

IN THE HIGH COURT
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN
ON THE APPLICATION OF
THE ANTI-TRAFFICKING AND LABOUR EXPLOITATION UNIT

Claimant

- and -

THE LORD CHANCELLOR

Defendant

CONSENT ORDER

BEFORE THE HONOURABLE

UPON the Court having considered the Statement of Reasons for this Consent Order at Annex 1

AND UPON the parties reaching an agreement on a review to be undertaken on behalf of the Defendant by the Ministry of Justice and the Legal Aid Agency in respect of the provision of civil legal aid under paragraphs 32(2) and (3) and 32A(2) and (3) of schedule 1 to the Legal Aid Sentencing and Punishment of Offenders Act 2012, the agreed terms of the review being annexed to this Order as Annex 2

IT IS HEREBY ORDERED BY CONSENT THAT:-

1. The hearing listed for 14 March 2016 shall be vacated on the basis of the preambles and the terms of the annexes attached to this order.
2. This claim is withdrawn on the terms of the preambles above and annexes to this Order.
3. Pursuant to CPR 46.7, the Defendant must pay costs for pro bono representation in these proceedings on or before 31 March 2016 to The Access to Justice Foundation (PO Box 64162, London WC1A

9AN) summarily assessed at £12,000 on the basis of the Protective Costs Order Level.

4. The order for a Protective Costs Order made by Blake J shall be discharged on the Defendant's compliance with (3) above.

Dated this day 2016

*Freshfields Bruckhaus
Deringer LLP*

Freshfield Bruckhaus Deringer LLP

Ref:163190-0003

For the Claimant

Michael J. R.

Central Legal Team
Legal Aid Agency

For the Defendant

Annex 1: Statement of Reasons

Introduction

1. The Claimant is the Anti-Trafficking and Labour Unit ('ATLEU'), a legal charity which provides legal advice and representation to victims of trafficking and labour exploitation.
2. The claim relates to the adequacy of provision of civil legal aid services under paragraphs 32(2)-(3) and 32A(2)-(3), schedule 1 to the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO). LASPO removed the availability of civil legal aid from all employment-related claims and civil claims for compensation against private individuals or entities save to the extent that the case amounted to claims for unlawful discrimination under the Equality Act 2010. The only other exception to this was paragraphs 32(2)-(3) and 32A(2)-(3) of Part 1 to Schedule 1 of LASPO and paragraphs 32A(2)-(3), as inserted by section 47(2) of the Modern Slavery Act 2015.
3. These provisions are directed to the availability of civil legal aid for trafficking and modern slavery compensation claims ('TMSCC') which can be brought as a claim under employment law or for damages arising in connection with the trafficking or exploitation of an individual who is a victim of trafficking in human beings or modern slavery. These provisions are directed at claims against private individuals and entities, not public authorities.
4. The Standard Civil Contract authorises civil legal aid providers to undertake work in specified 'Civil Category' of law for which they have contracted with the Defendant. The Category Definitions to the Standard Civil Contract sets out all 'Civil Category' of law. It also defines those matters or proceedings which fall outside the Civil Categories under "Miscellaneous Work". There are more than 20 types of such "Miscellaneous Work".
5. The Defendant has made provision for TMSCCs pursuant to sections 1 and 9 of LASPO by permitting any civil legal aid provider to re-allocate up to five matter-starts (funded under Legal Help) for a "Civil Category" for "Miscellaneous Work". Any given civil legal provider cannot exceed the 5 re-allocated matter starts for all "Miscellaneous Work."

