incomes.

3. GR is such an applicant. She claims to be the victim of serious and prolonged physical, emotional and sexual abuse from her former partner, BK. She applied for civil legal aid to fund private family-law proceedings in respect of the custody of the couple's two children and a dispute as to their jointly owned property. Her application for legal aid was "in scope" in that it was to fund litigation of a type that is funded by the Legal Aid Agency and listed in Schedule 1 of the *Legal Aid, Sentencing & Punishment of Offenders Act 2012 ("LASPO"*). Further, her claim met the merits test and, because she was in receipt of Universal Credit, she was deemed by regulation 6(2) of the *Means Regulations* to pass the gross income and disposable income elements of the means test. A modest bank balance aside, her only asset was her joint interest in her home, but she claimed that such paper wealth was inaccessible in that she could not sell or borrow against the asset.

4. The Legal Aid Agency refused GR's application for legal aid because it assessed her disposable capital to be well above the threshold in the *Means Regulations*. On 15 April

2020, Lewis J (as he then was) granted GR permission to challenge the Director's decision in this case on two grounds:

4.1 First, GR argues that on a proper application of the *Means Regulations,* the Director was wrong to regard herself as bound by regulation 37 to take the value of her interest in her home (subject to the statutory regards) as the hypothetical sale value of such asset. Rather, she argues, the Director should have valued the house at nil, or exercised her discretion pursuant to regulation 31(b) to do so.

4.2 Secondly, GR argues that the Director's decision to refuse legal aid breached, or has threatened to breach, her rights under Articles 6 and 8 of the *European Convention on Human Rights.*

5. This case therefore turns on the proper meaning and effect of regulations 31 and 37 of the *Means Regulations,* which provide:

> "31. Value of resource of a capital nature
>
> In so far as any resource of a capital nature does not consist of money, its value must be taken to be—
>
> (a) the amount which that resource would realise if sold; or
>
> (b) the value assessed in such other manner as appears to the Director to be equitable."
>
> "37. Interest in land
>
> (1) In calculating the disposable capital of the individual, the value of any interest in land must be taken to be the amount for which that interest could be sold after deducting, subject to paragraphs (2) and (3), the amount of any debt secured by a mortgage or charge on the property.
>
> (2) The total amount to be deducted under this regulation on an assessment of the individual's disposable capital may not exceed £100,000 in respect of all secured debts..."

6. In short, the issues can be stated as follows:

6.1 Is regulation 31 of general application upon the valuation of all resources of a capital nature other than money, or are interests in land to be valued solely in accordance with regulation 37?

6.2 Is the "amount for which [the interest in land] could be sold" in regulation 37(1) its hypothetical open-market value, or should the Director consider instead the amount for which the property "could be sold or borrowed against in time to fund the litigation?"

6.3 Has the Director breached GR's convention rights?

THE FACTS

GR's case

7. GR plainly cannot fund legal representation out of income. Following the breakdown of the relationship, GR continues to live in a three-bedroom house in London worth £650,000. It is subject to a mortgage of £302,000. She cannot, however, meet the mortgage payments or raise further funds against the property. She has no other assets save for a modest £28 in a bank account. Even if she were able to satisfy a lender that she could meet the repayments upon any new loan, she cannot obtain BK's consent to borrow against the property.

8. On 8 October 2019, GR applied for legal aid. Anticipating that her joint interest in her home might otherwise disqualify her from obtaining legal aid, GR explained that she remained the children's primary carer and that the house, which is within walking distance of their school, met their housing needs. She said that the couple were in dispute as to the house and set out the following matters:

   8.1 BK wished to sell the family home leaving GR to rent a property for her and the children.

   8.2 She could not raise a loan against the property without BK's consent, which he would not give. She could not therefore fund the costs of legal representation by raising a loan.

   8.3 She could not sell the property in order to raise funds for legal representation since BK challenges her entitlement to receive 50% of the equity, arguing that a loan to his parents of £40,000 must be repaid from the net proceeds of sale and that GR must pay an occupation rent from her share.

   8.4 Even if she were entitled to 50% of the equity, she would "only" secure £164,000. Since a three-bedroom property in the catchment area of the children's school would cost £650,000 and she has insufficient income to obtain a mortgage, she would have to rent. A suitable rental property would cost a minimum of £1,800 per month and, since her youngest child was then 4, she could not afford to rent at such rates from her share of the net proceeds of sale.

   8.5 Since part of the purpose of the litigation for which she sought legal aid was to secure an order that the property be transferred to her sole name to ensure that the children's housing needs are met, her solicitor argued that property could not be sold and that the Director should exercise her discretion pursuant to regulation 31(b) of the *Means Regulations* to value her interest in the asset at nil.

9. By letter of 15 October 2019, the Legal Aid Agency refused GR's application because it assessed her disposable capital at £65,278, comprising £65,250 in respect of her interest in her home together with the credit balance in her bank account. Although not spelt out in the decision letter, the agency subsequently explained that the property value was arrived at by the following methodology:

Declared value of property:	650,000
Less notional sale costs (at 3%):	(19,500)
Less allowance for mortgage costs (reg. 37):	(100,000)
	530,500
Value of half interest:	265,250
Less allowance for subject of the dispute (reg. 38):	(100,000)
Less equity allowance (reg. 39):	(100,000)
	£65,250

10. GR submitted an appeal arguing that the Director had failed to exercise her discretion to disregard the value of the property. It was again asserted that it should have been valued at nil because GR could neither sell nor borrow against the asset. The Legal Aid Agency rejected the appeal on 21 November 2019.

11. In January 2020, GR saw a mortgage adviser at her bank. She was told that she could not change the mortgage to an interest-only mortgage without BK's consent; that the bank would not lend further money against the property because the mortgage was in arrears; and that, even if the account was not in arrears, the bank could only make a further advance on a joint application with BK.

12. In December 2018, GR obtained a non-molestation order without legal representation but with the benefit of assistance from an Independent Domestic Violence Advocate. Between February and August 2019, GR was able to instruct Beck Fitzgerald on a private basis by borrowing £3,500 from her mother and by selling her engagement ring. Subsequently, Beck Fitzgerald provided some legal services on a *pro bono* basis in respect of the proceedings under the *Children Act 1989* and negotiated representation by counsel at reduced rates. Such assistance enabled GR to instruct a barrister on a private basis for a hearing in November 2019 by borrowing another £1,000 from her mother. In order to make this further loan, GR's mother had to sell some furniture and jewellery. For a further hearing in February 2020, the barrister agreed to charge a maximum of £390 which GR hoped to borrow from an aunt.

