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constitutional and administrative law bar association

The Rt Hon. the Lord McNally,

House of Lords,

SW1A 0PW.

28 November 2012

Dear Lord McNally

**Civil Legal Services (Merits Criteria) Regulations 2012**

We write to you in your capacity as Minister having responsibility for legal aid and on behalf of the Executive Committee of the Constitutional and Administrative Law Bar Association ("ALBA"). ALBA is the professional association for practitioners of public law. It exists to further knowledge about constitutional and administrative law amongst its members and to promote the observance of its principles. ALBA presently has in the region of 1000 members. It is predominantly an association of members of the Bar but some amongst its members are judges at all levels, solicitors, lawyers in public service, academics and students. Its members include both lawyers who act for both public authorities and claimants and those whose practices tend to cover work predominantly for either claimants or public authorities. One member of the Committee is employed by the Cabinet Office and we should point out that he has not participated in drafting or approving this letter.

This letter concerns the Civil Legal Services (Merits Criteria) Regulations 2012 which we understand have recently been laid in draft pending the affirmative resolution procedure. The draft Regulations have not at this stage been circulated to our entire membership. However, they have been seen by our executive committee. That committee is representative of our broad membership and includes members who act both for and against central Government and other public bodies in diverse sub-fields of public law. We write to register concerns about draft Regulation 53 which limits the circumstances in which legal aid can be made available for public law cases (defined in Reg 2 as judicial review, habeas corpus and homelessness cases).

We have seen a copy of the Legal Aid Practitioners Group briefing paper on these changes. We agree with the comments made there that the effect of this Regulation will be severely to limit access to the courts. Its impact will be particularly damaging in urgent cases where to insist that claimants pursue all alternatives before resort to judicial review will leave them without a remedy when they most need it.

In this letter we focus on the constitutional propriety of this rule. If it is accepted then the apparent effect is that the Director must refuse to grant legal aid where the claimant has not exhausted "all administrative appeals and other alternative procedures which are available to challenge the act, omission or other matter before bringing a public law claim". This is inconsistent with the intention and framework of the Legal Aid and Sentencing of Offenders Act 2010 (LASPO) and oversteps the proper role of the Ministry of Justice in limiting access to the courts through the application of a merits test.

It is first necessary to say a little about the role of public law cases and how they function.

Judicial review is nothing less than the rule of law in action. It is the means by which the courts ensure that the executive acts lawfully and as Parliament intended. Those who think of this as a modern development are mistaken. The number of public law cases has increased in recent years but over a hundred years ago Lord Lindley MR said:

> *"I know of no duty of the court which it is more important to observe, and no power of the court which it is more important to enforce, than its power of keeping public bodies within their rights"*
>
> (*Roberts v Gwyrfai DC* [1899] 2 CH 608, 614).

These words are echoed by those of Lord Dyson, the current Master of the Rolls in *R (Cart) v the Upper Tribunal* [2011] UKSC 33 (para 121):

> *"There is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection afforded by judicial review".*

The consultation paper[1] that preceded the enactment of LASPO recognised this. In recommending that legal aid be retained for judicial review case it said:

> *In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly.*

Habeas Corpus, which is also caught by this Regulation, needs no elaboration. It provides a fundamental guarantee of personal liberty by allowing a detained person to have the court decide whether they are being lawfully detained.

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[1] Proposals for the reform of Legal Aid in England and Wales CP 12/10, November 2010 para 4.61.

In developing the principles of judicial review, the courts themselves have recognised that it should be a remedy of last resort and this is how the concept of alternative remedies has arisen. Where a claimant has not used a suitable alternative appeal or other avenue of redress then they will usually be refused permission to apply for judicial review for that reason alone. There are many cases that illustrate this rule but the key point is that a claim will not automatically be dismissed because there is in principle some *potential* alternative remedy (the apparent stance taken in Reg 53). It will only be refused where the alternative procedure is one that is "satisfactory"[2], or "suitable"[3], or "equally effective or convenient"[4]. So the law strikes a balance between preserving access to the court where it is needed and ensuring that proper use is made of alternative procedures. Often, and as the LAPG briefing makes clear, it is not practicable to use alternative procedures. They may be too slow, particularly where the case is urgent; they may not be able to grant an effective remedy at all (for example quashing the decision complained about), or they may not be able to grant an interim remedy (such as a stay or an injunction); or they may be unable to deliver a clear and authoritative statement of the law on a disputed issue.

The current LSC Funding Code reflects the case law in that (at paras 7.2.3 and 7.3.3) it provides that legal aid *"may be refused if there are administrative appeals or other procedures which should be pursued before proceedings are considered."* This gives a power to decline funding where there is a suitable alternative remedy but does not make it obligatory to do so, regardless of suitability. We are not aware of any substantial concerns about the operation of this provision and in our experience it does not lead to funding being granted where an alternative ought reasonably to be pursued.

The reasoning described above, but also the flexibility inherent in it, is accepted in section 11 of LASPO which empowers the Lord Chancellor to set the criteria by which the Director must make decisions about legal aid. Section 11(5) reads:

"The criteria must reflect the principle that, in many disputes, mediation and other forms of dispute resolution are more appropriate than legal proceedings".

This is repeated in the pre-amble to the draft Regulations.

Where habeas corpus is concerned it is self-evident that a person suffering unlawful detention must be able to seek the help of the court at once. It is offensive to basic ideas of liberty that they should have to wait in detention while they pursue some other remedy or complaint – perhaps to the very person detaining them. The courts have never refused relief on this basis.

