IN THE COURT OF APPEAL (CIVIL DIVISION)
IN THE MATTER OF AN APPEAL FROM MR JUSTICE MURRAY
IN THE QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
CLAIM NO CO/4111/2018

BETWEEN:

THE QUEEN
on the application of
LIBERTY

Appellant

-and-

DIRECTOR OF LEGAL AID CASEWORK

Respondent

(1) SARAH WARD
(2) BOROUGH OF POOLE
(3) THE LORD CHANCELLOR

Interested Parties

APPELLANT'S SKELETON ARGUMENT
APPLICATION FOR PERMISSION TO APPEAL

Introduction

1. The Appellant seeks permission to appeal against Mr Justice Murray's dismissal of its claim for judicial review of the Respondent's refusal of civil legal aid to the First Interested Party, Ms Ward, to pursue her statutory application to quash prohibitions contained in the Second Interested Party's Public Spaces Protection Order ("PSPO") on the grounds that the Borough Council did not have the power to make them.

2. The Judge heard oral submissions from the Claimant and the Defendant on 20 March 2019 and handed down a written judgment on 17 June 2019.

Issues

3. The Appellant maintained that as a matter of law the Respondent was wrong to decide on 20 July 2018 that legal services provided in relation to Ms Ward's application ("the s.66 Challenge") are not "civil legal services" described in paragraph 19(1) of Part 1 of Schedule 1 to Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") and therefore fall outside the scope of civil legal aid.

4. Initially, the Respondent also "determined" that, even if the matter fell within scope, Ms Ward did not "qualify" for legal aid because the s.66 Challenge failed the "proportionality test" contained in the "Merits Regulations" (see below). However, after being served with the claim he elected not to defend this aspect of the decision.

5. The Respondent decided legal services for the s.66 Challenge are not "civil legal services" described in paragraph 19(1) of Part 1 of Schedule 1 LASPO for two reasons:

   (1) An application under s.66 Anti-Social Behaviour, Crime and Policing Act 2014 is not a "judicial review" because it is not a "procedure in which a court … is required by an enactment to make a decision applying the principles that are applied by the court on an application for judicial review"; and,

   (2) the application "does not have the potential to produce a benefit for" Ms Ward and/or her family.

6. It was common ground that to succeed before the Judge the Appellant had to establish that the Respondent was wrong in respect of both reasons. Although most of the written and oral

argument was directed at the first reason [34], in the event the Judge decided against the Appellant on the second reason and chose not to say anything about the first reason [57].

7. In summary, the Appellant maintains that the Judge erred in law by deeming benefits to Ms Ward "insufficient" when the requirement of the rule is merely to identify the recipient of the potential benefit and not otherwise determine its suitability for public funding, a task left to the Director's determination (subject to statutory appeal) of the merits criteria set out in the statutory scheme.

8. The issues in the case are of considerable significance in terms of identifying the scope of civil legal aid generally.

The facts

9. The facts are set out by the Judge in paragraphs [10] – [15] and not repeated herein.

Relevant law

Civil legal aid

10. The rules governing legal aid are set out in Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). Civil legal services are legal services[1] other than "criminal legal aid"[2] and are to be available to an individual if (s.9(1)):

> "(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 [the relevant regulations]."[3]

Scope

11. Paragraph 19 of Part 1 of Schedule 1 describes the following civil legal services:

> "(1) Civil legal services provided in relation to judicial review of an enactment, decision, act or omission."

12. In paragraph 19(1) "judicial review" means:[4]

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[1] As defined by s.8(1) LASPO.

[2] S.8(3) LASPO

[3] The term "scope" is used throughout the explanatory memorandum and by the Director to describe the services described in Part 1 of Schedule 1.

[4] See the definition of "judicial review" in sub-paragraph 19(10).

