**R (Gudanaviciene & Others) v Director of Legal Aid Casework & the Lord Chancellor**

[2014] EWHC 1840 (Admin)

1. In a judgment handed down on 13 June 2014, Collins J has allowed claims brought by six individuals challenging the refusal of legal aid for immigration cases under the Legal Aid Sentencing and Punishment of Offenders Act 2012 (‘LASPO’). He found that the refusal of exceptional case funding was unlawful in all six cases, that refugee family reunion was in scope of legal aid under LASPO, and that the Lord Chancellor’s Guidance on Exceptional Case Funding mis-stated the law in significant respects.

*The case of B*

1. In the case of B, an Iranian refugee, represented by Islington Law Centre, had sought advice in connection with an application for refugee family reunion by her husband and 16-year-old son whom she had left behind in Iran when she fled to seek protection in the UK. B’s husband and son had been arrested by the Iranian authorities after her departure and ill-treated in an effort to obtain information about her whereabouts. They subsequently went into hiding and later moved to Turkey where they were residing irregularly. It was argued on B’s behalf that advice about refugee family reunion was still in scope of legal aid under LASPO, contrary to [the position taken by the Legal Aid Agency](http://www.justice.gov.uk/downloads/legal-aid/legal-aid-reform/legal-aid-reform-faq.pdf). In order to safeguard her position, ILC had also applied for exceptional case funding (‘ECF’) under s. 10 LASPO on the grounds that legal aid was necessary to ensure effective protection of her Article 8 rights to respect for her family life. The Director had refused that application, applying the Lord Chancellor’s [Exceptional Funding Guidance](http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf) which stated that:

The Lord Chancellor does not consider that there is anything in the current case law that would put the State under a legal obligation to provide legal aid in immigration proceedings in order to meet the procedural requirements of Article 8 ECHR (§60).

*Refugee family reunion in scope of legal aid*

1. Collins J held that the Defendants’ interpretation of LASPO was incorrect and that refugee family reunion cases are in scope of legal aid. He accepted the Claimant’s argument that the right to refugee family reunion is a “right arising from the Refugee Convention” and therefore falls within paragraph 30 of Part 1 of Schedule 1 of LASPO which allows civil legal services to be provided in relation to applications for leave to enter or remain based on rights arising from the Refugee Convention. Collins J held that:

“A person who is recognised as a refugee has a right conferred by the Immigration Rules for family unity. As a matter of ordinary English, that right arises from the Convention since the Convention enabled that person to achieve the status of a refugee.” (§105).

1. He went on to observe that:

“The fact that it is in scope does not mean that it should be granted in every case. Many are no doubt straightforward and some refugees will be competent to deal with the necessary paperwork. But there are cases, and I am satisfied that this is one, in which an extremely vulnerable individual is faced with a difficult situation in relation to her son...”

1. Collins J considered that the statutory language in paragraph 30 of Part 1, Schedule 1 was unambiguous and therefore it was not permissible to look at the Parliamentary debates upon which the Defendants relied, applying the rule in *Pepper v Hart* [1993] AC 593. However, he had been shown the relevant passages relied on by the Defendants and concluded that they did not provide evidence of the necessary clear and unequivocal intention of Parliament not to include family reunion cases within the scope of LASPO. He held that:

“All this no doubt shows that the minister believed that the words used excluded family reunion. But the matter was left in the air in the House of Lords. Mr Chamberlain relies on what Lord McNally wrote to Mr Hughes. That is in my view insufficient to show that Parliament, which means both Houses, intended to exclude family reunion. It may be that it was appreciated that no amendment was needed having regard to the words used. The intention of government is not necessarily the same as that of Parliament. Thus even if recourse to Hansard is permissible a clear and unequivocal intention is not established.” (§109).

1. Collins J however rejected an alternative argument by B that even if family reunion was not a right arising from the Refugee Convention, it was a right arising from the Qualification Directive. He considered that the right to family unity in Article 23 of the Qualification Directive was limited to family members as defined in Art 2(h) of the Qualification Directive, namely those who are already present in the same Member State as the refugee (§110-111).

*Article 8 may require the provision of legal aid*

1. A central issue common to all the cases before Collins J was whether the procedural obligations in Article 8, ECHR could require legal aid to be made available. It was accepted by most of the claimants in light of the Strasbourg case of *Maaouia v France* (2001) 33 EHRR 1037 and of the House of Lords in *RB (Algeria)* [2010] 2 AC 110 that Article 6 ECHR, which has been interpreted as including a right to legal aid in certain circumstances in civil proceedings, does not apply to immigration cases because they are not concerned with civil rights and obligations, even where they have incidental effects on Article 8.
2. However, it was argued that the procedural obligations inherent in the notion of effective respect for family and private life under Article 8 ECHR may require legal aid to be provided in certain circumstances. The Defendants recognised that the Strasbourg court has found that a refusal of legal aid can engage Article 8 in certain circumstances, notably in the cases of *P, C and S v UK* (2002) 35 EHRR 1075 and *Airey v Ireland* (1979-80) 2 EHRR 305, both family law cases. The Defendants’ argument was that this caselaw could not be read across to the immigration context in light of the judgments in *Maaouia* and *RB (Algeria)* and of the decision of the Court of Appeal in *IR (Sri Lanka)* [2012] 1 WLR 232. Collins J rejected that argument, holding that “there are procedural requirements in order to make Article 8 rights effective and there is no reason in my view to believe that they are excluded when the reasoning which led to the decision in Maaouia which was concerned only to decide whether Article 6(1) applied is taken into account” (§31).
3. Collins J concluded that:

“... [the minimum standards of procedural fairness] must be applied to decide whether the interference with private or family life is proportionate because necessary yin a democratic society. It follows that there may be cases in which a failure to grant legal aid may breach minimum standards so that Paragraph 60 of the Guidance is erroneous. If legal aid is needed to provide that the procedure is effective and fair in dealing with Article 8 rights it will have to be provided.” (§35; see also §51, 52).