The Parties' Position

6. The Claimant is a legal charity which, prior to LASPO, undertook a number of TMSCCs under both employment law and as private law claims for damages. The Claimant was concerned that the arrangements under 'Miscellaneous Work' for the provision of civil legal aid for TMSCCs under paragraphs 32(2)-(3) and 32A(2)-(3) of Part 1 to schedule 1 of LASPO were not adequate and effective to ensure victims of trafficking and modern slavery are able to access legal advice and assistance to bring these claims. This was for the following reasons:
 7. It is the Claimant's case that:
 - (1) The Defendant failed to make such inquiries so as to equip himself with the necessary information to make an informed decision as to what arrangements to make to implement the provision of civil legal services for TMSCCs;
 - (2) The Defendant has failed to comply with his public law duty to make a decision based on a properly evidenced basis and has proceeded to make arrangements for civil legal aid for TMSCCs having regard to irrelevant considerations and failing to have regard to material relevant considerations;
 - (3) The system as currently operated carries an unacceptable risk and / or serious possibility of trafficked victims' right of access to legal advice and assistance to bring TMSCCs being curtailed.
 8. In support of the Claimant's contention, evidence was adduced from support agencies, Kalayaan, Medaille Trust, Migrant Help and Hope for Justice on which the Claimant relies to show that many of the victims they support are unable to access adequate and effective legal advice and assistance because there are a limited number of legal aid providers with the knowledge and experience to conduct such claims and to give competent advice and assistance; and the funding arrangements under Legal Help and the limited number of such claims can be brought per provider act to restrict access. Evidence was also adduced from several civil legal aid providers on which the Claimant relies to explain the variety of difficulties with funding, experience, knowledge and practical feasibility of

providing advice and assistance to victims under the current arrangements.

9. The Defendant's case in reply is that:
 - (1) The evidence does not demonstrate systemic illegality;
 - (2) The arrangements of any civil legal aid provider being able to re-allocate up to five matter starts for 'Miscellaneous Work' including TMSCCs are adequate. There are in any event no limitations to the number of applications an individual provider may make to obtain investigative or full representation to provide advice and assistance;
 - (3) The decision to make these arrangements was rational and lawful.
10. The Defendant adduced evidence from David Holmes, a Ministry of Justice policy advisor and Eleanor Druker, a senior manager in the Service Development Team of the Legal Aid Agency to make the points set out in the Defendant's case outlined above.
11. In granting the Claimant permission to proceed with its claim for judicial review, Blake J observed that:

I am persuaded that it is arguable that the absence of any tender scheme for specialist legal assistance for victims of trafficking and labour exploitation in employment, the limit of miscellaneous matter starts to 5 per annum that any holder of a civil contract may bring and the absence of employment claims within the scope of LASPO together amount to a breach of the duty to make legal aid available to victims of trafficking.
12. The trial was listed on 2 March 2016. In the lead-up to trial, the Defendant, via the Ministry of Justice and the Legal Aid Agency, agreed to undertake a Review by the end of June 2016 and the terms of that Review are at Annex 2. The hearing date of 2 March 2016 was vacated to provide further time for the Defendant to agree this Order and a directions hearing was listed for 14 March 2016.

Annex 2

Ambit of Review of Legal Aid for those with Trafficking and Modern Slavery Compensation Claims (TMSCCs)

Introduction

The Ministry of Justice (MoJ) and the Legal Aid Agency (LAA) will carry out a short and focussed review of existing arrangements for providing legal aid for advice and assistance (known as Legal Help) in respect of TMSCCs, under paragraphs 32(2) and (3) and 32A(2) and (3) of schedule 1 to Legal Aid Sentencing and Punishment of Offenders Act 2012.¹

A TMSCC is defined as a claim under employment law or for damages arising in connection with the trafficking or exploitation of an individual who is a victim of trafficking in human beings or modern day slavery.

A victim of trafficking or modern day slavery is defined with reference to the Council of Europe Convention on action against Trafficking in Human Beings and s1-2 of the Modern Slavery Act 2015. There is no requirement under paragraphs 32(2)-(3) and 32A(2)-(3) for an individual to be referred into or receive a positive decision – either Reasonable Grounds or Conclusive Grounds – in the National Referral Mechanism.

The current arrangements for civil legal aid for TMSCC permit any civil legal aid provider to re-allocate 5 matter-starts under their civil legal aid contract for Miscellaneous Work, of which TMSCCs are one type of such work.