> "(a) the procedure on an application for judicial review (see section 31 of the Senior Courts Act 1981) … and
>
> (b) any procedure in which a court, tribunal or other person mentioned in Part 3 of this 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"

13. Under "specific exclusion" paragraph 19(3) of Part 1 of Schedule 1 states that:

> "the services described in sub-paragraph (1) do not include 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."

14. It is common ground that the purpose of paragraph 19(3) is to exclude from the scope of legal aid "representative actions", i.e. judicial reviews that only have the potential to benefit persons other than the applicant or his family.

Merits criteria

15. Under s.11 LASPO the Director must determine whether an individual "qualifies" for civil legal services in accordance with regulations governing financial resources[5] and the Civil Legal Aid (Merits Criteria) Regulations 2013/104 ("the Merits Regulations").[6]

16. The Merits Regulations are divided into two main sections: "general merits criteria" and specific merits criteria, which disapply, modify or supplement the general criteria in specific categories of cases. Less stringent criteria apply to cases with certain features (e.g. cases with an overwhelming importance to the individual, cases which are of "significant wider public interest" or where the substance of the claim relates to a breach of Convention rights).

17. All applications for civil legal services must meet cost benefit criteria. Cases subject to the general merits criteria will only be funded if the applicable costs to damages ratio is met or, for claims not primarily for damages, the "reasonable private paying client test" is met. However, for cases which are of "significant wider public interest", funding will be granted if the less stringent "proportionality test" is met.[7]

18. A case will be of "significant wider public interest" if the Director is satisfied that it is an appropriate case to realise:

[5] Pursuant to section 21 LASPO and regulations made thereunder.

[6] Section 11 LASPO

[7] Regulation 42 of the Merits Regulations.

> "(a) real benefits to the public at large, other than those which normally flow from cases of the type in question; and (b) benefits for an identifiable class of individuals, other than the individual to whom civil legal services may be provided or members of that individual's family."[8]

19. Claims for judicial review have their own specific merits criteria. Regulation 56(2)(b) provides that civil legal aid for representation in a public law claims[9] is available if the "proportionality test" is met.

20. Therefore, for public law claims and cases of significant wider public interest, the applicable cost benefit criterion is the proportionality test set out in regulation 8 of the Merits Regulations:

> "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."[10]

21. The Lord Chancellor's Guidance under s.4 LASPO explains this:[11]

> *"4.2.16 Under the merits regulations, as under the Funding Code, there is a distinction between two separate forms of potential public interest:*
>
> > *(a) there are certain types of case which by their nature may exhibit some degree of public interest. In particular, it can be said to be in the general public interest for public authorities to act lawfully. Hence claims against public authorities alleging abuse of power or significant breach of human rights and applications for judicial review are subject to less strict criteria than the general merits criteria;*
> >
> > *(b) there are also individual cases which, on their own particular facts, can be said to deliver, in addition to the benefits for the individual, specific benefits to a section of the public, i.e. persons other than the individual bringing the proceedings*
>
> *4.2.17 It is the latter type of case that regulation 6 of the merits regulations is concerned with. This concept allows cases to qualify for funding where the benefits to the individual alone might not allow them to qualify."*

22. The Guidance addresses the proportionality test and states that:

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[8] Regulation 6 of the Merits Regulations

[9] Public law claim means any matter described in paragraph 19(1) of Part 1 Schedule 1 (regulation 2 of the Merits Regulations).

[10] As defined in regulation 8.

[11] Pursuant to s.4(3)(b) LASPO the Director must have regard to guidance given by the Lord Chancellor.

