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Case No: CO/2770/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/03/2015

Before :
LORD JUSTICE BEATSON
MR JUSTICE OUSELEY

Between :

The Queen on the application of:	**Claimants**
(1) Ben Hoare Bell Solicitors	
(2) Deighton Pierce Glynn Solicitors	
(3) Mackintosh Law	
(4) Public Law Solicitors	
(5) Shelter	
- and -	
The Lord Chancellor	**Defendant**

Martin Westgate QC and Martha Spurrier (instructed by **Public Law Project**) for the **Claimants**
James Eadie QC and Richard O'Brien (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 16 and 17 December 2014

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Approved Judgment

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Lord Justice Beatson:

1. This is the judgment of the court to which we have both contributed.

I. Introduction

2. The claimants are four firms of solicitors who provide legal services in public law areas and a charity providing advice, support and services to homeless and badly housed people in England. Following a tendering exercise in 2010, they were awarded contracts to provide legally aided persons with services in a range of public law contexts, involving many kinds of judicial review. We refer to such persons and bodies as "providers". The defendant is the Lord Chancellor. He has a duty under section 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") to secure that legal aid is made available in accordance with Part 1 of the Act and he is now effectively the other party to the claimants' contracts.[1] The Director of Legal Aid Casework is the civil servant in the Legal Aid Agency ("the LAA") designated by the Lord Chancellor to have statutory responsibility for making independent decisions about eligibility for legal aid in individual cases. The Director is responsible, subject to the directions and guidance of the Lord Chancellor, for administering the legal aid scheme.[2]

3. In this judicial review, filed on 13 June 2014, the claimants challenge the legality of an amendment to the legal aid scheme made by the Civil Legal Aid (Remuneration) (Amendment)(No 3) Regulations 2014 SI 2014 No 607 ("the Remuneration Amendment Regulations") which came into force on 22 April 2014. The question is the legality of the introduction by the Remuneration Amendment Regulations of what can broadly be described as a "no permission, no fee" arrangement for making a legally aided application for judicial review. There is also no entitlement to payment where permission has neither been granted nor refused, for example where the claim has been settled or withdrawn, but in such cases the amendment gives the Lord Chancellor power to pay the costs of making the application where he considers that it is reasonable to do so. This discretionary power is in practice exercised by or on behalf of the Legal Aid Agency.[3] Services in investigating the prospects of a claim are excluded and will be remunerated. The regulation challenged is set out at [14] below.

4. In grounds 1 and 2 of the challenge, the claimants maintain that there is no power to make entitlement to payment for the provision of properly assessed qualifying legal services dependent on the outcome of a case because LASPO does not contemplate that where substantial legal services under the scheme established by it are properly provided they will be provided without payment. They also maintain (in ground 3) that the effect of the amendment is likely to have a "chilling effect" on access to the High Court in the sense that providers who risk not being paid will apply criteria that are stricter than those in LASPO and the regulations made under it. Accordingly, they are likely not to take up judicial review cases which are meritorious but not straightforward and, as a result, the Lord Chancellor will be in breach of his statutory

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1 The tendering process was conducted by the Legal Services Commission, a non-departmental public body which was abolished by section 38 of LASPO 2012, and replaced by the Legal Aid Agency, an executive agency of the Ministry of Justice.

2 LASPO, sections 4(1), (3) and (4) and 37(1) and (2)

3 David Holmes, statement on behalf of the defendant dated 24 October 2014, §23.

duty to secure that legal aid services are made available to persons who qualify. The evidence in support of the claimants' case consists of 23 statements by 18 witnesses and the exhibits to them. There are statements of members of the claimant solicitors' firms, of the Chief Executive of Shelter, and of members of other solicitors' firms. There are also statements of members of other organisations including the Coram Children's Legal Centre, the Howard League for Penal Reform, and Medical Justice. The names of those who have made statements and of their firms and organisations are set out in Appendix 1 to this judgment.

5. The Lord Chancellor's case is that the legislation entitles him to place the risk of the costs of making an application where permission is not granted on providers in order to incentivise them to focus more on the proper application of the criteria which determine whether a case qualifies for legal aid under the relevant regulations. The natural meaning of section 2(3) of LASPO[4] as to remuneration authorises regulations setting out the circumstances in which payment will not be made as well as those in which it will, and the rate of payment. He maintains that his decision to place the risk on providers is justified by the fact that in 2011/12 and 2012/13, excluding cases which settled, permission was refused in about 30% of the judicial review cases funded by legal aid where the provider had stated when seeking a legal aid certificate that the merits criteria were satisfied.[5] As to the allegation of a "chilling effect", the Lord Chancellor's case is that the evidence does not demonstrate that this will occur or that the scheme is inherently unfair. His case is that this allegation is premature because there has been no proper opportunity in the approximately nine months since the amendment has been in force to see how the system will work in practice. The evidence in support of the Lord Chancellor's case consists of the statement dated 24 October 2014 of David Holmes, a Policy Manager in the Ministry of Justice's Legal Aid Policy Team who is responsible for providing policy advice on civil legal aid, and the exhibits to it.

6. In section II of this judgment, we summarise the legal framework. Further details are given in Appendix 2, in which the material provisions of LASPO and the relevant regulations are set out or summarised. Appendix 3 contains a summary of the material parts of the consultation process undertaken by the Lord Chancellor before he introduced the regulation that is challenged in these proceedings. Our analysis of the submissions and our conclusions are contained in section III of the judgment. We have concluded:

    (a) We reject the challenge based on ground 1, "strict" *ultra vires*/no power: see [27] – [28]);

    (b) Because the regulation extends to putting providers "at risk" in situations which cannot be said to be linked to its stated purpose, the *Padfield* "inconsistency with statutory purpose" ground (ground 2), succeeds: see [43] – [60];

    In the light of (b), it is not necessary to reach a decision on the challenge based on "chilling effect" in ground 3. Had it been necessary to do so, on the evidence before

[4] The material part of this is set out at [12] below and §2 of Appendix 2 to this judgment.

[5] The criteria are summarised at [13] below and set out at §§18 – 23 of Appendix 2 to this judgment.

us, we would, in the light of the existing authorities, have concluded that the high threshold for such a challenge has not been met: see [68] – [70].

7. In the interests of clarity, in the remainder of this judgment, as well as putting the background material in appendices, where it is necessary to avoid breaking up sentences with references to legislation, policy documents, and cases, we use footnotes. References to paragraphs in this and other judgments are indicated by square brackets and references to paragraphs in other documents by "§".

II. The legal framework

8. Since the introduction of legal aid in 1949, the legislation has defined the services to be provided and stated that the lawyers who provide them should be remunerated for work reasonably done. The coalition government formed after the 2010 election, which was dealing with the problems caused by the size of the nation's deficit, considered that the overall cost of legal aid was too high and was unsustainable. In November 2010, it published a consultation paper, CP12/10, *Proposals for the Reform of Legal Aid in England and Wales*. The introduction reiterated the intention stated in the coalition agreement to reserve public funding 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. One focus was on a simpler system allowing people to resolve issues out of courts using more informal remedies. Another was to narrow the type of issue and proceeding which justified legal aid and to reduce fees by 10%: see e.g. §4.12. The indication given was (see §3.22) that, in general, remuneration would continue to be on the basis of standard fees for legal services reasonably provided, and there was no indication of a move away from this.

9. As far as judicial review is concerned, the consultation paper stated (see §§4.96 – 4.99) that proceedings where litigants seek to hold the state to account by judicial review are important, and legal aid for most public law challenges is justified. It also stated that the permission stage is an important part of the process because it helps to establish whether the applicant has an arguable case, and because it helps to focus both the court's time and legal aid resources on meritorious cases. The regime for legal aid in LASPO was the outcome of this process.

10. LASPO and several sets of regulations made under it came into force on 1 April 2013. The regulations made under LASPO which came into force on that day which are relevant to these proceedings are: the Civil Legal Aid (Procedure) Regulations 2012 SI 2012 No 3098 ("the Procedure Regulations"); the Civil Legal Aid (Merits Criteria) Regulations 2013 SI 2013 No 104 ("the Merits Regulations"); and the Civil Legal Aid (Remuneration) Regulations 2013 SI 2013 No 422 ("the Remuneration Regulations"). As we have stated, the material provisions of LASPO and the regulations are set out or summarised in Appendix 2.

11. The scheme defines the legal services to be provided to those who satisfy the financial eligibility and merits criteria, and makes provision for them to be remunerated for work reasonably done by them. Sections 1 and 9 of LASPO require the Lord Chancellor to "secure" that the civil legal aid services described in Part 1 of Schedule

1 to LASPO are made available to those who qualify.[6] Paragraph 19(1) of Schedule 1 describes legal services provided in relation to judicial review as one of the categories of services to be made available, provided the matter had the potential to produce a benefit for the individual, the individual's family, or the environment. That is an example of narrowing the type of issue which justified legal aid. Under the Access to Justice Act 1999 legal aid was available for legal services unless they were excluded, whereas under LASPO it is only available for the services described in Schedule 1.

12. Section 2(1) of LASPO provides that the Lord Chancellor may make such arrangements as he considers appropriate for the purposes of carrying out his functions under the Act. Section 2(3) provides that he "may by regulations make provision about the payment of remuneration by [him] to persons who provide services under arrangements made for the purposes of [Part 1 of the Act]". The Remuneration Regulations reduced fees by 10% but did not move away from payment for services rendered to payment by result.

13. Under the Merits Regulations, broadly speaking a person may qualify for full representation for public law claims if the Director of Legal Aid Casework is satisfied that four requirements are met.[7] That which is of particular relevance to these proceedings is that legal aid can only be provided in cases where the prospects of successfully obtaining the substantive order sought in the proceedings at trial or other final hearing are 50% or higher. A claimant who has a 50% or more but less than 60% prospect of success is said to have "moderate" prospect of success and will thus satisfy the "merits test". In assessing whether the merits test has been satisfied, the Director relies on the assessment of the practitioner providing the legally aided services, but LASPO provides that the decision is one for the Director.[8] The Director must also be satisfied that the claimant is financially eligible, that it is proportionate to bring the proceedings in the sense that the likely benefits to the claimant and others justify the likely costs bearing in mind the prospects of success and the other circumstances, and that a letter before claim giving the proposed defendant a reasonable time to respond has been sent.