13. GR has no current plan to fund future hearings and explains that her mother is not in a position to lend her any more money. Her solicitor, Molly Ashcroft of Beck Fitzgerald, has confirmed that her firm cannot continue to act on a *pro bono* basis and that, without legal aid, GR will be unrepresented at any further hearings in the property dispute and, should the current childcare arrangements break down, in proceedings under the *Children Act 1989*. GR asserts that she lacks the ability to participate effectively in legal proceedings against BK without legal representation because, among other matters, she would not be able to cross-examine her abusive ex-partner in person.

A wider problem

14. Ms Ashcroft explains her firm's experience of this issue:

> "Beck Fitzgerald is a small specialist family law practice with particular expertise in domestic abuse. In my firm's experience, the Claimant's situation is not unusual or unique. Whilst difficult to quantify, it is the case at Beck Fitzgerald that, on average, we cannot assist 1-2 clients per week in securing legal aid as the equity in the property they live in is considered by the Legal Aid Agency as an asset which they can access. This is irrespective of whether the property is occupied by the client and their children, thus providing a home and irrespective of whether the property is jointly owned by the client and the perpetrator of abuse. These clients are unable to take out loans, are on a low income and often, the question of sale/occupation of the family home is the subject matter of the dispute."

15. In March 2018, the Law Society published a report by Dr Lisa Whitehouse into the affordability of legal proceedings for those who are ineligible for legal aid by reason of exceeding the capital threshold. Dr Whitehouse addressed the question as to the likely practical availability of equity release for someone on a low income or on a means-tested out-of-work benefit. Dr Whitehouse reported, at paragraphs 3.41-3.42 of her report:

> "3.41 On the basis of these calculations, persons in receipt of means-tested, out-of-work benefits such as income-related Employment and Support Allowance or Universal Credit and persons in employment whose gross or disposable income, as calculated in accordance with the *Means Regulations,* is below the thresholds of £2,657 or £733 per month respectively, with an average household expenditure, may not be eligible for a remortgage, further advance or second charge mortgage.
>
> 3.42 There is the potential for these low income households to obtain secured credit from lenders with a greater 'risk appetite' such as sub-prime lenders. However, this will come at a cost in the form of higher fees and interest rates. While these lenders may determine that the borrower meets the affordability criteria, the question arises as to whether such loans would be 'affordable' in reality for these low income households. As noted above, the decision to seek further secured credit from sub-prime lenders in order to pay legal costs, particularly at high rates of interest when incomes are relatively low, may place the household at greater risk of repossession."

16. Dr Whitehouse made the obvious point that those with negative or very little equity in their homes would not be able to obtain further secured credit. While some applicants might sell property to fund litigation, it takes on average 12-14 weeks to complete a sale in the UK, and of course some properties will sit on the market for significantly longer.

17. The claimant filed a late witness statement by Olive Craig, a solicitor employed by Rights of Women. Objection was taken to its admission. I do not admit it into evidence since the Director has not had a proper chance to consider and respond to this evidence. I do not, however, consider that GR is prejudiced by its non-admission since much of the statement sets out the history and context of the *Means Regulations*, the details of the regulations and GR's argument as to how the same should be

construed. Further, the case studies from paragraphs 31-74 of the statement can quite properly be considered by the court as hypothetical examples to test the way in which the regulations work in different factual scenarios.

18. At paragraphs 23-24, Ms Craig explained:

> "23. Obtaining loans secured against a jointly owned property is only possible with the consent of the person who jointly owns the property. In a family case, it would be extremely unusual for one party to agree to reduce the equity in a property in order to fund legal advice for the other party. This is particularly the case now that legal aid in most family cases is limited to victims of domestic abuse. It is well recognised that abusers will use any means they can to continue to control the victim of their behaviour following the end of the relationship. Preventing them from accessing legal advice would be an easy way to do so.
>
> 24. Even if the abuser did consent to the applicant securing a loan against a jointly owned property, lenders do not, in our experience, lend to only one owner – they would expect it to be a joint mortgage. This means the applicant needs the consent of the abuser not only for a loan to be secured against the property but also to be assessed for the mortgage and to become liable for it in the event the applicant cannot pay..."

19. These points are well made, but do not require evidence. I am content to take judicial notice of the followings matters:

    19.1 Commercial lenders do not routinely advance monies against jointly owned property save with the consent of all co-owners. Any such further advance would not only be secured against the entirety of the jointly owned asset, but the lender would invariably seek to ensure that all co-owners were jointly and severally liable to repay the advance.

    19.2 Anyone locked in acrimonious family litigation following the breakdown of a relationship would be unlikely to agree to assume joint and several liability for the repayment of monies borrowed to fund his or her former partner's legal representation. Equally, such person would be unlikely to agree to reduce the equity in jointly owned property to such end.

    19.3 Some abusers may seek to continue to control their victim even after the end of the relationship, including by seeking to prevent their accessing legal advice and representation.

20. By a letter dated 19 February 2020, the Government Legal Department set out the Lord Chancellor's understanding of the interplay between regulations 31 and 37:

> "9. Our client's position is that regulation 31 is the starting point for calculating the value of any capital resource (including land), and the regulation states that the value of a capital resource must be taken to be 'the amount which that would realise if sold.'
>
> 10. In respect of valuing land, regulation 37 further sets out that the value of any interest in land 'must be taken to be the amount for which that

> interest could be sold after deducting… the amount of any debt secured by a mortgage or charge on the property.' Regulation 37 will apply where, on the facts, the Director takes a decision that the land could be sold. Our client accepts that regulation 31(b) does give the Director a discretion to assess to value (sic) property 'in such other manner as appears to the Director to be equitable.'
>
> 11. In the case of valuing land, the regulations permit the Director to exercise her discretion conferred under regulation 31(b) where the Director has determined it is not possible or appropriate to establish the sale value of the land. Where land can be sold, the regulations state that its value should be the amount for which it could be sold pursuant to regulations 31(a) and 37."