> *"in considering "all the circumstances of the case" in regulation 8 of the merits regulations, it will be necessary to consider (i) the importance of the issues raised by the case pursuant to CPR 44.3(5)(e), for example how serious is the abuse of power alleged in a claim against a public authority? (ii) how far short of the appropriate damages/costs ratio or the reasonable private paying individual the case falls. The less cost effective the case appears to be, the more serious must be the issues raised by the case to justify the provision of services."*

23. In public law claims and cases of significant wider public interest individuals only qualify for legal representation if the Director is satisfied that 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.[12]

Rights of appeal against merits determinations

24. An applicant has a right of appeal to an Independent Funding Adjudicator against a determination of the Director pursuant to ss.11/9(1)(b). There is no right of appeal against an "out of scope" decision made pursuant to s.9(1)(a).[13]

Public Spaces Protection Orders

25. Chapter 2 of the Anti-Social Behaviour, Crime and Policing Act 2014 prescribes the circumstances in which local authorities may make a PSPO prohibiting activities in public spaces within their area that are have had or will have a detrimental effect on the quality of life of those in the locality.[14] A PSPO may only prohibit activities that are or are likely to be of a persistent or continuing nature and the effect of which that makes them unreasonable and justifies the restriction.[15]

26. A prohibition or requirement may be made to apply to all persons or only to those in specified categories or save for those in specified categories.[16]

27. Pursuant to s.66 of the 2014 Act an individual who lives in the restricted area or who regularly works in or visits that area ("an interested person") may apply to the High Court to question the validity of a PSPO (or a prohibition contained within it) on the grounds that (a)

[12] See regulation 39 and 53 of the Merits Regulations.

[13] Regulation 45(1) of the Civil Legal Aid (Procedure) Regulations 2012/3098

[14] Section 59(2) of the 2014 Act

[15] Ibid s.59(3)

[16] Ibid s.59(6)

the authority did not have the power to make the order or (b) a requirement under the Act was not complied with in relation to it.[17] The time limit for making an application is 42 days and cannot be extended under any circumstances.[18]

28. A PSPO may last no more than 3 years unless extended pursuant to s.60. An extension may not be for a period of more than 3 years but a PSPO may be extended an infinite number of times. There is no right to challenge the validity of a PSPO upon any such extension by the local authority.

29. The Secretary of State for the Home Department has a power to issue statutory guidance under the 2014 Act (s.73).

30. The Home Office Revised Guidance published in December 2017 states *inter alia*:[19]

> *"Public Spaces Protection Orders should not be used to target people based solely on the fact that someone is homeless or rough sleeping, as this in itself is unlikely to mean that such behaviour is having an unreasonably detrimental effect on the community's quality of life which justifies the restrictions imposed…*
>
> *Any challenge to the Public Spaces Protection Order must be made in the High Court by an interested person within six weeks of it being made. An interested person is someone who lives in, regularly works in, or visits the restricted area. This means that only those who are directly affected by the restrictions have the power to challenge."*

The Judge's approach to the second reason: the "benefit" test in paragraph 19(3)

31. In [35] of his judgment the Judge set out the Appellant's submissions regarding the proper approach to paragraph 19(3) of Schedule 1 LASPO:

> "i) Whether a judicial review has the potential to produce a benefit for an individual or a member of the individual's family is a question of mixed fact and law.
>
> ii) The question of whether a judicial review has the potential to produce a benefit is not one that the court must leave to the Director, only disturbing his decision if it is *Wednesbury* unreasonable or otherwise unlawful in public law terms. The court must determine the issue itself. Mr Burton contrasted this with section 9(1)(b) of LASPO, which provides that the Director has determined that an application for in-scope civil legal services has met merits and other relevant criteria.

[17] Section 66 Anti-Social Behaviour, Crime and Policing Act 2014

[18] Section 66(3). A person charged with an offence under s.67 of the 2014 Act may challenge the validity of the prohibition or requirement they are charged with offending in the criminal proceedings.

