Neutral Citation Number: [2014] EWHC 709 (Admin)

Case Nos: CO/16747/2013 AND CO/17196/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/03/2014

Before :

LADY JUSTICE RAFFERTY
MR JUSTICE CRANSTON
- -

Between :

The Queen on the application of The Howard League for Penal Reform	**Claimants**
-and-	
Prisoners' Advice Service	
- and -	
The Lord Chancellor	**Defendant**

- -
- -

Phillippa Kaufmann QC, Alex Gask and Martha Spurrier (instructed by **Bhatt Murphy**) for the **Claimants**
James Eadie QC and Richard O'Brien (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing date: 6 March 2014

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Judgment

Mr Justice Cranston:

Introduction

1. This is the judgment of the court to which we have both contributed.

2. These are applications for permission to apply for judicial review of the changes to criminal legal aid for prison law introduced by the Criminal Legal Aid (General) (Amendment) Regulations 2013, SI 2013 No 2790. The two claims concern separate but related issues. In broad outline the challenges are first, that there was not sufficient consultation in relation to aspects of the changes and secondly, that the removal from the scope of criminal legal aid funding of certain areas creates unacceptable risks of unfair decision making where fundamental rights are at stake

and of interference with the common law and article 6 ECHR right of access to justice. The removal from scope is also discriminatory, irrational in a public law sense and will undermine the rule of law.

3. The first claimant, the Howard League for Penal Reform, is a penal reform charity dating back to 1866, with consultation status with the Council of Europe and the United Nations. In addition to its policy and campaign work it has a specialist prison law contract, and a public law contract, with the Legal Aid Agency to deliver publicly funded legal services. The second claimant, the Prisoners' Advice Service, is a charity providing legal advice and representation to prisoners, and legal advice and education to solicitors and NGOs. It responds to 8000 letters from prisoners every year. Like the Howard League it also has contracts with the Legal Aid Agency to offer publicly funded legal services on prison law and public law.

4. The grounds for the claims covered some 100 pages and Ms Kaufmann's skeleton on the applications some 25 pages. We had been presented with 6 bundles, including a bundle of authorities. Fortunately we had been able to digest a great deal of the material beforehand. At the outset of the hearing we proposed to Ms Kaufmann that the matter be treated as a rolled up hearing. She resisted the suggestion on the basis that the claimants intended to lodge more evidence if permission were granted and because of the shortness of time available at the hearing. The hearing lasted for two and a half hours. With respect to her we thought her approach overlooked the pressures on the court and the need to deal with matters in accordance with the Overriding Objective of the CPR.

Background

5. Part of the Coalition's programme for Government in 2010 was an undertaking to carry out a fundamental review of legal aid to make it work, it was said, more efficiently. In November 2010 there was a consultation paper entitled "Proposals for the reform of legal aid in England and Wales". In June 2011 the Government published its response to the consultation and set out its proposals for change. These were implemented in the main in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Major changes brought about by the Act included the creation of the Legal Aid Agency and changes to the scope of and eligibility for civil legal aid.

(a) The April 2013 consultation

6. Further changes to legal aid were proposed in a consultation document dated April 2013, "Transforming legal aid: delivering a more credible and efficient system". The foreword by the Lord Chancellor stated that legal aid was the hallmark of a fair, open justice system but that it had lost much of its credibility with the public. In the current financial climate it was necessary to make further savings by embarking on the next phase of reform, mainly focused on criminal cases. Overall the proposals in the consultation document were estimated to deliver savings of £220 million a year by 2018-2019.

7. Chapter 3 of the consultation document reiterated the need to improve public confidence in the legal aid system, to remove anomalies and, in a time of financial austerity, to target public resources at cases which really required legal aid to ensure that the public could have confidence in the system. Limited public funds should not

be spent if matters could be better resolved by other means. As had been made clear in the 2010 consultation, public funding should be reserved for serious issues which had sufficient priority to justify its use, subject to people's means and the merits of the case.