21. By a further letter of 6 March 2020, the Government Legal Department added:

> "[The Lord Chancellor's] position is that in respect of valuing land, regulation 37 applies where, on the facts, the Director has taken a decision that the land in question could be sold. Regulation 37 states that the value of interest in land 'must be taken to be the amount for which that interest could be sold after deducting […] the amount of any debt secured by a mortgage or charge on the property'.
>
> Where the Director has determined the land cannot be sold, the regulations permit the Director to exercise her discretion conferred under regulation 31(b) to assess the value of the property 'as appears to the Director to be equitable.'"

22. By further letters dated 18 March and 21 May 2020, the Lord Chancellor reasserted the formulation in the 6 March letter and explained that the reference in the February letter to "where the director has determined it is not possible or appropriate to establish the sale value of the land" was a drafting error.

23. The Lord Chancellor has filed a statement from Jelena Lentzos, the Deputy Director of Legal Aid Policy at the Ministry of Justice. Ms Lentzos observes that it is a necessary feature of means testing that lines have to be drawn in order efficiently to direct resources to those most in need. She asserts that the *Means Regulations* comprise a carefully calibrated system that prevents the wealthy from having access to legal aid and ensures that funding is targeted on those in greatest need. In any event, she does not accept that the denial of legal aid is an absolute bar to access to justice, observing that a disappointed applicant might still engage in litigation:

    23.1 as a litigant in person;

    23.2 by agreeing a deferred payment scheme or conditional fee agreement for legal representation;

    23.3 by securing representation on a *pro bono* basis; or

    23.4 by selling assets to release equity to pay for lawyers on a private basis.

24. Ms Lentzos concedes that such steps might not be available in every case, but rejects the suggestion that GR herself cannot properly achieve access to justice through one

or more of these routes. Indeed, she points out that BK is himself seeking a sale of the property which would therefore release funds. She adds, at paragraph 31:

> "If it were right that money which is currently 'tied up' ought to be disregarded, the consequences of this would be that legal aid would change unrecognisably from its current model of assisting those most in need. The money of wealthy people may be 'tied up' in myriad ways, and [the Ministry of Justice] would certainly not want to have a policy of discounting it merely because it is not immediately accessible. To give just one example, the wealthy may choose to 'tie up' some of their money in a fixed-term savings accounts, where there is a notice period for withdrawing money or a penalty for doing so. Furthermore, there would be a risk that the wealthy would deliberately 'tie up' assets just so, or for just long enough, that they could not be used to purchase the legal services. It is certainly not the Lord Chancellor's policy decision to discount such 'tied up' capital (and the *Means Regulations* do not allow for it – it would be taken into account in assessing capital)."

25. Ms Lentzos adds that the Lord Chancellor is currently undertaking a review of the *Means Regulations* and, specifically, their effectiveness in protecting access to justice. A consultation paper was originally expected to be published by late summer 2020. At the time of handing down this judgment, the paper has not yet been published. No doubt it has been delayed by the significant additional work undertaken by all government departments in continuing to deliver public services during the continuing COVID-19 pandemic.

EF's case

26. In R *(EF) v. Director of Legal Aid Casework,* another disappointed applicant for legal aid sought to challenge the Director's failure to exercise the alleged discretion under regulation 31(b) in respect of the valuation of her interest in a property in Germany. On 8 November 2019, a deputy judge gave EF permission to pursue her challenge. Shortly thereafter EF's case was reconsidered and she was granted legal aid. The grant of legal aid in EF's case appears to be solely explicable on the basis that the Director exercised a discretion which, in these proceedings, she asserts is not open to her. That said, the case of EF does not assist the court in determining the legal question at the heart of these proceedings as to the correct construction of the regulations.

THE LASPO REFORMS

THE 2010/11 CONSULTATION

27. In November 2010, the government issued a consultation paper, "Proposals for the Reform of Legal Aid in England & Wales." In his ministerial foreword, the then Lord Chancellor, the Rt Hon. Kenneth Clarke MP, explained that the legal aid scheme had grown from its roots in 1949 to "one of the most expensive in the world, available for a very wide range of issues, including some which should not require any legal expertise to resolve." The government considered that there was a compelling case for going back to first principles. The Lord Chancellor argued:

> "To continue like this is unsustainable, and I want to use these lessons as an opportunity for fundamental reform of the scheme. I want to discourage people from resorting to lawyers whenever they face a problem, and instead encourage them, wherever it is sensible to do so, to consider alternative methods of dispute resolution which may be more effective and suitable. I want to reserve taxpayer funding of legal advice and representation for serious issues which have sufficient priority to justify the use of public funds, subject to people's means and the merits of the case."

28. He added, by reference to the then government's policy of austerity in order to rebuild the economy following the global financial crisis of 2007/8:

> "Legal aid must also play its part in fulfilling the government's commitment to reducing the fiscal deficit and returning this country's economy to stability and growth. The proposals on which I am consulting are therefore designed with the additional aim of achieving substantial savings.
>
> It is an approach which demands that we make tough choices to ensure access to public funding in those cases that really require it, the protection of the most vulnerable in our society and the efficient performance of our justice system."

29. The paper indicated, at paragraph 5.2, that the government's proposals for reform of the financial eligibility rules had been designed "with the aim of making substantial savings in legal aid expenditure." The proposals were put on the basis that "those who, whether on the basis of their disposable capital or income, have the ability to pay for or contribute towards their costs in civil litigation, should be asked to do so": para. 5.6. The proposals in respect of capital eligibility were said to preserve funding "for those without the means to pay for legal services": para. 5.8.

30. As to the detail, the government proposed to abolish "capital passporting" which allowed those applicants in receipt of certain benefits to bypass any further assessment of their disposable capital. It recognised that such proposal would remove from eligibility applicants, like GR, who were in receipt of a passporting benefit with a disposable capital assessed in excess of £8,000. Addressing directly this group, the paper explained, at paragraph 5.12:

> "These clients would be expected to rely on their own capital resources to fund their proceedings just as non-passported clients on similar incomes are expected to do at present."