14. The Remuneration Amendment Regulations were made pursuant to the power in sections 2(3) and 41(1) and (3) of LASPO. The Lord Chancellor laid them before Parliament on 14 March 2014, and, as we have stated, they came into force on 22 April 2014. Regulation 2(5) provides that a new regulation 5A be inserted into the Remuneration Regulations. Its material provisions are:-

> "***Remuneration for civil legal services: judicial review***
> **5A.** (1) Where an application for judicial review is issued the Lord Chancellor must not pay remuneration for civil legal aid services consisting of making that application unless either the court -
>
> (a) gives permission to bring judicial review proceedings; or

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6 LASPO, s. 8 defines "civil legal services" as including advice and assistance in relation to legal proceedings (s. 8(1)(b)), and (s. 8(2)) "in particular advice and assistance in the form of representation".

7 Merits Regulations, reg. 56 (criteria for full representation in public law claims), and see regs.5 (prospects of success test), 8 (proportionality test) and 39 (standard criteria). These are set out or summarised in §§17 – 23 of Appendix 2 to this judgment.

8 LASPO, ss 11 and 12. In certain urgent cases, providers are able to exercise delegated functions.

(b) neither refuses nor gives permission and the Lord Chancellor considers that it is reasonable to pay remuneration in the circumstances of the case, taking into account in particular …".

(i) the reason why the provider did not obtain a costs order or costs agreement in favour of the legally aided person;

(ii) the extent to which, and the reason why, the legally aided person obtained the outcome sought in the proceedings; and

(iii) the strength of the application for permission at the time it was filed, based on the law and on the facts which the provider knew or ought to have known at that time.

(2) Nothing in this regulation affects any payment—

(a) by the Lord Chancellor of disbursements incurred by a provider in accordance with the relevant contract; or

(b) on account by the Lord Chancellor to a provider in accordance with the relevant contract.

…"

15. The regulations had been preceded by a two-stage consultation exercise, the first stage of which started on 9 April 2013, nine days after LASPO and the other regulations came into force. The salient matters in the three consultation papers, *Transforming Legal Aid: Delivering a more credible and efficient system* (9 April 2013), *Transforming Legal Aid: Next Steps* (5 September 2013), and *Judicial Review: Proposals for further reform* (6 September 2013), and the government's response, *Judicial Review: Proposals for further reform* (27 February 2014) are summarised in Appendix 3 to this judgment. The government revised its proposals in the light of the responses. In particular, the original proposal contained no exception to the rule that there would be no payment where permission was not granted. This was replaced by the introduction of a power to pay where permission had been neither granted nor refused, which power was originally to be exercised taking account of a closed list of circumstances.[9] In the light of the later consultation, this was modified by removing the closed nature of the list, albeit the circumstances to be taken into account "in particular" in regulation 5A(1)(b) are those previously in the closed list.

16. In October 2014 the Lord Chancellor issued guidance on regulation 5A and on applications for interim relief relating to judicial review proceedings. The material parts of "the Guidance" state:-

"3. The effect of regulation 5A is that work on an application for Judicial Review (including drafting the grounds of claim or instructing Counsel to draft the grounds of claim, preparing the claim form or application for permission and the bundle of documents) will, if proceedings are issued, be undertaken by providers at risk of not being remunerated. Any work done for a rolled up hearing will also be at risk.

4. Regulation 5A does not apply to the earlier stages of work on a case, to investigate the prospects and strength of a claim (including advice from Counsel on the merits of the claim) and

[9] See Appendix 3, §8.

to engage in pre-action correspondence aimed at avoiding proceedings under the Pre-Action Protocol for Judicial Review.

…

6 … Regulation 5A does not apply to any work that relates to an application for interim relief in accordance with Part 25 of the CPR, even when that application is made alongside, or in the context of, an application for Judicial Review.

7 Case workers must ensure that, to the extent that work relates to an Interim Relief application, it is remunerated in the usual way, even where the application is made within the context of a substantive Judicial Review application under Part 54 of the CPR or Part 4 of the UTR to which regulation 5A otherwise applies."

III. Analysis

17. We have briefly summarised the cases of the claimants and the Lord Chancellor at [4] and [5] above, and now turn to our analysis and assessment of the rival submissions. Our brief summary of the claimants' grounds characterised them as "no power" to make regulation 5A and the "chilling effect" that regulation will have. What we characterised as the "no power" ground was formulated as two alternative grounds; *ultra vires*, and incompatibility with statutory purpose, i.e. a ground based on *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. But, analytically, the *Padfield* ground is a species of *ultra vires*,[10] and there was a considerable overlap between Mr Westgate QC's submissions for the claimants on what might be called "strict" *ultra vires* and those on incompatibility of purpose. He relied on the structure of the legal aid regime in LASPO and three sets of Regulations made under it to which we have referred, which came into force at the same time as LASPO for both. He submitted that the Act and the Regulations "…created a code for determining what cases should qualify for legal aid, how decisions should be made as to entitlement, and how they should be paid for".

18. As part of the claimants' case on *ultra vires* and the *Padfield* grounds, Mr Westgate submitted that it is also clear from the regulations that references to the "cost" in LASPO is to the fees paid to providers, and that regulation 5A is inconsistent with the scheme in requiring a provider to perform services in a case which meets the requirements of the merits test for no remuneration if permission is not granted. Because the procedure, merits and remuneration regulations were enacted together with LASPO and came into force at the same time as part of the framework created by LASPO, together with LASPO they constitute a single comprehensive code. In such circumstances, the decisions in *Hanlon v Law Society* [1981] AC 129, at 193-194, *R v Lord Chancellor, ex p Lightfoot* [2001] QB 597, at 611-613 and 626-627; and *R (Mehari) Legal Services Commission* [2001] EWCA Civ 2010, reported at [2002] 1 WLR 983 at [21] show that it is permissible to have regard to the regulations which may be a reliable guide to the meaning of the Act. He argued that LASPO and the regulations together established that the Lord Chancellor was required to take steps to make all the legal services referred to in section 9 available, and he relied on the

[10] It falls within "illegality", the first ground in Lord Diplock's restatement of the grounds for judicial review in *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410, and is so treated in *de Smith's Judicial Review*, 7th ed., chapter 5.

meaning of "merits" in the regulations as a guide to what was required by sections 1 and 9 of LASPO.

19. Mr Eadie QC, for the defendant, recognised that, where an Act provides a framework built on by contemporaneously prepared regulations, in principle the regulations may be a guide to the meaning of the Act where it is ambiguous. He, however, urged caution. This was because, as was made clear by Lord Lowry in *Hanlon*'s case (in the second of his propositions), the words of the regulation, while providing "a parliamentary and administrative *contemporanea exposito* of the Act", do not decide or control its meaning.

(i) "Strict" ultra vires:

20. The submission on behalf of the claimants is that regulation 5A has the effect of removing work on an application for permission to apply for judicial review from the provision of legal aid, subject to an exception where permission is granted, and a discretion where permission is neither granted nor refused. It is argued that this is *ultra vires* because, by sections 1 and 9 of LASPO, the Lord Chancellor is required to "secure" that the civil legal aid services described in Part 1 of Schedule 1 to LASPO are made available to those that qualify, and, by section 2, to "make such arrangements" as he "considers appropriate" to carry out his functions. It is argued that arrangements providing that, although the merits criteria have been satisfied, there is to be no payment where permission is not granted are inconsistent with the Lord Chancellor's duty under these provisions to "secure" that the civil legal aid services described in Part 1 of Schedule 1 to LASPO are made available to those who are financially eligible. This, it is argued, is because the assumption in LASPO is that the legal services the Lord Chancellor is required to make available are to be provided at a cost which, in the case of a third party provider, consists of the fees to the provider. This is also said to follow because it is the nature of a predictive process that some claims that providers properly assess as meeting the "over 50% prospect of success" criteria will in the event fail the permission hurdle.

21. Mr Westgate submitted that the assumption that the legal services are to be provided to an individual who qualifies at a cost is seen from a number of the provisions in LASPO, in particular section 11. Section 11(3)(a) refers to "the likely cost" and section 11(3)(c) to "the appropriateness of applying … resources to provide the services". He maintained that construing "cost" and "resources" to mean the fees to a third party provider fits with the rest of the scheme in LASPO. He relied in particular on the fact that the individual to whom the services are to be made available is not to be required to make payment for them except in accordance with the provisions in the regulations for a contribution.[11] The provision in section 2 of the Act for the Lord Chancellor to make "arrangements" for the carrying out of his functions, he argued, also assumes that legal services are to be provided at a cost; that is the fees to a third party provider.

22. The next stage of Mr Westgate's submissions concerned section 2(3) of LASPO, which provides that the Lord Chancellor may by regulations "make provision about

[11] See LASPO, ss. 23 and 28 (provider must not take payment except in accordance with arrangements made by Lord Chancellor or authorised by Lord Chancellor) at §§10 – 11 of Appendix 2 to this judgment. See also LASPO s. 25 (charge on property recovered).

the payment of remuneration … to persons who provide services under arrangements made for the purposes of [Part 1 of LASPO]". He submitted that section 2(3) of LASPO does not contemplate that an entire segment of legal services will not be paid for and does not authorise regulations which have this effect. The word "remuneration", he argued, means "reward" or "payment for services rendered". He also argued that, if the requirements of sections 1 and 9 of LASPO (summarised in the last paragraph) are met, "nothing [in the Act] permits the provision [of the legal services] to be contingent on whether or not the claim, or part of it, succeeds".[12] How, he asked, has a person had legal aid and how have civil legal services been "made available" for a category of case or a stage of that case when, apart from the empty formality of a legal aid certificate, the scheme established by the Lord Chancellor denies payment for making the application in such cases?

23. Mr Eadie submitted that the *ultra vires* ground is without merit. First, the natural meaning of the language of section 2(3) of LASPO, in particular of the words "provision about the payment of remuneration" (our emphasis), is that it included a provision setting out the circumstances in which payment would not be made. Even before the introduction of regulation 5A, entitlement to remuneration was subject to the provider satisfying certain conditions. Notwithstanding the caution he advocated in relying on the terms of the regulations as an aid to the construction of LASPO, he in fact relied on the Remuneration Regulations and the contract between providers and the LAA. The regulations contain a provision for non-payment of certain costs and expenses relating to experts.[13] The requirement in regulation 6 to pay remuneration in accordance with the "relevant contract" entitles the LAA to reduce or deny remuneration to a provider who has acted unreasonably.[14] He submitted that these showed that the statutory scheme contemplated that eligible legal services might be performed without remuneration.

24. Secondly, Mr Eadie submitted that regulation 5A does not have the same effect as removing work on an application for permission to apply for judicial review from the provision of legal aid because it concerns remuneration and not eligibility. It is, he argued, also incorrect to maintain, as the claimants do, that where regulation 5A applies, it empties legal aid of any practical effect beyond the empty formality of having a legal aid certificate. Placing the risk for a limited category of expense on providers is not the same as removing legal aid for this stage of an application for judicial review. Legal aid remains available for such applications, including the permission stage, and a person who is financially eligible and satisfies the merits test will be able to obtain civil legal aid for such applications and to take them to their conclusion. The regulation does not affect payment for the costs of work investigating the prospects of a claim at the pre-action stage or applications for interim relief. Even where permission is refused or neither granted nor refused, the claimant will have had legal aid to proceed as far as the conclusion of the permission stage, even if it did not lead to full remuneration for the solicitors.