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[2] *R (Cart) v Upper Tribunal* [2011] UKSC 28, at para 71.
[3] *Kay v Lambeth LBC* [2006] UKHL 10 at para 30.
[4] *R (C) v Financial Services Authority* [2012] EWHC 1417 (Admin) at para 89.

We now come to our concerns about Regulation 53. It provides:

> *"53. For the purposes of a determination for legal representation in relation to a public law claim, the Director* ***must be satisfied*** *that the criteria in regulation 39 (standard criteria for determinations for legal representation) are met and that—*
>
> *(a) the act, omission or enactment complained of in the proposed proceedings appears to be susceptible to challenge; and*
>
> *(b)* ***the individual has exhausted all administrative appeals and other alternative procedures before bringing a public law claim".***

The words in bold give no discretion to the Director. On the face of it if there is an administrative appeal[5] or alternative procedure then legal aid cannot be granted whether or not it is reasonable to use that alternative.

This is such a stark outcome that we doubt whether the Regulations, if passed in this form, would be lawful and they would themselves be open to judicial review with a view to quashing the requirement in Reg 53(b) or at least purposively construing the Regulations so that they sat sensibly alongside Regulation 39 (see below) and so that they accord with the right of access to the Court guaranteed by: the common law (which is of general application); by Article 6 ECHR (for those cases involving civil rights and obligations); and by the EU Charter of Fundamental Rights (which is engaged by any case raising points of EU law).

LASPO, quite properly, provides that legal aid is retained for public law challenges but Reg 53 unreasonably restricts representation for these claims and is inconsistent with the intention in the Act that they should remain a priority. In order to secure a grant of full representation in a public law case a claimant has to get over a number of hurdles:

Firstly they must pass the standard criteria in Regulation 39. Those deal with alternative means of funding and the complexity of the issues and they include:

"the individual has exhausted all reasonable alternatives to bringing proceedings including
any complaints system, ombudsman scheme or other form of alternative dispute resolution" (Reg 39(d)).

Secondly, under Reg 56:

[5] Where there is a true appeal – i.e. to an independent decision maker who has full power to quash or vary the decision- then it will be very rare for judicial review to be available – e.g. *Harley Development Inc v Inland Revenue Commissioner* [1996] 1 WLR 727, at 736C per Lord Jauncey. But this is only an application of the case law described above and the principles remain the same. In each case the touchstone is whether the alternative ought reasonably to be pursued.

- The Claimant must have written a letter before claim unless this was impracticable.

- The claim must have sufficiently high prospects of success (Reg 56(3)).

- The proportionality test must be met (Reg 56(2)(b) and Reg 8). That is:"the likely benefits of the proceedings to the individual and others justify the likely costs, having regard to the prospects of success and all the other circumstances of the case".

We take no issue with any of these criteria. They properly reflect the balance to be struck between controlling public expenditure and securing access to the court. However, Reg 53(b) adds another hurdle. Since the claimant has already passed Reg 39(d) (exhausted all reasonable alternatives) this must, if it is intended to add anything, mean that the claimant will be refused because of their failure to pursue some unreasonable alternative. This is nonsensical, particularly given that the claim has already been found to be sufficiently meritorious to warrant the grant of legal aid.

It is at least strongly arguable that the rule making powers in LASPO cannot authorise Regulation 53(b) if it is to be understood in this way. It would erect an exclusionary rule, in excess of anything that the courts have developed, barring access to the court for cases that are otherwise considered worthy of support. The ability of a citizen to have access to the courts has consistently been recognised by our domestic case law as being as a constitutional right (see for example *Raymond v Honey* [1981] UKHL 8; [1983] 1 AC 1, 13, *R v SSHD, ex p. Leech* [1993] EWCA Civ 12; [1994] QB 198 *R v Lord Chancellor ex p. Witham* [1997] EWHC Admin 237, [1998] QB 575). It is well established that Parliament cannot cut down that right by general words such as those that are found in S. 11 of LASPO (the section which authorises the criteria): *"Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically - in effect by express provision - permits the executive to turn people away from the court door" – Witham* (above) at 581E.

Alternatively, the word "reasonable" may have to be implied into Reg 53(b) in order to make it compatible with the principles we have discussed in this letter or the word "alternative" may have to be interpreted as incorporating the case law on this topic. But in that case there is no need for a separate Regulation because the same idea is in any event covered by the general criteria in Reg 39.

In either case, we consider that to affirm the Regulations in their present form will be to invite litigation about the validity and scope of Reg 53(b) in any case where that Regulation is applied against a claimant. This will be costly in itself but it is also obviously undesirable that the meaning of an important provision like this should be uncertain when the very far reaching reforms brought in by LASPO take effect.

It may be suggested that the problem can be avoid by a practical application of Reg 53 so that it is only used in cases where the alternative is reasonably available. This is not a satisfactory solution because an individual's entitlement (or otherwise) to funding should be apparent from the words used in the Regulations themselves. If the strict meaning of Reg 53 is adopted by the Director in any given case then the individual will have no remedy. It is particularly unacceptable to work around the problem in this way because the Director's functions may be delegated to other officials. If Reg 53 is to depend on how they apply or interpret it in individual cases then the potential for inconsistent decisions is obvious.

In conclusion we urge you to withdraw the draft Regulations in their current form and to replace them with a version either deleting para 53(b) (which we consider to be unnecessary since its proper reach it is already provided for by the general criteria) or replacing it with a form of words following that proposed by LAPG.

Please do not hesitate to contact Martin Westgate if you have any further questions on m.westgate@doughtystreet.co.uk or 0207 4040 1313.

Yours sincerely,

Javan Herberg QC (Chair)

Martin Westgate QC (Executive Committee member)