31. In respect of the assessment of disposable capital, the government proposed to remove the £100,000 cap on the mortgage disregard so that funding would be determined on the basis of the true equity in any interest in land. Against that, the government proposed to abolish the £100,000 disregard in respect of the value of the equity in the applicant's main dwelling (the equity disregard) and the further £100,000 disregard in respect of capital held by pensioners on low incomes (the pensioner disregard). Justifying these proposals, the paper explained, at paragraph 5.25:

> "The government believes that it is inappropriate that limited legal aid resources should be directed at clients who potentially have a substantial amount of equity or other capital which could be used to fund their case. Where clients have access to a capital resource, we believe it is right that this should be their first recourse before seeking public funds."

32. These proposals were balanced by a new property eligibility waiver. The paper explained, at paragraph 5.33:

> "We recognise that there may be situations where the client might find it difficult to access their equity readily. For that reason, it is proposed that the [Legal Services Commssion ("LSC")] would have the power to waive the capital limits in certain circumstances. This waiver would not apply to all capital, but only to capital held as equity in the client's properties. Clients with property or properties with a gross total value of £200,000 or less could apply for the waiver."

33. The new waiver was proposed on conditions that included a requirement that the assisted person should repay their legal costs by, for example, selling property or raising a loan unless the costs were paid by the other side or secured by a statutory charge. Paragraph 5.36 explained that among the circumstances in which the new waiver might be appropriate would be cases of urgency where the applicant could not be expected to obtain private finance in the time available and cases where the applicant was unable to obtain credit after two or more genuine attempts to do so.

34. The paper added, at paragraph 5.37:

> "Where an individual has applied for Legal Representation to obtain domestic violence protection, the LSC has an existing discretion to waive the eligibility limits for those individuals. In future, we would expect that where an individual was seeking domestic violence protection but was financially ineligible based on capital from property, the LSC would continue to consider exercising their general discretion to waive the eligibility limits in relation to that domestic violence application and the individual would not need to request a property eligibility waiver for that application."

35. The government proposed to retain the further capital disregard of £100,000 in respect of assets that are the subject matter of the dispute, but cautioned at paragraph 5.45:

> "While the government recognises that people may find it difficult to have ready access to capital in cases where property is the subject matter of the dispute, we believe that it is not appropriate for limited public resources to be used in cases where people are arguing over very substantial assets."

36. Following consultation, in June 2011 the government published its formal response under the title "Reform of Legal Aid in England & Wales: the Government Response." Mr Clarke explained that the government's aim were "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."

37. By its response, the government accepted that it should retain the equity and pensioner disregards since otherwise the suggested property eligibility waiver would be likely to be routinely applied given the practical difficulties in using capital in equity to fund legal proceedings: paras 38-40. Seeing its earlier proposals as part of a related package, it therefore decided against both lifting the cap on the mortgage disregard (paras 48-50) and introducing a new discretionary waiver scheme (para. 61).

38. During the committee stage of what became *LASPO,* an amendment was considered on 8 September 2011 that would have restricted the Lord Chancellor's power to make regulations about financial eligibility. In resisting the amendment, Jonathan Djanogly MP explained that the government's proposals ensured that legal aid was targeted on those most in need while recognising the difficulties that there may be in releasing capital held in property.

THE 2012 ACT

39. Sections 9, 11 and 21 of *LASPO* provide:

"9. General cases

(1) Civil legal services are to be available to an individual under this Part if—

(a) they are civil legal services described in Part 1 of Schedule 1, and

(b) the Director has determined that the individual qualifies for the services in accordance with this Part (and has not withdrawn the determination)…"

"11. Qualifying for civil legal aid

(1) The Director must determine whether an individual qualifies under this Part for civil legal services in accordance with—

(a) section 21 (financial resources) and regulations under that section, and

(b) criteria set out in regulations made under this paragraph."

"21. Financial resources

(1) A person may not make a relevant determination that an individual qualifies under this Part for services unless the person has determined that the individual's financial resources are such that the individual is eligible for the services (and has not withdrawn the determination)…

(2) Regulations may–

(a) make provision about when an individual's financial resources are such that the individual is eligible under this Part for services, and

(b) make provision for exceptions from subsection (1).

(3) Regulations may provide that an individual is to be treated, for the purposes of regulations under subsection (2), as having or not having financial resources of a prescribed description."

40. The principal regulations made under ss.11(1)(a) and 21 are the *Civil Legal Aid (Merits Criteria) Regulations 2013* and the *Means Regulations* respectively. Thus the Act and these two sets of regulations ration civil legal aid so that it is generally only available for the areas of work specified in Schedule 1 to individuals whose cases meet the merits criteria and who also meet the financial eligibility rules.

THE MEANS REGULATIONS

41. By regulation 6 of the *Means Regulations,* the Director must determine that an individual meets the financial eligibility rules if he or she is in receipt of a passporting benefit and does not have disposable capital in excess of £8,000. In limited circumstances the Director is given a discretion to waive the financial eligibility rules. None apply to the proceedings contemplated in this case but such circumstances include, at regulation 12, cases where the applicant seeks protective orders or committal for breach of such orders arising out of alleged domestic violence.

42. The regulations make detailed provision for the assessment of disposable capital. Regulation 30 provides the general rule:

> "Subject to the provisions of these Regulations, in calculating the disposable capital of the individual, the amount or value of every resource of a capital nature belonging to the individual on the date on which the application is made must be included."

43. I have already set out the terms of regulations 31 and 37 that are at the heart of this case. A number of other regulations are also relevant to arriving at the value of interests in land. Regulation 35 deals with the co-ownership of assets. It provides that where the individual owns property jointly or in common with another person, the Director "may treat" such property as held in equal shares or in such other proportions as appear equitable to the Director. There are then a series of provisions requiring the Director to disregard certain amounts or assets. Two may affect the valuation of interests in land:

43.1 Regulation 38 requires the first £100,000 of the value of any asset that is the subject matter of the dispute for which legal aid is sought to be disregarded.

43.2 Regulation 39 disregards the first £100,000 of the value of the applicant's home.

44. There are also a series of bespoke provisions in respect of other asset classes:

    44.1 The valuation of money due to an individual, which is expressly excluded from regulation 31, is dealt with by regulation 32. Such asset must be valued at its present value, regardless of whether it is payable immediately or whether payment is secured.

    44.2 Regulation 33 concerns the valuation of life insurance and endowment policies, which "must be taken to be the amount which the individual could readily borrow on the security of [such] policy."

    44.3 Regulation 34 provides that save in exceptional circumstances, the value of household furniture and effects of the individual's main or only dwelling, his or her clothing and (subject to regulation 36) his or her implements of trade must be disregarded.