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12 Claimants' skeleton argument, §42.

13 Schedule 5, § 4.

14 §10.1 of the 2013 standard terms (which are the same as the 2010 standard terms) requires providers to perform contract work in a timely manner and with all reasonable skill, care and diligence. The 2010 standard civil contract specification, §§4.4 and 6.1, refers to the providers' entitlement to pay for work "properly conducted" and the LAA's right to reduce payments.

25. Mr Eadie submitted that the claimants' arguments mistakenly focus on the impact of regulation 5A on providers rather than its impact on the claimants who will have had practical assistance. What appears to underlie the second of Mr Eadie's submissions on *ultra vires* is the contention that the arguments on behalf of the claimants are not free-standing arguments but are parasitic on their "chilling effect" ground and can only succeed if that is made out.

26. Mr Westgate's arguments are powerful. The structure of the statutory scheme is to secure the provision of services and provide for the payment of remuneration for eligible legal services, which have been certified by the Director to satisfy the merits criteria. We have had concerns as to whether such a scheme can lawfully authorise the creation of a category of work or a stage of work for which the provider will not be remunerated unless he or she is successful, with the result that the provider bears the entire risk, even where the provider has acted with all reasonable skill. It is understandable that, in making eligibility decisions, the Director will rely on the assessment of the practitioner who would be providing the legally aided services. But it is the Director who has the statutory responsibility under sections 11 and 12 of LASPO for making this decision, and shifting the risk in the way that regulation 5A shifts it, appears to remove any incentive on the Director to do anything in relation to the merits criteria other than leave it to the provider. It would, however, be an unlawful delegation of statutory power for the Director to rely entirely on the provider.[15]

27. Notwithstanding the force of Mr Westgate's arguments and our concerns, we have concluded that the result for which Mr Eadie has contended in relation to the "strict" *ultra vires* ground is correct. We accept his submission that regulation 5A does not, in itself, have the same effect as removing work on an application for permission to apply for judicial review from the provision of legal aid. It will only have this effect if providers either withdraw from judicial review work or apply a stricter test than the 50% or more prospects of ultimate success required by the Merits Regulations. In other words, it will only have this effect if the claimants' "chilling effect" is made out. In this sense, as Mr Eadie submitted, the strict *ultra vires* arguments on behalf of the claimants are not freestanding but are parasitic on that ground, and can only succeed if it is made out. Were the "chilling effect" made out, the regulations would conflict with sections 1and 9 of LASPO.

28. We turn to Mr Eadie's submissions based on the natural meaning of the word "about". We accept his submission that the fact that section 2(3) of LASPO did not empower regulations to make provision "for" the payment of remuneration is significant, and that the consequence of the use of the word "about" is that it empowers the regulations to provide for circumstances in which remuneration or reimbursement will not be made for certain aspects of what are otherwise eligible services. The strict *vires* are provided by section 2(3) of LASPO for the regulations to provide that some services in certain circumstances will not be remunerated. It was not indeed suggested by Mr Westgate that the provisions in the Remuneration Regulations on which Mr

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15 See *Lavender v Ministry of Housing and Local Government* [1970] 1 WLR 1231 and *R v Secretary for Education and Science, ex p. Birmingham CC* (1984) 83 LGR 79. See also Wade and Forsyth *Administrative Law* 11th ed. pp.259 – 262 and 270 – 271. There is a difference between "reliance" while maintaining proper supervision and ultimate control, which is lawful, and "delegation" or "abdication", which are not.

Eadie relied are *ultra vires* section 2(3), and they are consistent with the construction for which Mr Eadie contended. But that does not mean that the statute provides a general authority for regulations which tie remuneration to success. Tying remuneration to success is different from defining what services and what costs will not qualify for remuneration or reimbursement in any event.

29. For this reason Mr Eadie is only assisted to a limited extent by the provisions in the contract specification and contract which entitle the LAA to reduce or deny remuneration to a provider whose work is not of the contractually specified standard regardless of the outcome. Services of the required standard will be remunerated even if success is not achieved. The provisions in the Remuneration Regulations relied on by Mr Eadie similarly do not link remuneration to outcome. Regulation 10(a) and §4 of Schedule 5[16] together define which costs and expenses relating to experts are "not payable", likewise regardless of outcome. Those provisions define what will be paid for and in effect remove remuneration for those costs and expenses from the scope of what is to be paid for and thus from the scope of the legal aid provided for the eligible service.

30. A further difficulty in Mr Eadie's reliance on those provisions to show that remuneration can be tied to success lies in where this proposition takes him. He accepted that the logic of his submission and the Lord Chancellor's position is that the Lord Chancellor could make a regulation providing that, in the case of a particular type of proceedings within Schedule 1 to LASPO, there would be no payment at all unless there was success. That raises the question of whether such a regulation would be consistent with the overall structure and purpose of LASPO as drafted. The question whether such a regulation would be consistent with LASPO's structure and purpose is best considered under the "improper purpose" or "inconsistency with statutory purpose"/*Padfield* ground, and we do so at [38] ff below. We accept Mr Eadie's submission that regulation 5A is so consistent but only to a limited extent. That limited extent, however, is one which is sufficient for the strict *vires* of regulation 5A.

(ii) The Padfield/statutory purpose ground:

31. We have stated that the submissions on behalf of the claimants on the strict *ultra vires* ground substantially overlap with those on this ground. Mr Westgate submitted that regulation 5A conflicts with and frustrates the purpose of the civil legal aid scheme enacted by Part 1 of LASPO because it is inconsistent with and undermines the scheme. He relied on the affirmation of the importance of the approach in *Padfield's* case and the test for determining the purpose of a statutory provision by Lord Reed in *M v Scottish Ministers* [2012] UKSC 58, reported at [2012] 1 WLR 3386 at [42] – [47].

32. In the case of LASPO and the regulations made under it, Mr Westgate submitted that the statutory scheme is not one which ties remuneration to outcome. It is a scheme which is based on an *ex ante* assessment of the merits of a case for which assessment the Director has statutory responsibility. While accepting that the Director will be influenced by the assessment of a provider when putting forward a case and applying for full representation that the 50% or more prospect criterion is satisfied, the

[16] Set out at §§25-26 of Appendix 2 to this judgment.

Director's role is not a purely formal one in relation to the merits criteria. The upshot is that the statutory scheme provides for payment where the merits criteria are satisfied and work has been reasonably undertaken. Regulation 5A proceeds on the assumption that if a case is reasonably and genuinely prospectively assessed as having a greater than 50% success at final hearing then it will necessarily not be refused permission. But that assumption, Mr Westgate argued, is erroneous. Because of that error, he argued that regulation 5A is inconsistent with the merits test and thus with the Merits Regulations as well as with the provisions relied on as part of the strict *ultra vires* limb of the challenge.

33. Mr Westgate developed this part of his submissions as follows. The permission stage of an application for judicial review is one of the services described in paragraph 19(1) of Part 1 of Schedule 1 to LASPO. The Merits Regulations provide that legal aid should be available for applications for judicial review where their requirements are met. But regulation 5A empties this category of legal aid of any practical effect. It indirectly achieves the same result as removing this category of legal services from Part 1 of Schedule 1, but it does so by secondary legislation that was subject only to the negative resolution procedure. Section 41(6) and (7)(a) and (b) of LASPO provide that an affirmative resolution by each House of Parliament is required in order to vary or omit a service from the list of services for which civil legal aid is available.

34. The arguments on behalf of the Lord Chancellor on this ground are similar to those deployed to defeat the strict *ultra vires* ground. If regulation 5A is not *ultra vires*, the *Padfield/* "incompatibility with statutory purpose" ground cannot be a freestanding ground. The regulation is not inconsistent with the purpose of LASPO because legal aid is still available to individual claimants who are enabled to take their cases to their conclusion and there is no requirement in LASPO that payment is to be made to providers for services in all circumstances.

35. Mr Eadie submitted that regulation 5A is consistent with and supportive of the aim behind the merits test which restricts legal aid to cases where the prospects of success at trial or other final hearing are 50% or higher. Its purpose is, he submitted, to incentivise providers to focus more on the proper application of the merits test by giving careful consideration to the strength of a case before applying for judicial review and by undertaking a rigorous examination of a case when applying the test. He argued that in doing this regulation 5A "enhances" the merits test and makes it "more effective". There is, he maintained, no inconsistency with the statutory scheme in putting providers at risk of not being paid because the aim of the legislation is to target legal aid at those who need it most, for the most serious cases in which legal advice or representation is needed.[17] Regulation 5A advances this aim by reducing the risk of unarguable cases being funded.

36. The way the Lord Chancellor's case was presented was essentially a European Convention on Human Rights approach, which had at its core the concepts of "legitimate aim" and "proportionality". As to whether regulation 5A has a legitimate aim, Mr Eadie submitted that it does because about 30% of applications for judicial review launched by providers after stating that those applications satisfied the merits criteria resulted in a refusal of permission. The Lord Chancellor was entitled to conclude that, if permission was not granted, the provider's assessment of the merits

[17] David Holmes, statement on behalf of the defendant dated 24 October 2014, §5.

criteria in the Merits Regulations must have been flawed because there is a significant buffer or gap between the lowest merits criteria, a 50% chance of success at the substantive hearing, and the conclusion that a case is not even arguable. He was therefore entitled to conclude that there is a problem which required addressing, particularly in a period of fiscal austerity when it is necessary to target scarce funds to where they are most needed.

37. Mr Eadie then submitted that the consultation and the changes made by government as a result of it demonstrated a reasonable consideration of alternatives to see whether the proposed change should be targeted differently to achieve its aim more accurately. The result was a proportionate response to the problem. It was for the government to make the choice about the structure and the means to address it. Mr Eadie relied on the fact that regulation 5A only applies to a narrow and defined category of services and remuneration directly related to the aim. Regulation 5A does not apply to remuneration for investigating claims to get a provider into the position in which he or she could assess the merits in order to consider whether to apply for a certificate to enable proceedings to be lodged. Mr Eadie submitted that it was clear from the words "consisting of" in regulation 5A(1) that all pre-issue work was outside its scope. The fact that disbursements (except counsel's fees) and payments on account were protected by regulation 5A(2), as was all work for interim relief, now clarified by §7 of the October 2014 Guidance, also showed the proportionality and rationality of the Regulation. The addition of what he described as a "tailored regime" for cases which ended before permission was granted or refused was also rational. He also stated that the government would be keeping under review how the scheme under regulation 5A operated in practice and its effect.

