

EXPLANATORY MEMORANDUM TO
THE CIVIL LEGAL AID (MERITS CRITERIA) (AMENDMENT) REGULATIONS
2016

2016 No. 781

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to amend The Civil Legal Aid (Merits Criteria) Regulations 2013 (“the Merits Criteria Regulations”), which provide the merits criteria that the Legal Aid Agency (“LAA”) must apply when determining whether an applicant qualifies for civil legal aid. The effect of the amendment is that in cases where an application for full legal representation¹ is subject to an assessment of its prospects of success, a case must in general have 50% or higher prospects of success to receive legal aid. In addition, the LAA must fund certain cases that are assessed to have prospects of success that are “borderline”² or just below 50% (a 45% or more chance, but less than a 50% chance, defined as “marginal” prospects of success).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument will come into force on 22 July 2016. An urgency statement was presented to Parliament pursuant to section 41(9) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”) on 21 July 2016 alongside this instrument.
- 3.2 The Lord Chancellor considers it desirable for the amendments in this instrument to come into force without delay for the reasons given in that statement.

Other matters of interest to the House of Commons

- 3.3 This entire instrument applies only to England and Wales.
- 3.4 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter, and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

¹A form of civil legal service that is available through legal aid which covers all the work needed to support legal proceedings to trial and appeal.

²“Borderline” means that it is not possible, by reason of disputed law, fact or expert evidence, to quantify the prospects of success.

4. Legislative Context

- 4.1 The Merits Criteria Regulations set out the merits criteria that must be applied by the Director of Legal Aid Casework (the Director) when determining whether an applicant qualifies for civil legal services (that is, civil legal aid) under Part 1 of Schedule 1 to LASPO. These criteria provide the basis for deciding whether it is justified to provide, or to continue to provide, public funds in an individual case, which in some cases includes an assessment of the prospects of success of a case (the prospects of success test).
- 4.2 The prospects of success test was subject to judicial review and on 15 July 2015 the High Court handed down its judgment in *IS v The Director of Legal Aid Casework and the Lord Chancellor*³ (“the *IS* case). Prior to the High Court’s judgment, most applications that were subject to the prospects of success test were required to have at least a 50% chance of success to receive legal aid funding for full representation. Civil legal aid for full representation was not generally available for cases where the prospects of success were “borderline” or less than 50%. The Court declared that, insofar as they required a case to have 50% or greater prospect of success in order for full representation to be provided, the Merits Criteria Regulations were unlawful.
- 4.3 The effect of the High Court judgment was that it would be unlawful to refuse to provide legal aid in some cases where prospects were below 50%, where failure to determine that the prospects of success test is met would breach the applicant’s rights under the European Convention on Human Rights (ECHR). The Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2015 (S.I. 2015/1571) amended the Merits Criteria Regulations to reflect the High Court judgment. These changes introduced an exception to the general 50% threshold to require the LAA to fund full representation in cases where the prospects of success are borderline or less than 50% in circumstances where a refusal to provide funding would breach, or in some cases risk breaching, ECHR or enforceable EU law, in light of the High Court’s judgment.
- 4.4 On Friday 20 May 2016, the Court of Appeal handed down its judgment in the subsequent appeal⁴. The judgment overturned the High Court’s decision and held that the Merits Criteria Regulations as they were prior to being challenged and subsequently amended by S.I. 2015/1571, are lawful. The effect of this is that the general requirement for a case to have a 50% or higher prospect of success in order to be eligible for civil legal aid funding for full legal representation is lawful. As a result of the Court of Appeal’s judgment, the exception introduced by S.I. 2015/1571 is of no effect (as the effect of the Court of Appeal’s judgment is that applicants whose prospects of success are borderline or less than 50% do not have an entitlement under ECHR or EU law to legal aid), and the LAA are no longer funding any applications for civil legal aid where the prospects of success test applies and the prospects are assessed as ‘borderline’ or less than 50%.
- 4.5 The changes made by this instrument will remove the exception introduced by S.I. 2015/1571. However, rather than simply reverting to the version of the regulations as they were prior to the High Court’s judgment, this instrument adds a new exception for certain applications for full representation where the prospects of success are borderline or just below 50%.

³ [2015] EWHC 1965 (Admin)

⁴ [2016] EWCA Civ 464

4.6 The Supreme Court is currently considering an application to further appeal the judgment of the Court of Appeal in the IS case.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of this instrument is set out in Section 3 under "Other matters of interest to the House of Commons."

6. European Convention on Human Rights

6.1 Minister of State Sir Oliver Heald QC has made the following statement regarding Human Rights:

In my view the provisions of The Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016 are compatible with the Convention rights.

7. Policy background

7.1 The aim of the merits criteria is to make sure that public funding is targeted at the cases that most justify it; the factors to be considered are similar to those that would influence a privately paying client of moderate means when considering whether to become involved in proceedings.