    44.4 Regulation 36 deals with the valuation of businesses. Where an individual is the sole owner of or a partner in a business, the value of the business:

    > "must be taken to be the greater of:
    >
    > (a) such sum, or their share of such sum, as could be withdrawn from the assets of the business without substantially impairing its profits or normal development; and
    >
    > (b) such sum as the individual could borrow on the security of their interest in the business without substantially injuring its commercial credit."

45. Finally, a number of other assets either must or may be disregarded:

    45.1 Various welfare and compensation payments must be disregarded: reg. 40(1).

    45.2 Compensation payments made to victims of the fire at Grenfell Tower in June 2017 may be disregarded: reg. 40(2).

    45.3 Capital of up to £100,000 saved by applicants aged 60 or over whose monthly disposable income is less than £315 must be disregarded: reg. 41.

    45.4 Interim payments made in court proceedings may be disregarded: reg. 42.

    45.5 Assets that the applicant is restrained from dealing with (despite a request that all or part of the asset be released for use in connection with the proceedings for which legal aid is sought) may be disregarded: reg. 43.

GROUND 1

46. Chris Buttler, who appears for GR with Emma Foubister, argues that regulation 31 requires the Director to take the value of the home to be either the amount which it would realise if sold or "the value assessed in such manner as appears to the Director to be equitable." Accordingly, he argues that the Director was wrong to take the view that regulation 37 compelled her to refuse GR's application for legal aid. Alternatively, Mr Buttler argues that upon the true construction of the regulations, the expression "the amount for which that interest could be sold" in regulation 37(1) should be construed so as to allow the Director to enter a nil valuation where the applicant is not in a position to sell or mortgage the land.

47. Malcolm Birdling, who appears for the Director, relies on the principle of statutory interpretation that, in the absence of any contrary intention, the general gives way to the specific: see, for example, *Bennion on Statutory Interpretation,* 7th Ed., para. 21.4. He adds that there is no indication of any contrary intention in this instance and that it is entirely clear that regulation 37 is mandating the only permissible approach to the valuation of interests in land. Mr Buttler responds that, as the passage in *Bennion* makes clear, such principle does not apply where, rather than a specific provision and a more general provision, there are simply provisions with "overlapping aims and overlapping applications." He argues that the regulations expressly stated where the draftsman intended to show precedence between two provisions. Further, he argues that the two regulations serve different purposes; regulation 37 deals with the qualified deduction of any mortgage debt while regulation 31 acts as a safety valve and requires value to be assessed other than by sale value where such course appears equitable to the Director.

48. As to the second argument, Mr Birdling responds that Mr Buttler seeks to add a gloss to the statutory language that is simply not there on the face of the regulations. The statutory partial disregards for assets that are the subject of a dispute (reg. 38) and for the applicant's primary residence (reg. 39) indicate the proper approach where it is not possible in practice to sell an interest in land.

49. In support of this argument, Mr Birdling relies on the ministerial statement by Mr Djanogly at the committee stage of the *LASPO* bill on 8 September 2011 as to the purpose of what is now regulation 38:

> "The second [proposed change] is imposing a limit of £100,000 on the disputed assets that can be disregarded when assessing eligibility for civil legal aid at all levels of service, to ensure that legal advice is not provided to wealthy people contesting ownership of substantial properties."

50. Mr Birdling also relies on Mr Djanogly's explanation of the government's reasons for rejecting amendments that, if enacted, would have required the value of an applicant's primary residence to be entirely excluded:

> "If they were agreed, that might have the unfortunate effect of rendering wealthy homeowners, with high value properties, financially eligible for legal aid, thereby diverting limited public legal aid funding from those most in need. The government originally consulted on proposals that would have tightened the rules regarding capital held in a person's dwelling. However, we listened to respondents' views about the equity in their properties and announced that we will retain the current system of capital disregards in relation to disposable capital. The present system already allows for significant sums of capital to be disregarded when assessing disposable capital. For example, £100,000 of equity in the main dwelling house may be disregarded, and a further £100,000 may be disregarded in respect of a mortgage for the person's property. The current system therefore ensures that legal aid is targeted on those most in need, while it also recognises the difficulties that there may be in releasing capital held in property."

51. Mr Birdling points to the fact that while regulation 33 requires the Director to value life insurance and endowment policies by reference to the amount which the policyholder could "readily" borrow on the security of such policy, the absence of a similar qualification in regulation 37 points to the contrary construction. Further, he argues that a construction which requires the Director to consider whether an asset could be sold or borrowed against in time to purchase legal representation would render the means test unworkable and arbitrary.

52. Imogen Proud, who appears for the Lord Chancellor, made brief submissions supporting the position taken by the Director.

GROUND 2

53. Mr Buttler argues that the state is required by Article 6 of the *European Convention on Human Rights* to make legal aid available to an impecunious litigant unless he is able, as an unrepresented litigant, to present his case effectively and without obvious unfairness. Further, he argues that Article 8 requires the state to provide legal aid if it is needed to ensure that the procedures for asserting or defending an individual's Article 8 rights are effectively accessible. He therefore contends that the court must, pursuant to s.3 of the *Human Rights Act 1998,* read and give effect to *Means Regulations* in a way that is compatible with GR's convention rights. Further, he argues that by refusing legal aid in this case, the Director has breached GR's convention rights.

54. Mr Birdling argues that the regulations reflect a carefully calibrated scheme. There is no unlawfulness and, if there were, this claim should have been brought against the Lord Chancellor and not the Director, whose role is simply to apply the statutory scheme. The restriction of legal aid to those who meet both the means and merits tests is, he argues, lawful and in accordance with both Strasbourg and domestic jurisprudence. Means testing necessarily draws the line somewhere. In drawing bright-line rules, the Lord Chancellor made difficult decisions about the allocation of scarce resources to meet the greatest need. That such line may have been drawn imperfectly, did not mean that the policy cannot be justified: per Lord Neuberger in *R (RJM) v. Secretary of State for Work & Pensions* [2008] UKHL 63, [2009] 1 A.C. 311, at [57]. Further, Mr Birdling does not accept that GR is in fact unable to participate effectively in the family-law proceedings. He submits that she could reasonably be expected to investigate whether she might obtain legal representation on a deferred-payment basis. Further, the Family Court would be expected to ensure the fairness of proceedings were she to be unrepresented at any substantive hearing.