38. We have referred (at [30] above) to the acceptance by Mr Eadie that the logic of his submissions would entitle the Lord Chancellor to make remuneration for an entire category of work within Schedule 1 to LASPO dependent on a successful outcome. In our judgment, it would be difficult to square that with the structure of the legislation. But the question in these proceedings is whether the more limited exercise in regulation 5A is inconsistent with the statutory scheme and with the Merits Regulations.

39. The evidence by and on behalf of the claimants was relied on by Mr Westgate to show that it is particularly hard to predict the outcome of the permission stage of an application for judicial review. Karen Ashton, of Public Law Solicitors, stated that estimating the prospects of success is difficult because of "the imprecision of the test applied by the courts at the permission stage",[18] and Polly Glynn, of Deighton Pierce Glynn, referred to the fact that there is no "rigid definition of the test for permission".[19] But any predictive assessment involves a risk of error. Litigation is notoriously risky. Even if the data relied on by the claimants[20] as to the variation in permission grant rates between different judges is out of date, it is inherent in the nature of judicial decision-making that there will be a variation in how judges apply a test such as "arguability". Some of this is a reflection of the nature and complexity of

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18 First statement, §17.

19 First statement, §24.

20 The Law Commission's 1994 report, *Administrative Law: Judicial Review and Statutory Appeals,* Law Com No 226 at §5.13 and Annex 1 to Appendix C, and Bondy & Sunkin, *The Dynamics of Judicial Review: the resolution of public law challenges before final hearing* (Public Law Project, 2009) p 86.

the case, some may reflect the experience of the judge, but in general the variation follows a normal distribution. The main focus of the evidence on behalf of the claimants concerns matters such as the marginal profitability of legal aid work, the front-loaded nature of judicial review proceedings, the way in which the amount of work done "at risk" may increase by circumstances out of the control of the provider. Reliance was also placed on the fact that the reason for refusing permission may not impugn the provider's assessment of the merits at the time of issue as illustrating the difficulty of predicting whether permission will be granted or refused. Some of the evidence, however, indicates an ability to predict decisions on permission with considerable success: see Karen Ashton §13, Polly Glynn, §3, and Simon Garlick, of Ben Hoare Bell, §7 and second statement, §14.

40. We have concluded that the relationship between the "arguability" test governing the grant and refusal of permission and the criteria in the Merits Regulations means that the purpose for which the Lord Chancellor has acted is, overall, consistent with LASPO or the Merits Regulations. The question, however, is whether all aspects of regulation 5A can be seen as rationally connected to the purpose of incentivising providers to focus more sharply on the proper application of the merits test before applying for judicial review. We now turn to consider that.

41. Our starting point is what we shall describe as the "standard scenario" contemplated by the framers of regulation 5A and in Mr Eadie's submissions. What appears to be contemplated is a provider who expects permission to be granted or refused on the papers and who, because of the risk created by regulation 5A, will be incentivised to undertake rigorous scrutiny of the merits before issuing proceedings. The costs of investigations and disbursements do not fall within the regulations and are not at risk. Excluding those, the cost of making the application itself is, in general, relatively modest. It follows that the risk to which such a provider would be exposed by a regulation making remuneration dependent on obtaining permission would be defined and limited to a relatively modest sum. The more rigorous scrutiny of whether the merits criteria have been satisfied is designed to reduce the number of errors and, in principle, should do so. Accordingly, a regulation tying remuneration to success at the permission stage could and would, on this scenario, incentivise the provider.

42. Where permission is refused on the papers, subject to the provider's professional duties to the client and to the Director on which see [63] – [66] below, it is for the provider to decide whether to renew the application at an oral hearing. Before doing so, the provider will be able to reassess the case in the light of all the information about it and the reasons given by the judge when refusing permission. We also accept that in the "standard scenario" a regulation tying remuneration to success at the permission stage would again, in principle, incentivise the provider to undertake the reassessment of the merits rigorously before deciding to renew and thus reduce the number of errors in the operation of the merits criteria. If the application is renewed, the risk will be one which, subject to the provider's professional duties to the client, and under the regulations to the Director, is again a defined one. Both the degree of risk and the amount at risk would be reasonably predictable and to an extent controllable by the provider. In a case within the "standard scenario" in which it is legitimate for the regulations to remove providers' entitlement to remuneration, it follows that it is open to the Lord Chancellor to seek to ameliorate the consequences to providers by creating a discretion to pay in appropriate cases.

43. The consultation process and the evidence in these proceedings, however, show many departures from what we have described as the "standard scenario". Our focus is on the situation where, after the proceedings have been issued by a provider who has undertaken a proper scrutiny of the case beforehand, something occurs, not readily foreseeable and beyond the control of that provider, which materially weakens the claim or which makes continuing with the application for permission materially more expensive than properly anticipated before proceedings were issued, or contrary to the provider's duty to the court. An oral permission hearing or a "rolled-up" hearing may be ordered by the Court. The summary grounds of defence may raise issues which are far more complex than pre-action correspondence revealed. A claimant and his or her legal advisers are under a duty to reassess a claim in the light of information that has emerged after it was issued, whether in the Acknowledgement of Service or otherwise, and not to pursue if it is no longer viable.[21] These risks in the abstract are not part of a proper consideration of the merits test. Nor, though general risks in judicial review, are they predictable readily in specific cases, yet the amount of remuneration at risk before the permission decision would go well beyond that which is a proportionate incentive to focus sharply on the merits of the claim. In circumstances such as those we have outlined, there is a break in the otherwise rational connection between the effect of such a regulation and its purpose of incentivising the proper application of the merits test before proceedings are issued. If the provider's professional obligations to the client enable the claim to be withdrawn, at best the provider may get a discretionary payment pursuant to regulation 5A(1)(b). If they do not, and the case proceeds and permission is refused, regulation 5A requires the Lord Chancellor not to pay for making the application at all.

44. There are three scenarios which we identify where the event that changes the risk profile of a case is the action of the court, the defendant or a third party rather than the claimant. These are: (1) where it is the withdrawal by the defendant of the decision being challenged which leads to the refusal of permission (where the application could not have been withdrawn before the refusal), or which leads to permission not being considered; (2) where the application for permission is adjourned to an oral hearing by court order and then refused, or for whatever reason no decision is made, and (3) where the application for permission is dealt with and refused after a "rolled – up" hearing, where permission and the substantive application will be heard together. In the following paragraphs, we consider how the Lord Chancellor's stated purpose operates in each of these situations.

45. *(1) The defendant withdraws the decision challenged:* The provider may well know that defendants withdraw the decision under challenge in a non-trivial number of cases. But the effect of this is that if the permission stage is never reached, payment is discretionary, and if it is reached and permission is refused, payment is unlawful. The withdrawal of a decision may well be notified for the first time in the Acknowledgment of Service with a request, commonly from the Secretary of State for the Home Department, that permission now be refused because the challenge is academic, a request which is properly to be granted by the Court. The risk to any remuneration at all posed by this scenario cannot logically be factored in at the merits stage as a factor tending against the issue of proceedings, because the prospect of withdrawal of the decision would enhance the appraisal of the merits.

[21] See e.g. *R (Gul) v Secretary of State for Justice* [2014] EWHC 373 (Admin) at [42].

46. *(2) The Court orders an oral hearing of the application:* The second scenario is a decision by a judge to call an application for permission in for an oral hearing rather than deciding it on the papers. Such decisions might be characterised as part of the exigencies of litigation, but in many cases they are outwith the control of the claimant or his legal advisers, and may be unrelated to the apparent merits of the case. One example is where the reason the case is adjourned into open court is because the defendant has not filed an Acknowledgement of Service, arguability is uncertain, and would be more readily resolved at such a hearing. In certain categories of immigration judicial reviews, this has, in recent years, occurred in quite a number of cases. This may possibly be due to limited resources in the UK Border Agency or the Treasury Solicitor's Department. In such cases they have emphasised that the absence of an Acknowledgment of Service did not mean that the case should be regarded as arguable. But, in such cases, the effect of adjourning the paper application to a hearing in court involves an increase in the costs and thus the amount for which the provider is "at risk". There would be no further information in those circumstances. There may also be cases where the permission application is adjourned to court for other reasons. One is to test whether a point in the Acknowledgment of Service is truly a "knock-out" blow. Another is where directions, if permission is granted, are best given at an oral hearing. In such cases the provider is not given an opportunity to reassess the risks by scrutinising the case in the light of all the information and reasons given for refusing permission on paper. Where an oral permission hearing has been held, the issues may be gone into in greater depth on some occasions than on others which can raise the arguability threshold.[22]

47. *(3) The Court orders a "rolled-up" hearing:* A court may decide to do this where expedition is needed, or because there is a latent delay point in what is otherwise an arguable case and the court or the defendant,[23] or exceptionally an interested party,[24] wishes to preserve their position on delay, or where the whole case just needs to be managed to a rapid conclusion. A common example of the latter involves government departments and sensitive issues. It is also sometimes apparent that a permission hearing of the usual length of half an hour would not suffice, yet by the time a half day or more has been set aside to resolve arguability in a document heavy case, some planning cases come to mind, the whole case would be nearing resolution. Yet to conclude that the case was arguable only for most of the argument to be repeated on another day before another judge for want of an hour or two would be a complete waste of time.

48. In the February 2014 document, *Judicial Review – Proposals for further reform: the government response*, summarised in Appendix 3, §§9 – 20, it is stated (§172, set out in Appendix 3, §17) that to decide that "rolled-up" hearings should not be at risk of no remuneration if permission is refused "could incentivise their use where they are not warranted and…could undermine the permission filter". This point may have validity if a claimant has requested a "rolled-up" hearing. But, as seen from the examples we have given, that is not the position in many cases where such a hearing is ordered. The defendant or an interested party may request such a hearing in order to preserve their

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22 E.g. *Mass Energy Ltd. v Birmingham City Council* [1994] Env. L.R. 298 and *R v London Docklands Development Corp and another, ex p. Sister Christine Fox* (1997) 73 P & CR 199, 203.

23 See e.g. *R (Welsh Language Commission*) v *National Savings and Investment* [2014] EWHC 488 (Admin); *R (Gordon-Jones) v Secretary of State for Justice* [2014] EWHC 3997 (Admin) at [5].

24 See *R (Carnegie on behalf of Oaks Action Group) v Ealing LBC* [2014] EWHC 3807 (Admin) at [5].

positions on a delay point. The court may order such a hearing for the other reasons given.