[19] "*Anti-Social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers: statutory guidance for frontline professionals*" Updated December 2017 at p51/4

iii) The word "benefit" in para 19(3) is to be given its ordinary meaning. It is not qualified in any way in the statute, in contrast, for example, to paras 7.2.4 and 7.3.4 of the pre-LASPO Funding Code, which referred to "*real* benefits for the applicant, for the applicant's family and for the environment" (emphasis added). Mr Burton also contrasted para 19(3) with section 10(5) of LASPO, which addresses the question of whether there is a wider public interest in a proposed case due to the case being likely to produce "*significant* benefits for a class of person, other than the individual and the members of the individual's family" (emphasis added).

iv) The threshold for whether a judicial review has the potential to produce a relevant "benefit" is intentionally low as it is merely a threshold. Public resources are protected by the requirement under section 9(1)(b) of LASPO that the Director then consider whether public resources should be expended on the proposed judicial review according to the merits criteria and, in particular, the proportionality test.

v) Provided that there is a potential to produce a relevant benefit, then the proposed judicial review is within scope of the civil legal aid, regardless of the motives of the person seeking to bring the relevant proceedings, including whether those motives include a desire to bring benefit to persons other than the applicant or a member of the applicant's family."

32. The Judge accepted without qualification (i), (ii) and (v) (see [43] and [54]). In relation to (iii) and (iv) the Judge said that the "starting point is a consideration of the ordinary meaning of the word "benefit", which is a broad one" and agreed that [44]:

> "in view of the Director's application of the merits criteria and, in particular, the proportionality test, it is not necessary for the Director or the court, when considering "benefit", to consider the degree or quality of the benefit to the individual or the individual's family member."

33. Whilst the Judge also agreed that it is "not necessary for the applicant to show that the proposed judicial review has the potential to produce a significant benefit", he decided that in order to be "sufficient" the benefit "must have some substance … [i]t must be a real benefit." [44]. Moreover, in his view, the "benefit must be direct, personal and material to the individual or to a member of the individual's family." [45]

34. Finally, the Judge decided that that "elimination of a theoretical or hypothetical risk that an individual might at some future time form part of a class that could be affected by a public law wrong that the relevant judicial review is seeking to address would not … normally be a sufficient benefit", although he could [46]:

> "envisage an exceptional case where the elimination of a sufficiently grave and imminent risk threatening the applicant or a member of the applicant's family might be a sufficient…."

The Judge's application of the test to the facts

35. At [36] the Judge identified the benefits of the application to Ms Ward:

> "i) Ms Ward is not currently homeless, but she is a single mother of three children dependent on state benefits, living in Poole. Two of her children have disabilities. As recently as 2017 she was threatened with homelessness in circumstances set out in her witness statement dated 19 October 2018. If the Section 66 Challenge is successful, she will have removed the risk to her and her family members of being criminalised by the PSPO in the event of their becoming homeless.
>
> ii) Ms Ward has worked in homelessness services in Poole for many years and considers the criminalisation of homelessness not only unlawful but misguided and contrary to the interests of local residents, of which she is one."

36. Applying his interpretation of the correct test, the Judge concluded [47] (emphasis added):

> "Putting her case at its highest, the elimination of the hypothetical risk that Ms Ward might be subject to the PSPO should she in the future find herself homeless is not, as I have already said, **sufficient to constitute a benefit** in the sense required by para 19(3)."

37. After citing the relevant passages from her witness statement, the Judge continued (emphasis added):

> "51 While I do not doubt the sincerity of Ms Ward's fear of potential homelessness, I note that there is no suggestion that she was under significant threat of being made homeless at the time she filed the Section 66 Challenge or at any other time since 2017. Even on her own evidence, in the passages I have quoted above, it is not clear that homelessness for Ms Ward was imminent in 2017. She had, for example, the possibility of staying with friends. And, in the end, she was able to find a new home to rent.
>
> 52 The risk of homelessness in her case is hypothetical and the elimination of that hypothetical risk **is insufficient**, in my judgment, to constitute a benefit within para 19(3), construing it in the context of LASPO as a whole and taking into account the relevant policy background to which I have referred."