1. In considering in an individual case whether legal aid is required, Collins J also accepted that the rights of family members, particularly children must be taken into account, and indeed treated as a primary consideration (§52). In relation to B, the Defendants had submitted that her son’s Article 8 rights and his best interests were not relevant because he was outside of the jurisdiction. Collins J rejected that argument, relying on *Tuquabo-Tekle v Netherlands* [2006] 1 FLR 798 and *Mundeba* [2013] UKUT 00088.
2. In each of the individual cases, Collins J held that the decisions to refuse ECF under s. 10 LASPO should be quashed. In B’s case, he held that even if he was wrong that refugee family reunion was in scope, she should have been granted ECF and that the decision to refuse it was unreasonable (§107, 114).

*Other difficulties with the Guidance*

1. Collins J also upheld arguments made by the Claimants that the Guidance was wrong in other material respects, notably that it set too high a threshold for a decision that ECF was necessary because a refusal to provide legal aid would breach Article 6 ECHR and, by extension, Article 47 of the EU Charter. The Guidance indicated that the “overarching question” was “whether the withholding of legal aid would make the assertion of the claim practically impossible or lead to an obvious unfairness in the proceedings”. This test was based on the Commission decision in *X v UK* (1984) 6 EHRR 136. Collins J held that *X v UK* did not accurately state the test set out in the leading cases of the Strasbourg Court, notably *Airey* and *Steel & Morris v UK*, as well as that stated by the CJEU in *DEB v Germany* [2011] 2 CMLR 529.
2. Two of the claims concerned EU nationals (Gudanaviciene and Reis) seeking funding for an appeal against deportation. They relied specifically on Article 47 of the EU Charter which provides that legal aid shall be provided in so far as necessary to ensure effective access to justice. Their claims were allowed on the basis that, by applying the *X v UK* test to Article 47 cases, the Guidance was flawed, and that the decisions were unreasonable and legal aid should be granted as it was necessary to ensure effective access to justice in their cases.
3. In the case of the claimant Mr S, Collins J rejected the argument that there was a requirement under the Trafficking Directive and/or the Convention on Action Against Trafficking in Human Beings to provide legal aid to a person claiming to be a victim of trafficking in order for them to receive advice *prior* to a referral being made into the National Referral Mechanism for a decision as to whether the person is a victim of trafficking. However, he held that that “does not mean that in a given case legal advice may not be needed to ensure that an individual is able to pursue in an effective way an application to receive the status of a VOT.” (§82) He considered, however, that it should be made clear to all applicants that it would be unlawful to seek to remove them while their status as a victim of trafficking is under consideration by the NRM, and that other than in very exceptional circumstances it would be wrong to detain a victim of trafficking (§83). He did not accept that Article 4 necessarily required legal aid to be provided at the pre-referral stage, but indicated that he would quash the decision to refuse ECF so that the Director could reconsider the “powerful arguments based on the vulnerability of the claimant which show that legal aid was not only desirable but necessary to enable his overall rights, which could not be completely divorced from the VOT application, to be made effective” (§87).
4. A further important issue considered by Collins J is the test to be applied by the Director in deciding whether to grant ECF under s. 10(3) LASPO. This (a) requires legal aid to be granted where its refusal would breach a person’s Convention rights or EU law rights and (b) allows the Director to grant legal aid where it is appropriate to do so because of the risk of a breach of the individual’s Convention rights or EU law rights. Collins J upheld a submission by the Claimants that Coulson J had been wrong in *R (M) v Director of Legal Aid Casework* [2014] EWHC 1354 (Admin) to hold (in *obiter dicta*) that both limbs of s. 10(3) imposed a very high threshold for the grant of legal aid.
5. In relation to s. 10(3)(a), Collins J held that the appropriate test was not, as Coulson J had considered “complete certainty” that there would be a breach, but rather that “if the Director is satisfied that legal aid is in principle needed when its refusal would to a high level of probability result in a breach, s. 10(3)(a) is met and means and merits will determine whether legal aid is to be granted and to what extent” (§44).
6. In relation to s. 10(3)(b), Collins J accepted that the appropriate test was whether there was a “real risk” of a breach of Convention rights, meaning that the Director was required to consider whether “If legal aid is refused, there [is] a substantial risk that there will be a breach of the procedural requirements because there will be an inability for the individual to have an effective or fair opportunity to establish his claim” (§50). In using the words “substantial risk”, Collins J was applying the test of “real risk” as explained in *Rabone v Pennine Care NHS Trust* [2012] 2 AC 72 at §38, namely that a real risk is a “substantial or significant risk and not a remote or fanciful one”.

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Doughty Street Chambers

13 June 2014