49. Guidance as to when to use "rolled-up" hearings has been given by the Judicial College in an *Administrative Court Handbook*, prepared for its Administrative Court induction courses. The most recent version, dated April 2013, states (at p.15) that "rolled-up" hearings "should only be ordered in very limited and rare circumstances, as … valuable court time and resources will be set aside because the case has to be prepared for a full hearing",[25] and "in other words, an order for a rolled-up hearing leads to queue jumping". The *Handbook* also states that an order for a "rolled-up" hearing should "never be made as a means of avoiding a decision whether a claim is arguable". It should normally only be ordered where "(a) there is a genuine degree of urgency and the judge is in doubt whether the claim is arguable, or where there is a genuinely important point which arises which should be determined … and (b) there is believed to be an arguable case but a delay argument should be kept open to the defendant on the wider basis available under the [CPR] as opposed to section 31 of the [Senior Courts] Act 1981".

50. The issue of a "rolled-up" hearing may also arise at a renewed application for permission during the oral hearing. The *Handbook* states (p.21) that where it does "[i]t is important to bear in mind that [adjourning the question of permission to a subsequent "rolled-up" hearing] should only be used exceptionally because a "rolled up" hearing will use up much valuable time and [should] only [be used] where it is reasonably likely that permission will be granted".

51. It does not appear from either the consultation paper or the evidence filed on behalf of the Lord Chancellor that there was awareness of the way "rolled-up" hearings are used. They are the result of a Court order and not a party's choice. Defendants, including government departments, are at least as likely, for reasons of urgency or to preserve their position on a delay point, to request them. A fear of an over-use by the Court of rolled-up hearings is neither warranted nor a lawful basis for the application of regulation 5A to the situation where permission is not given after such a hearing.

52. In these three situations, in our judgment the reach of regulation 5A extends well beyond those in which such a regulation could lawfully incentivise providers to a sharper focus on the merits test in the way described in the consultation papers. In the first, the defendant's withdrawal of the decision, the solicitor cannot rationally be said to have misjudged the merits test by reference to the outcome. The intended incentive, and the consequence to the solicitor, whether non-payment at all, or the possibility of a discretionary payment, have no rational connection.

53. In the second, adjournment to an oral hearing, the judge would not have regarded the application as warranting refusal on the papers alone. The refusal at the oral hearing may either reflect a higher threshold being applied, or the effect of default by the defendant at the paper stage in not filing an Acknowledgment of Service which is only made good at the hearing. That, however, is not what the incentivising process has in mind. In the third situation, "rolled-up" hearing, the conclusion as to arguability would only have been reached after a full hearing, which the court, perhaps on the

[25] See e.g. *R (O) v Hammersmith and Fulham LBC* [2011] EWHC 369 (Admin) at [6] – [7] and *R (WJ (China)) v Secretary of State for the Home Department* [2010] EWHC 776 (Admin) at [18].

application of the defendant, has decided is required by the needs of justice and the efficient management of the court's workload.

54. We also consider that in the second and third situations, there is no rational or proportionate connection between the effect of regulation 5A and the purpose for which the Lord Chancellor has stated he introduced it. It is one thing to decide to transfer risk to providers in order to incentivise them. It is another thing to decide to transfer risk to providers in situations in which doing so cannot incentivise them because what has happened to the application for permission and the way it is handled after the case is issued was beyond the control of the provider and the provider can show that this is so. But the point goes beyond the degree of risk which the provider has taken. The proportionality and rationality of the connection is also affected by the amount of remuneration at stake. The incentive to sound judgment in the normal case is the cost of a paper application and perhaps of a renewed application which the client, on or against the advice of the solicitor, decides to pursue. That is the amount the anticipated loss of which is regarded for the purpose of the legislative scheme as a sufficient incentive. But the amount at risk in the second and third scenarios, particularly the third, depends in an unpredictable way, on the decisions of the court and is affected by the actions of others, both of which are beyond the solicitor's control and occur after proceedings have been issued. The level of exposure to risk required to provide an incentive at the outset to focus sharply and objectively on the merits cannot rationally be one which varies from case to case, and is not dependant on its complexity but on the actions of defendants, third parties or the Court.

55. We have considered whether the incompatibility is cured by the discretion given to the Lord Chancellor in regulation 5A(1)(b) to pay remuneration where he considers it reasonable to do so. In cases falling within the three situations we have identified, we do not consider that the existence of the discretion cures the incompatibility. First, there is no discretion where permission has been refused. In cases where permission is neither granted nor refused, our consideration of the discretion has, for the reasons in [57] – [60] below, led us to the same conclusion.

56. In the exercise of his discretion to remunerate the provider, regulation 5A(1)(b) directs the Lord Chancellor to take into account "in particular" three circumstances. These are: the reason the provider did not obtain a costs order, the extent to which and the reason why the legally aided person obtained the outcome sought, and the strength of the application for permission at the time it was filed based on the law and facts which the provider knew or ought to have known at that time.

57. As to costs, the first consultation paper, *Transforming Legal Aid*, (see Mr Holmes' statement, §21 and Appendix 3, §4) saw the ability to recover costs from the other party as the safeguard to the provider and apparently the indication of a meritorious case. The position changed in the light of the responses. The evidence of Mr Holmes (§27) is that "the aim of the discretionary payment mechanism is to ensure that work carried out on applications in meritorious cases which issued but did not reach the point of a decision on permission, and where costs cannot be recovered from the other side, will continue to be paid". It, however, appears from regulations 5A(1)(b)(i), Mr Holmes' statement (paragraph §27(a) and (b)), and Mr Eadie's submissions, that the perception remains that generally meritorious cases which settle are ones in which costs will generally be recovered from the defendant. This is seen from the way that regulation 5A(1)(b)(i) focuses on the reasons why costs were not obtained. But the

experience of those representing claimants is that often the real obstacle to settling a case is the unwillingness of the defendant to pay costs. Defendants, including government departments, rightly or wrongly, resist costs with considerable determination. The questions that arise are often not susceptible of easy "black and white" answers, but involve assessing where in the spectrum of shades of grey the case falls. The determination of the answer is sometimes intensely fact-specific, and sometimes dependant on fine analysis of a complex legal scene.

58. Where the reason that the claim has become weaker after issuing is because of information from or action by the defendant or a third party which was not available to the claimant before issuing but is deployed after proceedings have been issued, we accept that, particularly since the *Boxall* regime[26] has been superseded,[27] where the information or action emanates from the defendant, a claimant probably now has a better chance of obtaining a costs order against the defendant. But that may not be so where the point that emerges after proceedings have been issued, is not what, at the hearing, was described as "a killer point", but nevertheless affects the prospect of success, or where it emanates from a third party. It is, moreover, in our judgment, a mistake for the legal aid regime to assume that the *inter partes* costs regime as currently applied provides routinely for clear success on costs for claimants where the decision is withdrawn. It may be withdrawn because of a point which emerges from the claimant after litigation has commenced, and defendants, not least the Secretary of State for the Home Department, often make this point, seeking to defeat an *inter partes* costs order. There is often a debate about whether it was truly new and important, or merely unappreciated when it should have been.

59. The other two criteria highlighted in regulation 5A(1)(b) are the extent to which, and the reason why, the legally aided person obtained the outcome sought, and the strength of the application for permission at the time it was filed, based on the law and on the facts which the provider knew or ought to have known at that time. These factors, in particular the second and third, are appropriate indications of the meritoriousness of a claim, but they are only indications. Where the reason that the case did not reach the point of a decision on permission is something that occurs beyond the control of the provider, it is again difficult to see the rational connection between the effect of this part of the regulation and the stated purpose of incentivising rigour before issuing proceedings.

60. More fundamentally, and recognising that there is not a closed list of criteria, we take the view that, in a case where it is clear that the anticipated merits and risk have changed as a result of something that was not foreseen by the provider and was outside his or her control, such as the action of a third party or the defendant, it is difficult to see how the "incentivising" purpose given for the regulation is served. We have explained why this is so in relation to the loss of the *ex ante* entitlement. Although it is possible that the merits of some cases might have been over-optimistically assessed, in the three situations we have identified, the existence of an *ex post* discretionary power rather than an entitlement will also not serve the "incentivising" purpose for substantially the same reasons. For these reasons, we consider that this ground succeeds.

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26 *R (Boxall) v Mayor and Burgesses of Waltham Forest LBC* [2001] 4 CCLR 258.

27 See *R (Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895 and *R (M) v Croydon LBC* [2012] EWCA Civ 595.

61. Before leaving this part of our judgment, we make two observations about the impact or potential impact on the *Padfield*/incompatibility with statutory purposes ground of the matters discussed in the remainder of the judgment, which were canvassed at the hearing but on which we make no decision. The first is that in the second and third of the situations we have identified, we consider that our conclusion is likely to be supported by the effect of the service providers' obligation to the Director and their professional obligation to the client for the reasons we give at [63] – [66] below. Those considerations, whilst not yet proven, may make the non-payment or discretionary payment inconsistent with the very obligations that were created by the grant of legal aid. If so, they reinforce our conclusion that where the amount at risk is increased by Court orders, the intended purpose of incentivising providers to bring a better focus on merits at the outset cannot be served. This is because by that time any power to incentivise has been spent.

62. The second observation concerns the relationship of our conclusion with the "chilling effect" ground of challenge. For the reasons we give at [68] – [70], had it been necessary to decide the point we would have concluded that at the present time there is insufficient evidence for it to succeed as a free standing ground. We, however, observe that, in the three situations we have identified, a regime which deprives a provider of an entitlement to remuneration because of circumstances outside his or her control where there is no rational or proportionate connection with the incentivising purpose given for the regulation has the potential to create a different incentive to providers, one not just to examine a case rigorously when considering whether the merits test threshold has been met, but, even in an ordinary case which breaks no new ground, to focus on a higher threshold for the sake of financial safety.

(iii) Providers' professional duties to their legally aided clients and duties to the Director:

63. We have referred to providers' obligations to the Director and their professional obligations to their clients. The former are in part contained in the Procedure Regulations, and in part in the standard terms and the contract specification. These were referred to during the hearing but were not central to the submissions of either party, and not all the relevant documents were before us. It was suggested on behalf of the claimants that the regime introduced by regulation 5A is inconsistent with or cuts across the professional duties of providers to legally aided clients. Mr Eadie submitted that the Solicitors' Regulatory Authority ("SRA") Rules do not contain a specific obligation to go on with a case regardless of prospect of success. The question involves matters of some complexity, and as we did not hear full argument we are unable to express a view as to whether this is in itself a reason for finding that regulation 5A was unlawful. We, however, consider it appropriate to state that we were concerned about the operation of regulation 5A in a situation in which there has been a change in the merits assessment/risk profile after proceedings have been issued which was outwith the control or foresight of the provider, but the provider will, as a result of the factors in the paragraphs below, in effect be "locked into" continuing with the proceedings.