38. In terms of the "second alleged benefit", the Judge held that (emphasis added):

> "53 Similarly, the second alleged benefit to Ms Ward, to which I have referred at [36](ii) and at [50] above, is in my judgment **insufficient**. Although Ms Ward is a resident of Poole and therefore has a more direct interest than, say, a resident of Newcastle in the quashing of the PSPO, this second alleged benefit is **not sufficiently direct, personal and material** to Ms Ward or a member of her family to constitute the sort of benefit that would distinguish the Section 66 Challenge from what is, in essence, a representative action.

> 54 I agree with Mr Burton that when assessing "benefit" to an applicant or a member of an applicant's family under para 19(3) it does not matter whether others would benefit from the proposed judicial challenge or even that the benefiting of others is a strong motivation in bringing the challenge. However, there must be **a sufficient direct, personal and material benefit** to the applicant or a member of their family.
>
> 55 **Neither** Ms Ward's status as a resident of Poole nor her longstanding professional and personal involvement in the issue of homelessness **is sufficient** in my view to mean that the Section 66 Challenge would have the potential to produce a benefit to Ms Ward or a member of her family in the sense required by para 19(3)."

Grounds of appeal

Ground 1: Misdirection in law: (a) sufficiency not the right test

39. The Appellant accepts that it "goes without saying"[20] that for the purposes of 19(3) a benefit must not only be personal to the applicant (or their family) but real in the sense of not being fanciful or frivolous. Beyond that threshold however, no test of sufficiency is to be applied. This is because:

    a) The ordinary meaning of the word 'benefit' does not require further elucidation or explanation. A benefit is any "*advantage or profit gained from something*."[21] In *Rolls-Royce PLC v. Unite the Union* [2009] EWCA Civ 387 the Court of Appeal applied the dictionary definition and Arden LJ, as she then was, explained at [165]:

        > "[Benefit] is a word used when it's difficult or undesirable to place limits on the advantage that is to be caught by particular provision."

    b) The draftsman used qualifying adjectives to restrict "benefit" elsewhere in LASPO ("significant benefits" - s.10(5)) and in the regulations made at the same time: (see "real benefits" and "sufficient benefit" in reg 6 and 31 of the Merits Regulations respectively). Parliament plainly intended no restriction to apply to benefits in 19(3).

    c) Moreover, although the words "real" and "direct" were used in the predecessor rule (contained in paragraphs 7.2.4 & 7.3.4 of the Legal Services Commission Funding Code), they were omitted from paragraph 19(3), further confirming the unrestricted meaning in 19(3).

[20] Judgment at [45]

[21] Oxford English Dictionary.

d) Paragraph 19(3) should be construed as authorising only such a degree of intrusion upon the right of access to the courts as is reasonably necessary to fulfil the objective of the provision (see Lord Reed in *R (UNISON) v. Lord Chancellor* [2017] UKSC 51: [2017] 3 W.L.R. 409 at [80]). Paragraph 19(3) is a "specific exclusion" that denies the provision of legal aid without further consideration: it should be construed narrowly as a result.

e) On any view, no additional words are necessary to ensure the provision achieves the statutory purpose of excluding legal aid for "representative actions". That is achieved by identifying the recipients of a potential benefit: a binary task that does not engage issues of sufficiency.

f) Neither are additional words necessary to uphold the general policy objectives of LASPO. As the Judge recognised [44], whether the benefits of a judicial review, including those personal to the applicant and to other members of the public, are sufficient to justify the use of public funds is a matter for the Director to determine when applying the proportionality test contained in the Merits Regulations.[22]

g) A determination by the Director that the likely benefits of a judicial review are disproportionate to the potential costs can be appealed to an Independent Funding Adjudicator. Questions of scope can only be challenged by judicial review. [23]This is consistent with the the court's inquiry on an application for judicial review being limited to establishing whether there exists a potential benefit to the individual or his family exists, and not the extent, scale, seriousness or significance of such a benefit.