DISCUSSION

55. Although the submissions sometimes strayed into questions of *vires*, this case does not involve any challenge to the lawfulness of the *Means Regulations*. Rather it is a challenge to the Director's application of the regulations to GR's case. I have, as I explain below, been able to determine such challenge on the basis of conventional principles of statutory construction.

THE PROPER APPROACH TO CONSTRUCTION

56. In construing the *Means Regulations,* the court is seeking to interpret the words used by the draftsman having regard to the context and the mischief which the Act and regulations sought to address. As Lewison LJ explained in *Pollen Estate Trustee Co. Ltd v. Revenue & Customs Commissioners* [2013] EWCA Civ 753, [2013]1 W.L.R. 3785, at [24]:

> "The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose… In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole..."

57. It is of course fundamental that the state must provide access to justice. While the arguments before me were framed by reference to Article 6 of the Convention, such right is, as Lord Reed powerfully demonstrated in *R (Unison) v. Lord Chancellor* [2017] UKSC 51, [2017] 3 W.L.R. 2543, not some recent European import but deeply embedded in our constitutional law. Section 3 of the *Human Rights Act 1998* requires the court, in so far as it is possible to do so, to read and give effect to legislation in a way that is compatible with convention rights.

58. Here, Articles 6 and 8 are engaged. While Article 6 does not in terms require the state to provide legal aid, the European Court of Human Rights has recognised that the article can in certain circumstances require the provision of such support in order to guarantee fair access to a court since the Convention is not intended to guarantee rights that are "theoretical or illusory" but rights that are "practical and effective": *Airey v. Ireland* (1979) 2 EHRR 305, at [24]. Further, GR's Article 8 rights to respect for her private and family life can only be vindicated by a fair and effective resolution of the family-law disputes with her former partner: *Re. K (Children)* [2015] EWCA Civ 543, [2015] 1 W.L.R. 3801, at [47].

59. In *R (Gudanaviciene) v. Director of Legal Aid Casework* [2014] EWCA Civ 1622, [2015] 1 W.L.R. 2247, Lord Dyson M.R., at [46], accepted the following summary of the effect of the European caselaw:

> "(i) The Convention guarantees rights that are practical and effective, not theoretical and illusory in relation to the right of access to the courts…;
>
> (ii) The question is whether the applicant's appearance before the court or tribunal in question without the assistance of a lawyer was effective, in the sense of whether he or she was able to present the case properly and satisfactorily…;
>
> (iii) It is relevant whether the proceedings taken as a whole were fair…;
>
> (iv) The importance of the appearance of fairness is also relevant: simply because an applicant can struggle through 'in the teeth of all the difficulties' does not necessarily mean that the procedure was fair…; and

(v) 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…"

60. Parliament has determined that legal aid should in principle be available to alleged victims of domestic violence both as they seek protective orders against their abusers and in respect of associated family-law proceedings. Longmore LJ observed in *R (Rights of Women) v. Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91, [2016] 1 W.L.R. 2543:

> "Legal aid is one of the hallmarks of a civilised society. Domestic violence is a blot on any civilised society but is regrettably prevalent. It is therefore no surprise that in an age of austerity, when significant reductions in the availability of legal aid are being made by Parliament, legal aid is preserved for victims of domestic violence who seek protective court orders or who are parties to family law proceedings against the perpetrator of the violence. The main reason for that preservation, apart from natural sympathy with the victims of domestic violence, is that they will be intimidated and disadvantaged in legal proceedings, if they are forced to represent themselves against and perhaps be cross-examined by the perpetrator of the violence."

61. In *Re. K,* the Court of Appeal did not accept that there would be a breach of Articles 6 and 8 if the court failed to appoint a legal representative at public expense to cross-examine a child (Y) in family-law proceedings on behalf of a father alleged to have been her abuser. Lord Dyson explained, at [52]:

> "I do not accept that the only way in which Y can be questioned effectively is by being cross-examined by a legally qualified advocate appointed to represent the father. The court has at its disposal a number of other possible case management options. These include: (i) a direction that the order that Y should give oral evidence is made subject to the condition that the father questions her through a legal representative (this may not be a viable option if the judge's finding about the father's inability to pay stands); alternatively (ii) Y should be questioned by the judge himself; (iii) Y should be questioned by a justices' clerk; or (iv) a guardian should be appointed to conduct proceedings on behalf of [the children]."

62. After considering the difficulties involved in a judge questioning a vulnerable witness in order to prevent inappropriate questioning by an alleged abuser, Lord Dyson concluded that judges in a number of earlier cases had been unnecessarily cautious. He explained, at [60]:

> "In a simple straightforward case, questioning by the judge is likely to be the preferred option and it should present no difficulties. The judge will know what the unrepresented party's case is. It may be helpful for the judge to ask him or her to prepare written questions for the court to consider in advance. Sometimes, unexpected answers may be given to the judge. These may require the judge to ask the unrepresented party to comment on the unexpected

answers and to suggest supplementary questions for the judge's consideration."

63. While dismissing the appeal in *Re. K,* the Court of Appeal did, however, recognise, at [62], that there might be more complicated cases where there was no realistic option and the lack of public funding for a legal representative might amount to a breach of Articles 6 and 8.

64. Parliament has also determined that legal aid should be further limited by reference to both the merits of the proposed litigation and the applicant's means. This is perfectly lawful since where the state would otherwise be required to provide legal aid in order to ensure a fair trial, it can properly restrict the availability of such assistance by reference to both the merits and the applicant's means: *Steel & Morris v. UK* (2005) 41 EHRR 402, at [62].

65. Accordingly, I consider that the proper approach to the construction of the financial eligibility rules in the *Means Regulations* is as follows:

65.1 First, it is important to note that there is no suggestion in this case that the regulations were *ultra vires* in that they were made other than in accordance with the power delegated by Parliament under *LASPO* to the Lord Chancellor.

65.2 The court's principal duty is to consider the words used in the regulations. In construing regulations 31 and 37, I should, however, consider these regulations in their proper statutory context. Accordingly, I have considered both *LASPO* and the *Means Regulations* more broadly.