64. The Procedure Regulations provide that a solicitor-provider's retainer, and thus his or her obligations to the client, continues until the certificate is withdrawn by the Director. The Director can require the solicitor-provider to continue even where the solicitor's assessment of the financial risk after issue would lead the solicitor to wish to terminate that retainer. Mr Eadie stated that, where a provider has taken on a case

and stated that the merits criteria have been satisfied, the Lord Chancellor expects that provider to continue with the case until the Director consents to withdrawal.

65. It, moreover, appears from the 2010 standard civil contract specification (§§3.64, 3.66 and 3.67) that, while a solicitor-provider can decline to undertake controlled work for good cause, the level of the remuneration for or cost of such work is not good cause. It appears to follow that the fact that the amount for which the provider is "at risk" has increased would also not be good cause. If one puts these factors together with the fact (§1.45) that the solicitor-provider cannot charge a fee to the client, one could say that the solicitor-provider who takes a case on the basis of a particular assessment of its prospects of success and the financial exposure involved may be in effect "locked in" to continue with proceedings where, notwithstanding events beyond the provider's control, the Director does not withdraw the certificate or consent to the ending of the retainer.

66. The contract with the Lord Chancellor (see §25.1) entitles a provider to terminate it on giving three months' notice but, importantly, this right is only to terminate the contract in whole. It was suggested during the hearing that, where the prospects of success fall to below 50% after issue or the amount "at risk" increases, if the Director does not withdraw the certificate the provider's remedy is to seek to judicially review the Director's decision. We observe that although that may be the procedural route, it is far from clear that it could provide a remedy in the sense of an order compelling the Director to withdraw the certificate. It is also, in our view, fanciful to suppose that the answer to the predictable problems created by this regulation is speculative litigation, for which the erstwhile claimant would seek legal aid as an interested party from another firm of solicitors.

(iv) "Chilling effect":

67. In view of our conclusion on the *Padfield* ground, it is not necessary to decide the "chilling effect" ground. But that ground occupied a substantial part of the submissions at the hearing, and it is appropriate to comment briefly. The evidence from the providers who will be at risk is as to the likely cost to them, the narrowness of the margins within which they work in judicial review cases, and the analysis of the particular difficulties in cases which are either factually or legally complex and involve a disadvantaged client. It is telling evidence, although, for the reasons we have given at [39] above, we accept Mr Eadie's submission that the claimants have exaggerated the difficulties of predicting whether permission will be granted or refused. Also, not surprisingly given the relatively short time since the regulations came into force, the evidence about specific meritorious claims that had been turned away was very limited.

68. The problem with this ground is the height of the threshold that the authorities state is required for success in a claim that a decision or a regulation is unlawful because it discourages the provision of services to a substantial number of individuals who would qualify, or in fact results in such services not being provided, or creates an inherent risk of unlawfulness in that the services will not be provided to individuals who would qualify for them. The decisions in *R (Unison) v Lord Chancellor* [2014] EWHC 218 (Admin), reported at [2014] ICR 498, *R (Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014] EWCA Civ 827, and the second *Unison* case, *R (Unison) v Lord Chancellor (No. 2)* [2014] EWHC 4198 (Admin), handed down on

17 December, the second day of the hearing in these proceedings, show there are formidable difficulties to overcome. One is the need to show, as was held in *Tabbakh*'s case, that the system contains "a risk of unfairness inherent in the system itself" as opposed to being a system where the risk arises "in the ordinary course of individual decision-making". Another difficulty, illustrated by the first *Unison* case, concerning challenges to the introduction of fees in Employment Tribunals, where the evidence was the impact on eight hypothetical claimants and statistical evidence about falls in the number of claims, is that the court will consider it is not possible to weigh the impact with precision. Such challenges face the additional hurdle that it will be extremely difficult to furnish the evidence required within the tight time limits and the duty to act promptly required in a judicial review, particularly where the challenge is to subordinate legislation. Claims of this sort are thus likely to be brought when a defendant can plausibly argue that the evidence is insufficient and, as in this case, also argue that it reflects transitional effects.

69. The evidence in this case is stronger than that in the first *Unison* case because it is direct evidence from the providers who will be at risk. The response on behalf of the Lord Chancellor focuses on the fact that there is little evidence of claims being turned away or of identifying meritorious individuals who have been unable to persuade a solicitor to take them on. To some extent, this defence requires the claimants to prove a negative or to wait until a significant number of individuals with claims which appear meritorious, but who have not been able to obtain legal representation, have been identified. That is only likely to occur long after the time limit for a judicial review challenging the regulations has expired unless some flexibility is shown with regard to the time limit in such cases. In the first *Unison* case, in the light of the Lord Chancellor's position about the evidence required for such challenges and the prematurity of the claim in that case, the Court appeared to favour such flexibility: [2014] EWHC 218 (Admin) at [46]. It may have been these factors which led Mr Eadie to state during the hearing in these proceedings that the position would be kept under review, as the Lord Chancellor had undertaken in the *Unison* case. No such undertaking had previously been given. The 23% decline in applications for legal aid in such cases and the 15% drop in the number of certificates granted, together with the evidence from so many experienced practitioners, is a matter of great concern and suggests that such a review is necessary.

70. Despite the fact that the evidence is from those who will be directly affected by the regulations, and notwithstanding the force of Mr Westgate's submissions, the decisions in the two *Unison* cases mean that, had it been necessary to decide this point, we would have concluded that the high threshold has not been met in this case. In the second case, Unison filed statistical evidence additional to the evidence filed in the first case before Moses LJ and Irwin J. The second court, Elias LJ and Foskett J, dismissed the application. It accepted the Lord Chancellor's submission that the claim was premature, despite what Elias LJ (at [55]) described as a "striking", and Foskett J (at [96]) as a "dramatic", reduction in the number of cases brought. It was important that the only evidence in that case was statistical and that there was no evidence of actual instances of individuals who asserted that they have been or would be unable to take claims although their income disqualifies them from fee remission.

IV Summary

71. The reason given for introducing regulation 5A was to incentivise providers to focus more on the proper application of the merits test before applying for judicial review. For the reasons we have given at [27] – [28] and [40] – [42] above, we reject ground 1 of the challenge, the "strict" *ultra vires* ground. Had it been necessary to reach a conclusion on ground 3, that the effect of regulation 5A is likely to have a "chilling effect" on access to the High Court by way of judicial review, in the light of the authorities and on the evidence before the court, we would also have rejected that ground.

72. In relation to incompatibility with statutory purpose, ground 2, for the reasons given at [43] - [60] above, the scope of regulation 5A extends beyond the circumstances which can be seen as rationally connected to the stated purpose given for its introduction. To that extent it is inconsistent with the purposes of the scheme in LASPO, and this application succeeds. We will hear submissions on the relief required, if it is at issue.

APPENDIX I

Evidence by or in support of the claimants

(i) Evidence by the claimants

Name of witness	Firm/organisation	Date of evidence
Karen Ashton	Public Law Solicitors	19 June 2014 and 25 November 2014
Simon Garlick	Ben Hoare Bell LLP	20 June 2014 and 24 November 2014
Polly Glynn	Deighton Pierce Glynn	19 June 2014 and 25 November 2014
Nicola Mackintosh QC	Mackintosh Law	20 June 2014 and 24 November 2014
Campbell Robb	Shelter	12 June 2014 and 21 November 2014

(ii) Evidence in support of the claimants

Name of witness	Firm/organisation	Date of evidence
Noel Arnold	Coram Children's Legal Centre	19 June 2014
Polly Brendon	Public Law Project	20 June 2014
Abi Brunswick	Project 17	21 November 2014
Nancy Collins	Irwin Mitchell LLP	11 June 2014
Simon Creighton	Bhatt Murphy Solicitors	12 June 2014
James Elliott	Wilsons Solicitors	20 June 2014
Alison Roma Harvey	Immigration Law Practitioners' Association	19 June 2014
Laura Janes	Howard League for Penal Reform (Legal Co-Director)	19 June 2014
Giles Peaker	Anthony Gold, Solicitors	9 June 2014
Theresa Schleicher	Medical Justice	20 November 2014
Ollie Studdert	Maxwell Gillott Solicitors (trading name of Simpson Millar LLP)	19 June 2014
Carita Thomas	Howells LLP	19 June 2014
Anna Louise Thwaites	Hodge Jones and Allen LLP	20 June 2014

APPENDIX 2

LASPO and the relevant Regulations

(i) LASPO

1. Section 1(1) and (2) of LASPO provide:

> 1(1) The Lord Chancellor must secure that legal aid is made available in accordance with this Part.
>
> (2) In this Part "legal aid" means-
>
> > (a) civil legal services required to be made available under section 9 or 10 or paragraph 3 of Schedule 3 (civil legal aid),…"

2. Section 2(3) provides:

> "The Lord Chancellor may by regulations make provision about the payment of remuneration by the Lord Chancellor to persons who provide services under arrangements made for the purposes of this Part."

3. Section 8 provides:

> "(1) In this Part "legal services" means the following types of services-
>
> > (a) providing advice as to how the law applies in particular circumstances,
> >
> > (b) providing advice and assistance in relation to legal proceedings,
> >
> > (c) providing other advice and assistance in relation to the prevention of disputes about legal rights or duties ("legal disputes") or the settlement or other resolution of legal disputes, and
> >
> > (d) providing advice and assistance in relation to the enforcement of decisions in legal proceedings or other decisions by which legal disputes are resolved.
>
> (2) The services described in subsection (1) include, in particular, advice and assistance in the form of-
>
> > (a) representation, and
> >
> > (b) mediation and other forms of dispute resolution.
>
> (3) In this Part "civil legal services" means any legal services other than the types of advice, assistance and representation that are required to be made available under sections 13, 15 and 16 (criminal legal aid)."

4. Section 9 provides:

> (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).
>
> (2) The Lord Chancellor may by order-

(a) add services to Part 1 of Schedule 1, or

(b) vary or omit services described in that Part,

(whether by modifying that Part or Part 2, 3 or 4 of the Schedule)."

5. Paragraph 19(1) of Part 1 of Schedule 1 to LASPO describes "civil legal services provided in relation to judicial review of an enactment, decision, act or omission" so that services for such proceedings qualify for legal aid. By paragraph 19(3) and (4), services provided to an individual in relation to judicial review "that does not have the potential to produce a benefit for the individual, a member of the individual's family or the environment" before the civil legal services have been provided. By paragraph 19(10), "judicial review" means the procedure on an application for judicial review, but not including the procedure after the application is treated under rules of court as if it were not such an application. It also includes any procedure in which a court, tribunal or other person mentioned in Part 3 of the Schedule is required by an enactment to make a decision applying the principles that are applied by the court on an application for judicial review.