The Anti-Trafficking and Labour Exploitation Unit have presented some evidence which they suggest shows that there may not be adequate access to Legal Help for individuals wishing to consider bringing a TMSCC.

The MoJ's and LAA's position is that victims of trafficking and modern slavery are entitled under the relevant provisions of LASPO to access legal advice and assistance to consider bringing a TMSCC. It is acknowledged that that access must be effective and must be capable of equipping the individual with the ability to make an informed decision about whether to bring and in order to bring a TMSCC.

The purpose of the review is to: (i) identify whether there are current barriers to effective access; (ii), if so, identify the causes of these; and; (iii) as a result, to consider what, if any, steps should be taken by the Lord Chancellor and/or the Legal Aid Agency to ensure adequate and effective access to Legal Help regarding TMSCCs. It is accepted that some action must be taken to investigate this fully, although it is recognised that this Review can only identify actions in respect of the provision of Legal Help and the responsibilities of the Lord Chancellor and Legal Aid Agency, rather than more widely. The focus is on access to Legal Help and the opportunity to make an informed decision around pursuing a TMSCC, rather than whether that Legal Help results in a claim being pursued.

¹ The Review will not consider any widening of the scope of civil legal services for victims of trafficking or victims of modern slavery than is currently provided for in paragraphs 32 and 32A of Part 1 Schedule 1 of the LASPO, or for arranging for legal aid to be more generally available in employment matters, or any wider changes to the legal aid scheme.

There is considerable urgency in relation to this review, and that it should therefore be undertaken within the shortest timescale practicable having regard to the potential impact on a large number of vulnerable people, the range of providers and support agencies which should be involved, and taking into account the availability of Ministry of Justice and Legal Aid Agency staff, and the need for a review that is as comprehensive and reflective of the need for access to Legal Help by vulnerable individuals as possible.

Accordingly, the Ministry of Justice and the LAA will aim to complete this Review and present its conclusions and recommendations to the Minister for legal aid by no later than the end of **June 2016**. The review will be published upon completion². Any recommendations from the Review which Ministers agree will be implemented as soon as practically possible.

It is acknowledged at the outset that within the tight timescale there may be some barriers to collecting evidence of the full extent of the need for Legal Help in relation to TMSCCs. The Ministry of Justice and the LAA will however use reasonable endeavours to consult as widely as necessary (or appropriate) with relevant parties such as support providers, first responders and legal practitioners.

The Ministry of Justice and the Legal Aid Agency will however continue to keep arrangements for provision of Legal Help (and legal aid more widely) in respect of TMSCCs under more general review, and may make further changes as they consider necessary to maintain effective access to legal aid.

Terms of the Review

The Review will involve research into the following points in particular:

A: Potential numbers of individuals entitled and eligible to seek Legal Help in relation to a TMSCC and their geographical location.

B Ability, preparedness and willingness of legal aid providers to carry out this work, and any factors which may limit this.

This will include consideration of:

- a. The current contractual arrangements for funding TMSCCs, including financial viability.
- b. The nature of the work involved and extent of expertise required to provide legal help for a potential TMSCC.
- c. The existing expertise among legal aid providers in working with victims of trafficking; compensation claims in the employment tribunal or county / high court, and the international and human rights framework among legal aid providers.

² Note that the publication date may be subject to any purdah requirements in the run up to the EU referendum.

- d. The numbers of providers currently undertaking this work as well as those who may or wish to expand their practice in or into this area.

The review will also consider, *inter alia*, the extent to which factors outside of the legal aid scheme may limit the numbers of individuals seeking Legal Help in relation to a TMSCC. The Review will not however consider any widening of the scope of civil legal services for victims of trafficking or victims of modern slavery than is currently provided for in paragraphs 32 and 32A of Part 1 Schedule 1 of the LASPO, or for arranging for legal aid to be more generally available in employment matters, or any wider changes to the legal aid scheme.