h) The courts should be slow to gloss terms like benefit or significant as "attention might then turn to the meaning of the gloss and, albeit with the best of intentions, the court might find in due course that they have travelled far from the word itself" (Lord Wilson in *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 at [26]). This is particularly pertinent to LASPO and the regulations made thereunder

[22] Delegated legislation made under an Act may be taken into account as persuasive authority on the legal meaning of the Act's provisions, especially where the delegated legislation is roughly contemporaneous with the Act. Bennion 7 Ed at 21.18

[23] Regulation 45(1) of the Civil Legal Aid (Procedure) Regulations 2012/3098

where the word benefit is used frequently (e.g. s9, s.10, s.11, s.55, s.56. Schedule 1 para 3 and 20 occasions in the Merits Regulations alone).

40. Therefore, respectfully, the Judge's use of the qualifying words "real", "direct", "material" and "of substance" constituted a misdirection in law insofar as they exclude any (non-fanciful or frivolous) benefits to the applicants or the applicant's family. Rather than merely start with the ordinary meaning of the word benefit, the Judge ought to have stopped there.

Ground 1: Misdirection in law: (b) erroneous treatment of contingent benefits in any event

41. The Judge's treatment of contingent benefits was erroneous in any event. Plainly, the avoidance of a detriment constitutes a benefit. Avoidance of a potential detriment is also a benefit: an applicant is obviously advantaged by the elimination of a risk in the same way a person is disadvantaged by the loss of an opportunity. A judicial review which will eliminate a risk of detriment or secure an opportunity to make a gain has the potential to produce real not merely hypothetical benefits: in both cases the judicial review has produced an advantage for the applicant and that suffices.[24]

42. The Judge offered no principled basis for excluding almost altogether contingent (or "hypothetical") benefits from the statutory test. There is none. The para 19(3) test does not distinguish between types of benefit, only the identity of the potential recipient(s).

43. Critically, the extent and gravity of a risk of harm/prospect of gain are factors to be weighed in the cost benefit analysis inherent to the proportionality test and should not be incorporated into the test of whether a benefit exits in the first place.[25] For the reasons set out in [39] above the court needs to be wary of any blurring of these lines. This is especially the case where, as here, the contingent factors relating to that risk are outside the control of the applicant.

44. The Judge's approach will exclude many judicial reviews entirely from the scope of legal aid. It is not uncommon for a policy or practice to be of imprecise scope or uncertain application, particularly at the point of implementation and hence potential challenge. Moreover, it is unduly restrictive in that it requires prior, or at least the prospect of immediate, infliction of harm before funding can even be considered. Some obvious examples of excluded cases are:

[24] See [38(a)] and ft 21 above.

[25] "A comparatively small risk of really serious harm can justify action, while even the virtual certainty of slight harm might not." Lady Justice Hale as she then was in C & B (Children) (Care Order: Future Harm)

(a) persons not currently unwell or in mental health crisis judicially reviewing closures to NHS facilities or restrictive detention arrangements in their area (b) persons with no immediate plans to protest but who have in the past and want to challenge a new protest restriction (c) a person without leave to remain but not currently at risk of removal challenging deportation rules (d) someone stopped and searched in the past from challenging new stop and search powers that s/he cannot know if/when will apply to him or her and (e) someone not immediately looking for a home challenging government rules which incentivise landlords to racially discriminate against certain persons. There are countless such examples. Parliament cannot be assumed to have wished to place them all out of scope.

45. The circumstances of the present case also demonstrate the unrealistic consequences of this approach.

Ground 2: Wrong conclusion on the facts

46. The Judge did not hold that the "alleged benefits" of the S.66 Challenge to Ms Ward were not benefits to her in the ordinary meaning of the term. His conclusion was that neither constituted "a sufficient benefit for the purposes of para 19(3)" [41]. This is explained by the errors in his approach identified above and is, with respect, wrong.