6. Section 10 of LASPO concerns cases where the Director has made "an exceptional case determination" that it is necessary to make the services available to the individual because failure to do so would be a breach of the individual's Convention rights within the meaning of the Human Rights Act 1998 or any rights of the individual to the provision of legal services that are enforceable EU rights, or that it is appropriate to do so in the particular circumstances, having regard to any risk that failure to do so would be such a breach.

7. By Section 11(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".

8. By section 11(2) and (3), in setting the criteria the Lord Chancellor must consider the circumstances in which it is appropriate to make civil legal services available and the extent to which the criteria ought to reflect the factors listed in subsection (3). Those factors include *inter alia* (a) the likely cost of providing the services and the benefit which may be obtained by the services being provided, (c) the appropriateness of applying those resources to provide the services, having regard to present and likely future demands for the provision of civil legal services under this part, and (g) if the services are sought by the individual in relation to a dispute, the individual's prospect of success in the dispute.

9. By section 12(1) a determination by the Director that an individual qualifies under this part for civil legal services must specify (a) the type of services, and (b) the matters in relation to which the services are to be made available.

10. Section 23(1) provides "an individual to whom services are made available under this part is not to be required to make payment in connection with the provision of the services, except where regulations provide otherwise".

11. Section 28 provides that:

"(1) The fact that services provided for an individual are or could be provided under arrangements made for the purposes of this Part does not affect–

(a) the relationship between the individual and the person by whom the services are provided,

…

(2) The person who provides services under arrangements made for the purposes of this Part must not take any payment in respect of the services apart from–

(a) payment made in accordance with the arrangements, and

(b) payment authorised by the Lord Chancellor to be taken."

12. Sections 41(4) and (5) provide:

"…

(4) Orders and regulations under this Part are to be made by statutory instrument.

(5) A statutory instrument containing an order or regulations under this Part is subject to annulment in pursuance of a resolution of either House of Parliament, unless it is an instrument described in subsection (6) or (9).

…"

[It was common ground that regulations made under s.2(3) do not fall within the phrase "an instrument described in subsection (6) or (9)", and that regulations made under s.2(3) are thus subject to "annulment in pursuance of a resolution of either House of Parliament", otherwise known as the "negative resolution procedure".]

(ii) The Civil Legal Aid (Procedure) Regulations 2012 (SI 2012 No. 3098)

14. The material parts of Regulation 31 of the Procedure Regulations provide:

"**31. The application**

(1) An application for Licensed Work must be made in writing in a form specified by the Lord Chancellor and signed by the individual and proposed provider.

…

(4) The application must specify–

(a) the form of civil legal services to which the application relate;

…

(d) a proposed provider with whom the Lord Chancellor has made an arrangement under section 2(1) of [LASPO] for the provision of the services which are the subject of the application (unless the effective administration of justice test described in paragraph (5) is satisfied.

(5) The effective administration of justice test is satisfied if the Director decides that it is necessary for a provider to provide the services which are the subject of the application under an individual case contract having considered–

(a) the provider's knowledge of the particular proceedings or dispute and expertise in providing the civil legal services which are the subject of the application;

(b) the nature and likely length of the particular proceedings or dispute;

(c) the complexity of the issues; and

(d) the circumstances of the individual making the application.

…"

15. The material parts of Regulation 37 provide:

"**37. Certificates**

…

(4) The Director may amend a certificate for–

…

(b) investigative representation to record a subsequent determination that the individual qualifies for full representation in the same proceedings.

…"

16. The material parts of Regulation 42 provide:

"**42. Withdrawal of determinations**

(1) The Director may withdraw a determination where–

(a) the individual no longer qualifies for the services to made available by the determination in accordance with–

(i) the criteria set out in regulations made under section 11 of [LASPO]; or

(ii) regulations made under section 21 of [LASPO];

(b) the services made available by the determination have been provided;

(c) the proceedings to which the determination relates have been concluded;

(d) the service made available by the determination was investigative representation and sufficient work has been carried out to determine the prospects of success and the cost benefit critera;

…

(j) the Director is satisfied that the individual has required the proceedings to be conducted unreasonably so as to incur unjustifiable expense;

…"

(iii) The Civil Legal Aid (Merits Criteria) Regulations 2013 (SI 2013 No. 104)

17. Regulation 5(1) of the Merits Criteria Regulations provides:

"**5 – Prospects of success test**

(1) Where the Director assesses, for the purposes of these Regulations, the prospects of success of a matter to which an application for civil legal services relates, the Director must classify the prospects of that matter as follows:

(a) "very good", which means an 80% or more chance of obtaining a successful outcome;

(b) "good", which means a 60% or more chance, but less than an 80% chance, of obtaining a successful outcome;

(c) "moderate", which means a 50% or more chance, but less than a 60% chance, of obtaining a successful outcome;

(d) "borderline", which means that the case is not "unclear" but that it is not possible, by reason of disputed law, fact or expert evidence, to:

(i) decide that the chance of obtaining a successful outcome is 50% or more; or

(ii) classify the prospects as poor;

…"

18. Regulation 8 provides:

"**8. Proportionality test**

For the purposes of these Regulations, the proportionality test is met if the Director is satisfied that 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."

19. Regulation 10 provides:

"**10. Likely costs**

(1) For the purposes of these Regulations, "likely costs means the total costs likely to have been incurred on behalf of an applicant for civil legal services at final judgment or settlement of the proceedings–

(a) calculated on the basis that the proceedings fail to obtain a successful outcome, or costs are not recovered from another party to the proceedings; and

(b) taking into account the prospects of the proceedings settling before trial or other final hearing.

(2) In paragraph (1), 'costs' means the fees payable to any provider, calculated by reference to remuneration rates set out in arrangements made by the Lord Chancellor under section 2(1) of [LASPO] or in regulations under section 2(3) of [LASPO], including (but not limited to)–

(a) counsel's fees;

(b) disbursements; and

(c) any fees payable at any enhanced rate,

but not including Value Added Tax."

20. Regulation 18(3) provides:

"**18. Legal representation**

…

(3) 'Investigative representation' means legal representation which is limited to the investigation of the strength of the contemplated proceedings and includes the issuing and conducting of proceedings but only so far as necessary–

(a) to obtain disclosure of information relevant to the prospects of success of the proceedings;

(b) to protect the position of the individual or legal person applying for investigative representation in relation to an urgent hearing; or

(c) to protect the position of the individual or legal person applying for investigative representation in relation to the time limit for the issue of the proceedings.

…"

21. Regulation 39 sets out the standard criteria for determinations for legal representation. It provides:

"**39. Standard criteria for determinations for legal representation**
An individual may qualify for legal representation only if the Director is satisfied that the following criteria are met–

(a) the individual does not have access to other potential sources of funding (other than a conditional fee agreement) from which it would be reasonable to fund the case;

(b) the case is unsuitable for a conditional fee agreement;

(c) there is no person other than the individual, including a person who might benefit from the proceedings, who can reasonably be expected to bring the proceedings;

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

(e) there is a need for representation in all the circumstances of the case including–

(i) the nature and complexity of the issues;

(ii) the existence of other proceedings; and

(iii) the interests of other parties to the proceedings; and

(f) the proceedings are not likely to be allocated to the small claims track."

22. The application of the merits criteria to public law cases is dealt with in Chapter 2 of Part 5 of the Merits Criteria Regulations. Regulation 53 provides:

"**53. Standard criteria for determinations for legal representation in relation to public law claims**

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 other matter complained of in the proposed proceedings appears to be susceptible to challenge;

…"

23. By Regulation 56(2) and (3):

"**56. Criteria for determinations for full representation in relation to public law claims**

…

(2) An individual may qualify for full representation in relation to a public law claim only if the Director is satisfied that–

(a) the individual has sent a letter before claim to the proposed defendant (except where this is impracticable), and where such a letter has been sent, the proposed defendant has been given a reasonable time to respond;

(b) the proportionality test is met; and

(c) the criterion in paragraph (3) is met.

(3) The Director must be satisfied that the prospects of successfully obtaining the substantive order sought in the proceedings are–

(a) very good, good or moderate."

(iv) The Civil Legal Aid (Remuneration) Regulations 2013 (SI 2013 No. 422)

24. Regulation 5A of the Remuneration Regulations is set out at [14] of the judgment.

25. By Regulation 10:

"The Lord Chancellor must pay remuneration to a provider in relation to expert services incurred as a disbursement by the provider in accordance with–

(a) the relevant contract; and

(b) the provisions of Schedule 5."

26. Paragraph 4 of Schedule 5 provides:

"(1) The costs and expenses relating to experts listed at sub-paragraph (2) are not payable by the Lord Chancellor.

(2) The costs and expenses are–

(a) any administration fee charged by an expert, including (but not limited to)–

(i) a fee in respect of office space or provision of a consultation room;

(ii) a fee in respect of administrative support services, such as typing services;

(iii) a fee in respect of courier services;

(iv) a subsistence fee; and

(b) any cancellation fee charged by an expert, where the notice of cancellation was given to the expert more than 72 hours before the relevant hearing or appointment."

APPENDIX 3

The consultation process that preceded the Remuneration Amendment Regulations

1 The first stage of the consultation which preceded the Remuneration Amendment Regulations was CP14/2013, *Transforming Legal Aid: Delivering a more credible and efficient system*, issued on 9 April 2013. The introduction stated that financial considerations made it necessary to make further savings and that "on Judicial Reviews, lawyers who bring weak cases will no longer be reimbursed; and cases with less than a 50% chance of success will no longer be funded". While (see §3.61) the government continued "to believe it is important to make Legal Aid available for most Judicial Review cases, to ensure access to a mechanism which enables persons to challenge decisions made by public authorities which affect them" it stated that it was concerned that "Legal Aid is being used to fund a significant number of weak cases which are found by the court to be unarguable and have little effect other than to incur unnecessary costs for public authorities and the Legal Aid scheme".

2 The consultation paper relied (see §§3.65 – 3.68) on figures showing that a majority of cases where legal aid was granted for a judicial review ended before an application for permission was lodged with the court, and that 845 of the 1,799 cases where applications had been made ended after permission was refused. It acknowledged that in 330 of these the legal aid provider had recorded that the case was of "substantive benefit to the client" because the public authority had conceded in advance of the court's consideration or had modified its decision to some extent. But even so it stated that there were over 500 cases (28% of the 845 cases) which "failed and ended without benefit to the client but with potentially substantial sums of public money expended on the case". These figures suggested "that there are a substantial number of cases which benefit from legal aid but are found by the court to be 'unarguable'".