65.3 In construing the regulations, I also take into account the mischief addressed by these legal aid reforms. The Lord Chancellor will have had firmly in mind the state's obligations under Articles 6 and 8 to provide legal aid where it is necessary to provide fair and effective access to justice. I am satisfied therefore that his purpose was to draft regulations that honoured the state's obligation to provide fair and effective access to justice while also:

a) strictly controlling the cost of the legal aid scheme;

b) ensuring that scarce public resources would only be available to those in the greatest need; and

c) excluding from the scheme those who had the means, whether through their income or capital, to fund their own legal representation.

66. I accept that by his ultimate rejection of the property eligibility waiver and his perpetuation of fixed-sum capital disregards, the Lord Chancellor sought where possible to provide bright-line rules that could be used to assess financial eligibility without falling back on the more subjective and administratively inconvenient need to exercise a discretion in individual cases. The apparent inflexibility of the scheme is, however, mitigated by a number of provisions which confer some element of discretion upon the Director:

66.1 First, the Director may waive the financial eligibility rules altogether in multi-party actions of significant wider public interest (reg. 9); inquests (reg.10),

cross-border disputes (reg. 11); and applications for protective orders or for committal to enforce such orders in certain cases of domestic abuse, female genital mutilation and forced marriage (reg. 12).

66.2 Secondly, the Director has a discretion as to whether she should have regard to the resources of anyone with a beneficial interest in property in assessing applications for funding made by individuals acting in a representative, fiduciary or official capacity: reg. 15(2)(c).

66.3 Thirdly, the Director has a discretion as to whether she should have regard to the resources of a parent or guardian of any child applicant, or to the resources of any other person maintaining such child, parent or guardian: regs 16(4)-(5).

66.4 Fourthly, the Director has some discretion in assessing gross and disposable income:

a) In determining gross income, the Director may determine the period over which she assesses income: reg. 21.

b) The Director has a discretion as to whether she should discount compensation payments made to the victims of the Grenfell fire: reg. 24(3).

c) The Director may take into account the income or resources of any dependent child or dependent relative in reducing the allowance to be made for such person in the calculation of disposable income: reg. 25(3).

d) The Director has a discretion as to any allowance for childcare costs: reg. 27(1).

e) The Director has a discretion whether to allow the full contractual rent or any lesser amount actually paid by the applicant: reg. 28(4).

66.5 Fifthly, the Director has some further discretion in respect of her assessment of disposable capital:

a) Most obviously, the Director of course has some discretion under regulation 31(b). The issue in this case is as to the extent of that discretion rather than its existence.

b) The Director has a discretion as to how she values interests in jointly owned property: reg. 35.

c) The Director has a discretion as to the valuation of controlling or significant interests in companies: reg. 36(3).

d) The Director has a discretion as to the valuation of interests arising on the termination of prior estates: reg. 36(4).

e) The Director has a further discretion as to whether she should discount compensation payments made to the victims of the Grenfell fire: reg. 40(2).

f) The Director may disregard interim payments made in any court proceedings: reg. 42.

g) The Director may, in certain circumstances, disregard assets with which the applicant is restrained by court order from dealing: reg. 43.

67. Accordingly, a construction of regulations 31 and 37 that affords the Director some discretion in the valuation of interests in land is far from alien to the statutory regime.

THE PROPER CONSTRUCTION OF THE MEANS REGULATIONS

68. I have no hesitation in rejecting the submission that the expression "the amount for which that interest could be sold" in regulation 37(1) should be read as meaning "the amount for which the property could be sold or borrowed against in time to purchase the legal representation needed." No such qualification is apparent on the face of regulation 37(1) and I am satisfied that the proposed construction seeks to introduce unnecessary complication to the assessment process that was simply not intended by the draftsman. Indeed, Mr Buttler's formulation not only introduces a timing qualification as to the open-market value but seeks to rewrite the regulation by adding a secondary method of valuation, namely the amount which could be borrowed against the asset. I can well understand the reason for seeking to introduce the latter since otherwise the proposed focus on the timeframe would lead to absurd and plainly unintended consequences. For example, there is self-evidently a very small market for the most valuable properties. It would be an absurd reading of the regulations, and directly undermine the Lord Chancellor's aim of restricting legal aid to those most in need, to require the Director to place a nil valuation on a £5,000,000 mansion simply because it could not be sold within a reasonable time in order to fund proposed litigation. Indeed, such construction of regulation 37(1) would overlook the fact that very often a property, even if not immediately saleable, can be offered as security to raise funds which could be used to instruct lawyers.

69. I am therefore satisfied that regulation 37(1) is directed to the market value that might be achieved in the event of a sale and that the Director did not err in this case by finding that to be £650,000.

70. The proper interplay between regulations 31 and 37 is, however, more complex:

    70.1 On its face, regulation 31 appears to be applicable to the valuation of all resources of a capital nature other than money. Indeed, if the presence in the subsequent regulations of a discrete provision mandating a particular method of valuation of specific assets were of itself sufficient to displace the application of regulation 31 then it is curious that the draftsman thought it necessary expressly to exclude money rather than rely on the mandatory nature of regulation 32. Such consideration, together with the clear opening words of regulation 31, point to the regulation applying as an overarching provision to the valuation of all assets save money. On this view, the primary purpose of regulation 37 is to make provision for how the Director should treat mortgage debt.

    70.2 Against that, regulation 37(1) is drafted in mandatory terms and appears to be concerned with the assessment of "value" rather than simply questions of equity or the calculation of the "amount which the resource would realise if sold." Thus, regulation 37 appears on its face to make bespoke provision for the valuation of interests in land and not simply assist with how the Director might assess value if proceeding under regulation 31(a).

    There is, therefore, a tension between the drafting of the two provisions.

71. Upon the Director's construction, the discretion in regulation 31(b) would be limited to the valuation of assets other than money, life insurance and endowment policies, business interests, interests arising on the termination of prior estates and interests in land. On such reading, the discretion would, however, be available when valuing cars, paintings, racehorses, coins, medals, stocks, smaller shareholdings, bonds, debentures and other assets not specifically caught by regulations 32-37. I agree with Mr Buttler that it is not obvious why there should be such distinctions, but it may be properly said in reply that the draftsman, no doubt realising the futility of seeking to make rules for each and every class of asset, preferred to make bespoke provision for the most commonly occurring classes and leave regulation 31 to cover all other assets. The point is not therefore decisive.