(a) Removal of the risk to Ms Ward and her family members of being criminalised

47. Ms Ward is a single parent of two disabled children who is dependent on state benefits, living in a privately rented home in Poole and who has no independent means or other resources. In her unchallenged evidence Ms Ward states that she lives a "financially precarious existence" and knows from her experience working in homelessness that "no one who depends on state benefits is very far away from experiencing homelessness." She has been "frighteningly close to experiencing street homelessness" in the past and worries she would be subject to the terms of the PSPO if for any reason in the future she lost her current home.

48. It would be untenable to suggest that the elimination of that risk would not be a "real" and "direct" benefit of "some substance" to Ms Ward. The Court might not have considered it to be a significant benefit having regard to the scale of the risk, but that is not the para 19(3) test.

49. The reason for the Judge finding this benefit insufficient was his approach to "hypothetical" benefits generally (i.e. Ms Ward's is not "an exceptional case where the elimination of a sufficiently grave and imminent risk" is at stake [52]). In particular, the Judge's decision seems to have been based on the absence of an "imminent risk" of homelessness [51].

50. Whilst Ms Ward was not "under significant threat of being made homeless at the time she filed the Section 66 Challenge", this is too restrictive a window of time: the PSPO would have existed for three years [B13], if not perpetuity (s.60 of the 2014 Act), unless successfully challenged by way of an application issued within the 42-day statutory deadline (s.66(3)). A consequence of the Court's interpretation of the "benefit" test is that it undertook no assessment of the extent of the risk of Ms Ward being caught by the PSPO in the future.[26]

51. The narrowing of the class of persons who can even apply for legal aid to those who are homeless or on the cusp of homelessness within 42 days of the PSPO having been made was unrealistic, arbitrary and improperly restrictive. It is obvious that persons living such inherently contingent lives are unlikely at a time of such extreme instability to be well placed or otherwise predisposed, to apply for legal aid to challenge a PSPO.

52. Therefore, even if the Judge was correct to apply a higher threshold to contingent benefits (which, for the reasons set above, is not accepted), the Judge was wrong to impose such a restrictive temporal restriction, at least in the manner he applied it to the facts of this case.

(b) Other benefits

53. Finally, the Judge does not explain why the other ("second alleged") benefits of the application to Ms Ward, who has standing to bring the application pursuant to a statutory test designed by Parliament to restrict the right of challenge to "*only those who are directly affected by the restrictions"*,[27] should be excluded altogether from the costs/benefit analysis. They are direct and personal to her as a local resident and user of the public spaces subject to the PSPO: insofar as they were not considered by the Judge to be "material" benefits, that was the wrong approach: 19(3) does not distinguish between types of benefit. The proximity

[26] Ms Ward has recently been informed that her landlords are in arrears with their mortgage provider and the debt has been referred to a debt collection agency for enforcement. Ms Ward is therefore threatened with homelessness once again. It is accepted that this information was not before Murray J.

[27] See Home Office guidance para. At [30] above.

and direct nature of these benefits distinguishes her case from that of Ms Evans, a "purely representative action"[28] where Ms Evans was concerned about treatment of captured detainees in Afghanistan (*R (Evans) v. Lord Chancellor* [2011] EWHC 1146).[29]

54. It is essential to understand that whilst para 19(3) excludes purely representative actions from the scope of legal aid, the statutory scheme does not discourage still less exclude claims that are likely to benefit people other than the applicant or their family, including the "public at large." On the contrary, as set out above, the "general public interest for public authorities to act lawfully" and the prospect other will benefit explains why applications for judicial review are subject to less strict criteria and why cases may qualify for funding where the benefits to the individual alone might not allow them to qualify.[30] The test is emphatically not one of primary benefit or purpose: the Judge's reference therefore to "what is, in essence, a representative action"[31] is inapt and liable to confuse.