3 Although (see §3.72) "the merits criteria are in place to help weed out weak cases", the government did "not consider that these are sufficient by themselves to address the specific issue we have identified in Judicial Review cases". It was the provider who certified the assessment of the merits of the case and the LAA "is necessarily strongly guided by the provider's assessment of the prospects of success" in deciding whether the claim should receive funding. It was for this reason that the government considered it appropriate "for all of the financial risk of the permission application to rest with the provider" who "is in the best position to know the strength of their client's case and the likelihood of it being granted". The equalities impact assessment in the consultation paper stated (§5.4.1) that any impact on clients was likely to depend on the provider response to the reforms and the extent to which the transfer of financial risk reduces the availability of representation and, as such, remained unquantifiable.

4 It was not proposed (see §§3.73 – 3.74) to make an exception for the 330 cases identified where permission was refused but a benefit was recorded. The reason given was that this would depend on the provider's assessment and "allowing providers to decide whether or not they get paid for the permission work of failed

cases would not provide a robust control of funds". The government also observed (at §§3.75 – 3.76) that, in cases where a substantive benefit was achieved, "it may well be possible for the provider to recover their costs…either as part of a settlement between the parties or through a costs order from the court".

5 A further consultation paper, *Transforming Legal Aid: Next Steps*, was published on 5 September 2013. The next day, *Judicial Review: Proposals for Further Reform* Cm 8703, a paper which sought views on a wide range of substantive reforms to the judicial review process, including "rebalancing financial incentives", was presented to Parliament by the Lord Chancellor.

6 In the *Next Steps* paper, the government recorded the concerns of respondents that the proposal that placing the financial risk of the permission stage on providers would reduce access to judicial review as an effective mechanism for challenging decisions by public authorities, and that the grant of permission was the wrong indicator and disproportionate. This was because, in addition to weaker cases, it would result in legal aid not being paid in cases which were refused permission but where there was a substantive benefit to the client, and cases which were not unmeritorious at the time proceedings were issued but settled or were withdrawn prior to a court decision for good reason. Two examples of such reasons were the defendant granting the relief sought or the claim becoming academic through an external event: see §§137, 141 and 144. It also recorded respondents' references to the flexible approach taken by the court to permission, and to the fact that in some cases they used an enhanced test with a higher standard than "arguability".

7 The government stated (at §156) that it recognised these concerns and proposed to introduce a discretion to permit the Legal Aid Agency to pay providers in certain genuinely meritorious cases which conclude prior to a permission decision where the provider has been unable to secure a costs order or costs agreement as part of a settlement. That proposal was contained in the *Proposals for Further Reform* paper. The foreword to that paper stated that the use of judicial review had "expanded massively in recent years and…is open to abuse". It referred to concern about time and money wasted in dealing with "unmeritorious cases which may be brought simply to generate publicity or to delay implementation of a decision that was properly made" and stated that "a significant proportion of these weak applications are funded by the taxpayer".

8 The proposals for the permission stage in judicial review cases are (see *Proposals for Further Reform* §§112 – 113) an aspect of the aim to rebalance financial incentives. The government justified its proposal (§123) on the ground that the provider is well-placed to assess the strength of a client's case and its likelihood of being granted permission, and is well-placed to make an informed judgment as to whether the permission test is met. It was envisaged that the discretion would only be made if the case qualified under four exhaustive criteria. These are (§125):

> "(i) The reason for the provider not obtaining a costs agreement (whether in full or in part) as part of any settlement, not seeking a costs order, or the court not awarding a costs order (whether in full or in part). This will include consideration of the conduct of the provider under the Pre-Action Protocol and in the proceedings;

(ii) The extent to which the client obtained the remedy, redress or benefit they had been seeking in the proceedings;

(iii) The reason why the client in fact obtained any remedy, redress or benefit they had been seeking in the proceedings;

(iv) The likelihood, considered at the point the settlement is made (or the case is otherwise concluded), of permission having been granted if the application had been considered, whether on a specific indication in the proceedings by the court or based on the strength of the claim at that point."

The claimants submitted that these focus on the outcome rather than whether it was reasonable to initiate the proceedings in the first place.

9 On 27 February 2014, *Judicial Review – Proposals for Futher Reform: the Government Response* to the consultation (Cm 8811) was published. The section on legal aid stated (§42) that "the purpose of the proposal is ensure that limited legal aid resources are properly targeted at those judicial review cases where they are needed most, if the legal aid system is to command public confidence and credibility". It also stated (§43) that in general respondents remained opposed to the proposal permitting the LAA to pay providers in certain cases which conclude prior to a permission decision because "the uncertainty and financial risk for providers would impact on the number of providers willing to carry out public law work and the kinds of cases they would be willing to take on in future".

10 As to the proposed discretionary payment mechanism, a number of respondents argued (§44) "that it would not address the risk they would face at the point of issue and would involve an additional burden for providers in making their application to the LAA" and "the proposed exhaustive list of criteria was too narrow, and did not take account of factors which might weaken the case after issue, placed too much weight on the claimant's conduct in the proceedings (rather than the defendant's) and would allow defendant public bodies to influence a provider's payment by arguing that the reasons for settlement were unrelated to the claim". The paper states (§46) that, having taken account of the responses, "the government will enable the [LAA] to pay in meritorious cases which conclude prior to a permission decision and…will adjust the criteria – or factors – which will be in legislation and which the [LAA] will apply". It also stated that the proposed amendments will reduce to a degree the risk that providers will be expected to take.

11 Annex B to the document concerns paying for work in judicial review cases. This states that the key issues raised concerned market sustainability and access to justice (§§151 – 152), with many respondents, including the senior judiciary, legal aid providers and representative bodies arguing that providers will not be able to carry the uncertainty and financial risk of work on a permission application even with the introduction of a discretionary payment mechanism. They argued that the number of providers willing to carry out public law work will reduce considerably and access to justice will be compromised in a way that would breach Article 6 of the ECHR and Article 47 of the Charter of Fundamental Rights of EU, and the Aarhus Convention. Some respondents stated that it would not remain viable for them to continue to take judicial review work. Others argued that they would, in practice, be likely to apply a higher merits test than in the Merits Criteria Regulations, and take on only the very strongest cases.

12 The other key issues raised were that the merits test is in place to ensure the provider and the LAA consider the prospects of success, that there are cases in which permission is refused but have provided substantive benefit to the client, and cases which are meritorious but settle for a good reason, such as the claim becoming academic through an external event: §§153 – 154. It was suggested (§157) that the criteria should not be exhaustive because an exhaustive list cannot cater for all circumstances in which it might be appropriate to make payment. Such a list would lead to potential injustice, and would also amount to unlawful fettering of discretion. One of the alternative proposals referred to (§165) was that by the Judicial Executive Board and others that payment should only be withheld in cases certified by the court as "totally without merit", and that there should be discretion to allow payment for cases where permission is refused "but it was reasonable for permission to have been sought".

13 The government's response on the market sustainability and access to justice points (§§166 – 169) made two main points. First, that it is difficult to assess the extent to which providers would in practice refuse to take on judicial review cases. Secondly, that, although similar arguments were made in respect of other reforms to civil legal aid, significant numbers of providers have remained in the civil area. As to providers holding a public law contract, before 2010 that was 43 and 100 providers offered contracts in the 2010 contract tender, and 82 held contracts in February 2011. These numbers suggested that "in recent history there has been a strong willingness among providers to undertake public law contract work" and that, since February 2011, there has been little change in the number of providers despite the recent reduction in fees.

14 The government's view was that its proposal would assist providers "in robustly considering the merits of the case prior to issue". It also stated that "having carried out that consideration, we would expect providers generally to proceed to issue a claim which they and the LAA have properly assessed as having prospects of success of 50% or more, in accordance with the merits test". It was, therefore, not accepted that providers would leave the market or that there would be insufficient numbers of providers as a result of the proposal, with a consequent denial of access to justice. The government considered that "it is likely that there will remain sufficient providers who will undertake judicial review work, taking on cases which they consider to be of merit".

15 The government also stated that "it is proper that they scrutinise claims carefully before applying to the LAA for funding, and in a case where the LAA and the provider agree that the case is meritorious, the client will still be represented (albeit the provider will act at risk up to the point of a permission decision)". In view of these factors, and the modifications to the discretionary criteria, the government did "not accept that the proposal gives rise to a chilling effect on access to justice or is unlawful".

16 On the sufficiency of the merits test, the government stated (§171):

> "[A] significant number of cases pass the merits test but fail the permission threshold. Therefore we consider it is appropriate to introduce further controls in these cases. Although the LAA will assess the case at the outset, the agency is necessarily guided by the provider's assessment on the

> information provided. …[u]ltimately the LAA will be dependent in large part on the information provided at the point of issue by the provider, so it is important that the provider is incentivised to do all they can to consider the prospects of success thoroughly."

17 On other general issues, the government stated (§172):

> "[W]e do not agree that the proposal should not place rolled-up hearings at risk. We consider that this could incentivise their use where they are not warranted and, were more hearings ordered, could undermine the permission filter. We also consider that it would have the effect of putting a provider who failed at a rolled-up hearing (which takes more time for all parties and the court) in a better position than a provider who had lost at the permission stage in the ordinary way."

18 As to the discretionary criteria, the government stated (§176) "we agree that the list of criteria should be non-exhaustive, in order to take into account the range of circumstances in which a judicial review may conclude prior to permission". The LAA would be required to consider whether it is reasonable to pay the provider, taking into account three factors which, with minor amendments, are those contained in Regulation 5A(1)(b) set out at [14] of the judgment.

19 In relation to the proposal that the principle of proceeding at risk be restricted to cases certified as "totally without merit", the government stated (§184) that this would certainly capture some cases which ought not to have been brought, but will not extend to all weak cases and therefore will not necessarily incentivise providers sufficiently to consider the strength of the claim before issuing.

20 In relation to the suggestion that the judiciary be given discretion to allow payment where it was reasonable for permission to have been sought, although permission was subsequently refused, the government stated (§185) that the judiciary "has an important role to play in weeding out cases which are not meritorious, which has been evidenced by the number of legal aid cases not granted permission". But there was "a similar system of judicial discretion previously existed in immigration and asylum Upper Tribunal appeals where legal aid for the application for reconsideration of a ruling of the Asylum and Immigration Tribunal (AIT) and the reconsideration hearing was awarded at the end of the process". It was stated that system aimed "to reduce the number of weak challenges to AIT decisions reaching the Administrative Court" but that costs orders were made almost as a matter of routine, and the scheme therefore failed to transfer any financial risk to the providers.