7.2 In light of the Court of Appeal's judgment in the IS case, there is no legal requirement to broaden eligibility for legal aid. However, the Government has taken into account the arrangements that were in place following the High Court judgment, the effect of the Court of Appeal judgment, and the factors taken into consideration in the merits criteria and has decided to make legal aid funding available for certain cases where prospects are borderline or just below 50%.

7.3 For most cases where a prospects of success test applies this exception is subject to the case being of overwhelming importance to the individual⁵, or of significant wider public interest⁶; this is the standard prospects of success test. In certain cases, where the standard prospects of success test does not apply, the amendments made in this instrument mean the prospects of success criterion can be met in certain borderline and marginal cases (such as domestic violence cases, or cases relating to court orders for possession) without meeting the additional criteria. In others, borderline and marginal cases can satisfy the prospects of success criterion if the substance of the

⁵ case with overwhelming importance to the individual" means a case which is not primarily a claim for damages or other sum of money and which relates to one or more of the following--

- (a) the life, liberty or physical safety of the individual or a member of that individual's family (an individual is a member of another individual's family if the requirements of section 10(6) are met); or
- (b) the immediate risk that the individual may become homeless

⁶ a case is of significant wider public interest if the Director is satisfied that the case is an appropriate case to realise--

- (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.

case relates to a breach of Convention rights. This is consistent with exemptions to the application of the standard prospects of success test that existed for borderline cases in the Merits Criteria Regulations as originally made.

- 7.4 The instruments sets out transitional arrangements to make it clear that the amendments will not apply to applications for civil legal services made before the 22 July 2016.
- 7.5 Applications for full representation in claims for damages or other sums of money are subject to a cost benefit test, under regulation 42 of the Merits Criteria Regulations. The transitional provisions provide that for ongoing cases where the application was made before this instrument comes into force, which, under the amendments in this instrument would be assessed as having marginal or borderline prospects of success, the classifications in regulation 5 of the Merits Criteria Regulations will apply as though the amendments made to them by this instrument had not been made.

8. Consultation outcome

- 8.1 There was no consultation undertaken for this instrument. The amendments to the Merits Criteria Regulations made in July 2015 by SI 2015/1571 were necessary to comply with the High Court judgment and ensure the Director and LAA were not at risk of acting unlawfully. The Explanatory Memorandum accompanying that instrument made clear that the purpose of it was to amend the Merits Criteria to reflect the judgment pending the decision of the Court of Appeal. The Court of Appeal has recently overturned the High Court judgment, and the amendments made in this instrument are necessary to remove provisions that, as a result, have no effect.
- 8.2 Given this, and in light of the additional exceptions for borderline and marginal cases created by this instrument being in line with the policy approach taken for borderline cases in the Merits Criteria Regulations as originally made, the Government do not consider that consultation is necessary before making this change. These exceptions will also generally be of benefit for providers or potential applicants when compared to the current position of cases not receiving funding if prospects are below 50% or borderline. The Government will however monitor the impact of changes as part of ongoing monitoring of legal aid expenditure.

9. Guidance

- 9.1 Existing guidance for LAA staff from the Lord Chancellor (which is publicly available via gov.uk) has been amended to reflect the changes to the Merits Criteria Regulations.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies of the amendments set out in this instrument is an anticipated increase in the number of grants of funding for civil legal aid which may have a positive impact on civil legal aid providers and applicants. The Government estimates the amendments made in this instrument will result in around 70 more grants of civil legal aid funding per year, when compared to continuing the current position. These are cases with marginal or borderline prospects of success that will be eligible for civil legal aid subject to meeting specified criteria. Civil legal aid providers may therefore experience an increase in demand for their services compared to the position prior to these amendments being made.

- 10.2 The impact on the public sector is confined to the LAA. Based on eight months of data collected since amendments in July 2015, the Government estimates the amendments in this instrument will result in costs of approximately £250,000 per annum to the LAA when compared to maintaining the current position. The amendments will incur one-off administrative costs to the LAA of around £5,000, which will be absorbed in current administration budgets.
- 10.3 An Impact Assessment is submitted with this memorandum and is published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

- 11.1 The Regulations do not impose any additional regulatory burdens on small firms.
- 11.2 The legislation applies to small business only insofar as it affects specific operational arrangements, as set out in operational guidance, of the Legal Aid Agency and providers of legal aid services.
- 11.3 The Ministry of Justice has not taken any specific steps to minimise the impact of these amendments on businesses employing up to 50 people.

12. Monitoring & review

- 12.1 The operation of and expenditure of the legal aid scheme is continually monitored by the Ministry of Justice and the LAA.

13. Contact

- 13.1 Hannah Cook at the Ministry of Justice (Telephone: 0203 334 5347 E-mail: Hannah.Cook1@justice.gsi.gov.uk) can answer any queries regarding the instrument.