

NO MAD LAWS CAMPAIGN

BRIEFING PAPER ON THE ATTACK ON LEGAL AID AND THE RULE OF LAW

THE NO MAD LAWS CAMPAIGN

This campaign consists of Gypsy and Traveller support groups and representatives and Gypsies and Travellers themselves who have joined together to highlight the disastrous effect that the Coalition Government's legal aid and judicial review reforms will have upon Gypsies and Travellers.

The legal aid and judicial review reforms have been widely and heavily criticised. In the House of Lords debate on 7th May 2014 Lord Howarth said:

There are constitutional principles at stake in these regulations of bedrock importance: the principle that effective remedy should be available against arbitrary government and the principle that there should be equality under the law. Indeed, it is the rule of law itself which is in question. The law should be for the convenience of the people and not their governors. It is essential, therefore, that remedy should be available that is practical for an aggrieved citizen to seek, and that is available regardless of his personal means, against a public body that conducts itself in a manner that is unlawful, procedurally incorrect, incompetent, oppressive or unreasonable. If judicial review is not available to enable a challenge to wrongful decisions by the state or its agencies, we move away from a liberal constitution and towards executive absolutism.If it is unsure that legal aid will be available for the preparation of meritorious cases, then the freedom to seek judicial review is no more than the proverbial freedom of the poor man to dine at the Ritz.

Steve Hynes, the Director of the Legal Action Group said in an article entitled *A Year of Austerity Justice* (Legal Action May 2014 p10):

Taken together, the changes to legal aid and judicial review combined with attacks on individual rights...indicate that the government seems intent on denying everyone – apart from the wealthy – access to the justice system.

RECOMMENDATIONS

We recommend that the following steps are taken for the reasons set out in this briefing paper:

1. The legal aid regulations relating to the payment for work done on judicial review claims pre-permission should be withdrawn and legal aid should be reinstated for judicial review subject to the usual merits criteria and eligibility provisions;
2. Trespassers should be brought back within the definition of 'loss of home' for the purposes of legal aid;
3. As proposed by the Low Commission, Housing Law should be brought back within scope for legal aid;
4. As the Low Commission also recommended, there should be an urgent radical overhaul of the provision of Exceptional Funding.

THE IMPACT OF CHANGES TO LEGAL AID AND JUDICIAL REVIEW

Judicial Review

During the consultation process on proposals to amend the situation with regard to legal aid and judicial review, the vast majority of respondents indicated that most judicial review applications were settled prior to permission being dealt with and were settled successfully. Despite this, the Government has now brought into force provisions which mean that legal aid providers will not be paid on a judicial review application unless either permission is granted or the matter is settled prior to permission without costs being awarded to the claimant and the Legal Aid Agency exercises their discretion in favour of the provider. The situation with regard to interim relief applications is entirely unclear at this stage in terms of whether there will be any guaranteed payment for them or not. Judicial review, obviously, provides a means by which people can hold public authorities to account with regard to unlawful actions and decisions. It leads to an improvement in public authority decision making processes. The changes to legal aid provision with regard to judicial review may mean that many providers will no longer take judicial review cases. The possibly disastrous effect on the rule of law of this is obvious.

Evictions of unauthorised encampments

As is well known, a significant proportion of the Gypsy and Traveller population who live in caravans have no alternative but to resort to unauthorised encampments due to the totally inadequate national supply of permanent and transit pitches and emergency stopping places. Prior to the bringing into force of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPOA) 2012 in April 2013, when a local or other public authority took eviction action in the county court, a Gypsy or Traveller facing such action who believed the action was unlawful (e.g. due to a failure to make welfare enquiries in line with government guidance and case law) could defend the action in the county court. LASPOA 2012 left matters involving 'loss of home' in scope for legal aid but excluded from the definition of 'loss of home' trespassers such as Gypsies and Travellers on unauthorised encampments (in fact, it might be speculated that this exception was specifically created to target Gypsies and Travellers). Thus Gypsies and Travellers who want to challenge such action have to lodge a judicial review application in the high court and seek a stay of the county court action. A much less sensible and much more complicated route.

Housing Law

The Low Commission on the Future of Advice and Legal Support has been established to develop a strategy for access to advice and support on Social Welfare Law in England and Wales. The Low Commission is chaired by Lord Colin Low and is made up of eight other Commissioners with expertise in this area. The Low Commission is independent of Government, political parties and advice providers.

The Low Commission have called for the return of legal aid in Housing Law cases (see Low Commission *Tackling the Advice Deficit*, January 2014). Gypsy and Traveller 'accommodation' cases come under the umbrella of Housing Law.

Mobile Homes Act 1983

Following a very long campaign and leading on from the European Court of Human Rights judgment in the case of *Connors – v – UK* (2005), the Westminster Government finally amended the law to bring proper security of tenure onto local authority Gypsy and Traveller sites by bringing into force the Mobile Homes Act (MHA) 1983 on those sites. This occurred in 2011 in England and in 2013 in Wales but, ironically, when the LASPOA 2012 came into force this led to a situation where only possession actions and serious disrepair cases under MHA 1983 remain within scope for legal aid. Though Gypsies and Travellers living on local authority sites obtained important rights under the MHA 1983 many of them will find themselves unable to enforce those rights due to the fact that most MHA 1983 disputes are now out of scope for legal aid.

Exceptional Funding

During the passage of the LASPO Bill through Parliament, the Government placed great emphasis on Section 10 of the Bill, the possibility of exceptional funding (EF). It was stated that this would act as a vital safety net. EF is intended to ensure that the failure to provide advice and representation to someone does not result in a breach of Article 6 of the European Convention on Human Rights (the right to a fair hearing) and does not breach European Union Law.

In October 2013 Community Law Partnership made a Freedom of Information Act (FOIA) request to the Ministry of Justice with regard to EF due to the fact that all of their attempts to obtain such funding had been unsuccessful. The response indicated that, to that date, there had been 602 applications and 37 of these related to Housing Law. Surprisingly, only 11 applications in total throughout the country had been granted and only one had been granted under the heading of Housing Law. In the latest statistics from the Ministry of Justice (*Ad Hoc Statistical Release: Legal Aid Exceptional Case Funding* 1 April 2013 to 31 March 2014) of 1,519 applications in total only 57 have been granted (42 of those for Inquests). Of 81 Housing Law applications it is still the case that only 1 has been granted.

EF ought to be available to cover matters involving:- housing benefit; Traveller planning inquiries; disrepair issues on Travellers' sites which need to go to tribunal; demoted tenancy cases. Many, many hours of solicitors' and advisers' time has been spent in attempting to get EF. It is absolutely clear to us that, in these cases, Article 6 is breached because clients are not able to deal with the relevant hearings and, thus, there is no equality of arms (the case of *Airey – v – Ireland* refers).

Conclusion

The reduction in scope of legal aid has led to situations where, for example, tenants are being evicted needlessly. We believe that the predictions that this will lead to increased costs in the end are already being proved true. At the same time, the purported safety net of EF has proved to be illusory but, in the process, has led to barristers, solicitors and advisers wasting vast amounts of time in fruitless attempts to obtain EF. This, in turn, is now leading to a situation where legal aid providers are no longer willing to even attempt to obtain EF. We believe that the Government may well be very happy with this result and we also believe that EF was never really intended to provide a proper safety net.

We fully support the Law Commission's call for the return of legal aid in Housing Law cases. The Law Commission has also recommended that there be a radical overhaul of the provision of EF. That overhaul should take place without delay.

No Mad Laws Campaign
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