72. I reject the argument that Mr Buttler is essentially seeking to resurrect the abandoned plan to introduce a general property eligibility waiver:

    72.1 The essence of the Lord Chancellor's abandoned 2010 proposal was to lift the cap on the mortgage disregard (thereby allowing the Director to start from the true equity), remove the equity and pensioner disregards but introduce a general property eligibility waiver. The proposal was abandoned because the government realised that in the relatively few applications for legal aid made by homeowners, the Director would be routinely called upon to exercise the waiver. It was therefore administratively convenient to allow fixed-sum disregards.

    72.2 By contrast, the construction argued by GR would allow the Director to proceed on the basis of bright-line rules provided that she would retain a discretion to value the land (or other asset) not on the basis of its notional sale value but in such other manner as appears to the Director to be equitable. In most cases it will be fair to take the market value of the asset and the point will not arise.

73. If the proper construction of the *Means Regulations* is that the general rule under regulation 31 yields to the specific rule under regulation 37 such that the Director has no discretion to attribute a reduced or no value to assets that the applicant cannot use to fund litigation then I am satisfied that some litigants on low incomes with meritorious claims will be denied legal aid despite having no realistic prospect of being able to fund their own lawyers. Such situation is most likely to arise upon the breakdown of a relationship where a couple were previously able to buy a property principally upon the basis of one party's earnings while the other either does not work or is in receipt of a very low income. I postulate four examples. In each case, the applicant must be assumed to be bringing a claim within the scope of the legal aid scheme, in receipt of a passporting benefit or some other very low income and to have no assets other than his or her home:

    73.1 Case 1: Mr A jointly owns his home with his high-earning former partner. The property, which is the subject of their dispute, is worth £550,000. Assuming a 50% interest, he would be refused legal aid because his disposable capital would be assessed at £16,750 after allowing costs of sale at 3%, an assumed maximum mortgage disregard of £100,000 and further equity and subject-matter-of-the-dispute disregards of £100,000 each against his 50% share. His

former partner refuses, however, to agree to any further advance being made against the property or to an order for sale. Mr A, who not only has a low income but a poor credit rating, does not meet the affordability criteria for a loan and cannot offer his interest in his home as security without his former partner's agreement.

73.2 Case 2: Ms B is in the same position as Mr A, save that her former partner agrees that they should sell their home. Ms B cannot raise immediate funds, but the sale would allow her to fund her own lawyers. Although there may be a timing problem, arguably Ms B does not need legal aid to ensure fair and effective representation.

73.3 Case 3: Ms C is in the same position as Mr A, save that she and her former partner are unable to sell their house because of uncertainty created by a possible new development on neighbouring land. Such planning issue may properly be reflected in the value allowed by the Director, but it might – as in this example – also affect saleability such that there is no realistic prospect of the sale raising funds in time for Ms C to fund her litigation.

73.4 Case 4: Mr D owns his own home. It is worth £225,000 but he has lost his job, is badly in arrears and has fallen into negative equity. He would be refused legal aid because his disposable capital would be assessed at £18,250 after allowing costs of sale at 3%, a maximum mortgage disregard of £100,000 and an equity disregard of a further £100,000. Yet in truth he has no net assets and could not realistically hope to use the property to raise funds to pay for lawyers.

74. Even in such cases, a breach of Articles 6 and 8 is not inevitable. Some, like Ms B, may be able to sell their properties to fund litigation. Some will be able to represent themselves, while others will not have the ability to do so or to confront an abusive partner. Some will find that friends and family will rally round to help fund representation; others will not. Some will find lawyers who will act *pro bono* or on the basis of a deferred or conditional fee; but others will be less fortunate.

75. I am therefore satisfied that a fixed system for the valuation of interests in land ameliorated only by fixed-sum disregards would prevent some people on low incomes who cannot access the equity in their homes from having fair and effective access to justice. Such cases are likely to be rare since very few homeowners will meet the gross income and disposable income tests. Where they do, some will find other ways of ensuring their fair and effective participation in proceedings. It is, however, in my judgment necessary to resolve the tension between regulations 31 and 37 by reading and giving effect to the *Means Regulations* in a way that is compatible with the convention rights of those who might otherwise be denied legal aid.

76. For these reasons, I conclude that upon the proper construction of the *Means Regulations,* the Director's discretion under regulation 31(b) is not limited to the valuation of assets other than those specifically mentioned in regulations 32-37, but rather that it is a discretion open to her in all cases save in respect of the valuation of money. Accordingly, the Director erred in law in GR's case in failing to consider

the exercise of her discretion under regulation 31(b) and the matter will have to be remitted for further consideration.

77. Such construction is in my judgment consistent with and gives effect to the Lord Chancellor's purpose of honouring the state's obligations under Articles 6 and 8 while restricting scarce public resources to those in greatest need. Further it is unlikely in practice to involve any substantial net cost to the public purse since in these cases it is likely that the statutory charge under s.25 of *LASPO* will bite on applicants' interests in their homes. Where it does not, then it may be that it is open to the Director to grant legal aid on condition that the applicant agrees to such charge. Any doubt about that must, however, await another occasion when the point has been properly argued.

78. While GR's application for legal aid must therefore be remitted for further consideration, I do not suggest that the discretion in this case is only capable of being exercised in one way. Indeed, compared to many applicants, GR is very fortunate in that she has an interest in a property worth substantially in excess of the national average house price. Further, her own share of the equity, after allowing 3% for the costs of sale and the alleged debt to BK's parents, is some £124,250. Although the *Means Regulations* do not allow the full mortgage to be deducted from the value of the asset, the effect of the disregards under regulations 38 and 39 reduces the assessed value in this case to £65,250. Such assessed paper wealth very comfortably exceeds the maximum value of assets beyond which legal aid is available. If such wealth were accessible, there could be no question of a public-law challenge to the refusal of legal aid in this case. Further, while GR might not wish to sell her home for the reasons that she articulates, if the Director concludes that she is able to do so then it might well follow that the Director would also conclude that she is able to fund her own legal representation. Accordingly, I decline the further declaration, which was not in any event pressed in oral argument, that the Director has breached GR's convention rights.

79. Finally I regret the time that it has taken me to hand down judgment in this case. Unfortunately I had to undergo surgery during the long vacation and have only recently returned to court.