55. To this end, it is wholly consistent with the purposes of statutory scheme that Ms Ward is motivated to bring the claim not just for herself but on behalf of other persons who may be at greater risk, because it is the potential of the claim to do precisely that which may allow it to meet the proportionality test.[32]

The first reason: the definition of judicial review in LASPO

56. In the event the appeal succeeds then the first reason for the Respondent's decision contingently arises. The first reason raises a pure question of law that requires no factual assessment and therefore the Court of Appeal may see no purpose in referring it for determination by the High Court pursuant to CPR 52.20(2)(b). Moreover, any further delay in the determination of Ms Ward's application for legal aid is very likely to seriously prejudice her claim against the PSPO.[33]

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[28] See (*R (Evans) v. Lord Chancellor* [2011] EWHC 1146) at [27] and [31]

[29] For the avoidance of any doubt the Appellant has not suggested that paragraph 19(3) or its purpose of denying legal aid to "purely representative actions" is improper in the manner advanced in *Evans* or otherwise.

[30] See the Lord Chancellor's Guidance under s.4 LASPO" at 4.2.16/17 and cited above at [21].

[31] Judgment at [53]

[32] This also explains why Ms Ward goes to considerable lengths to explain the wider public interest in the s66 Challenge.

[33] The s66 Challenge is currently stayed pending the resolution of this claim. For this reason the Appellant seeks an order expediting this appeal.

57. Whilst the Respondent may ultimately file a Respondent Notice seeking to uphold the Judge's decision on the basis of its second reason, the Appellant in any event invites the Court to determine the issue concerning the definition of judicial review for the following reasons:

    a) The Respondent conceded that a Cost Capping Order was appropriate because the claim met the definition of "public interest proceedings" and resolution of both issues will have consequences beyond this claim.

    b) The merit of the Court of Appeal considering the second issue is increased by the possibility of the court reaching a different view than that reached by Silber J in *R (Bhatia Best) v. Lord Chancellor* [2014] 1 W.L.R. 3487.

    c) The Appellant's claim that the Respondent was wrong to decide that a s.66 application is not a "judicial review" is highly arguable. Although permission to apply for judicial review was initially refused on the papers the judge did not have sight of the Claimant's Reply to the Defendant's Summary Grounds for Resisting the Claim. The Appellant's counsel was not called upon by Swift J at the oral renewal hearing at which permission to apply for judicial review was granted.[34]

Permission to appeal

58. It is submitted that an appeal would have a "real prospect of success" (CPR 52.6(1)(a)). The claim is the first to consider the application of the benefit test set out in paragraph 19(3) of Schedule 1 to LASPO: an issue of great importance in terms of defining the scope of legal aid. It also raises a second issue of considerable public importance, namely the correct interpretation of the definition of "judicial review" in paragraph 19(1). For these reasons it is also submitted that there is a compelling reason for the appeal to be heard pursuant to CPR 52.6(1)(b) (see White Book 2019 at 52.6.2).

Jamie Burton

Doughty Street Chambers

8 July 2019

[34] The Appellant relies on the Detailed Grounds and Claimant's skeleton argument for the final hearing dated 6 March 2019 for the purposes of setting out its case on the definition of judicial review and the application for permission to appeal. Both issues can be dealt with in one day.

IN THE COURT OF APPEAL (CIVIL DIVISION)
IN THE MATTER OF AN APPEAL FROM MR JUSTICE MURRAY
IN THE QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
CLAIM NO CO/4111/2018

BETWEEN:

THE QUEEN
on the application of
LIBERTY

Appellant

-and-

DIRECTOR OF LEGAL AID CASEWORK

Respondent

(1) SARAH WARD
(2) BOROUGH OF POOLE
(3) THE LORD CHANCELLOR

Interested Parties

APPELLANT'S SKELETON ARGUMENT
APPLICATION FOR PERMISSION TO APPEAL

Counsel for the Appellant:

J Burton

Doughty Street Chambers

Solicitors for the Appellant:

LIBERTY

(in house)