8. The first of five proposals in chapter 3 addressed the subject matter of these challenges, restricting the scope of criminal legal aid for prison law. (The document defined the term "prison law" as matters relating to treatment in prison, sentencing issues, disciplinary matters and Parole Board reviews.) Prison law legal aid should be available for cases involving "the determination of a criminal charge, or which affects the individual's ongoing detention and where liberty was at stake, or which meet the criteria set out in case law (see para 3.14)": para 3.4. There was then a review of current practice. Criminal legal aid was available to prisoners seeking advice and assistance, including advocacy assistance, for matters relating to treatment, sentencing, disciplinary matters and Parole Board reviews (with a reference to Annex B): para 3.6. Paragraph 3.7 dealt with the change made in the 2010 Standard Crime Contract for legal aid, that matters concerning the treatment of prisoners (e.g. regime conditions) were not covered, when they could be suitably resolved through the internal prisoner complaint system, unless the legal provider could demonstrate that it would be practically impossible for the applicant to use the system (for example, prisoners with learning difficulties or mental health issues). There was also discussion of both the internal prison complaint mechanism and the work of the Prisons and Probation Ombudsman. A table set out how legal aid spent on prison law had risen from £1 million in 2001/02 to £25 million in 2009/10 (£26 million in 2010/11, £23 million in 2011/12).

9. The consultation document then set out the Government's proposals as follows:

> "3.14 We propose to restrict the scope of advice and assistance, including advocacy assistance, to criminal legal aid for prison law cases that:
>
> - involve a determination of a criminal charge for the purposes of article 6 European Convention on Human Rights (ECHR – Right to a fair trial);
>
> - engage article 5.4 ECHR (right to have ongoing detention reviewed); and
>
> - require legal representation as a result of successful application of the "Tarrant" criteria."

The last bullet point was a reference to the criteria set out in R v Secretary of State for the Home Department ex p Tarrant [1985] QB 251 as to when a prisoner should be legally represented on a disciplinary offence. The following paragraph explained that the Government believed that the cases in paragraph 3.14 alone were of sufficient priority to justify the use of public money and that the internal prisoner complaint system, prisoner discipline procedures and the probation complaints procedures should be the first port of call for other issues. Criminal legal aid would remain available for prisoners, for example, where liberty was at stake: para 3.15.

10. The document turned to specific prison law issues. Treatment matters were likely to be removed from criminal legal aid: para 3.17. With sentencing matters it was anticipated that issues relating to sentence planning or minimum term review applications would continue to be funded, subject to means and merits, since they related to the review of ongoing detention. However, those relating to "categorisation, segregation, close supervision centre and dangerous severe personality disorder referrals and assessments, resettlement issues and planning and licence conditions would not be funded as they do not engage any of the proposed scope criteria": para 3.18. With disciplinary matters, criminal legal aid and advice would remain available where the charge was so serious that an award of additional days might be imposed or where for some other reason the case was referred to an independent adjudicator: para 3.19. Regarding Parole Board review matters, the document said:

> "3.20 Criminal legal aid advice and assistance would remain available for Parole Board review matters as these cases concern decisions about ongoing detention."

At the end of this section the document posed this consultation question: Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria?

11. Annex B set out the then current position with criminal legal aid for prison law. For Parole Board cases it covered "advice and advocacy assistance for eligible persons subject to proceedings before the Parole Board or who require advice and assistance regarding representations in relation to a mandatory life sentence or other parole review".

12. The consultation produced nearly 16,000 responses and there were 14 stakeholder events around the country attended by some 2,500 people. In relation to the proposed changes in prison law there was a great deal of critical comment, including from the claimants. HM Chief Inspector of Prisons expressed concern that there was a distinct lack of confidence among prisoners in the internal complaints procedure in prisons. Prisoners with identified communication, mental health problems and learning difficulties should continue to obtain legal aid. Important sentence issues such as parole related sentence planning and the use of segregation and deep custody should remain in scope. The Council of Her Majesty's Circuit Judges also disagreed with the changes: criminal legal aid for the purposes in paragraph 3.4 should continue, in particular for all aspects of "Parole Board reviews". However, additional areas should also remain in scope, for example, categorisation reviews, since a prisoner usually has to progress from category A through category C if they are to be released. The Council was sceptical about the claimed cost savings. The Prisons and Probation Ombudsman also responded to the consultation, highlighting the unmanageable increase in demand he would face as a result of the changes. Those, he said, would further expose the limitations inherent in his office's lack of a statutory footing. The Association of Prison Lawyers also objected to the changes: we return to their response below.

13. In its response in early June the Parole Board raised a concern that the proposed changes would have a significant detrimental effect on its working. In relation to the proposal to restrict criminal legal aid for prison law matters to the proposed criteria,

the board stated that "the removal of treatment, categorisation and resettlement issues from the scope of criminal legal aid would have a dramatic effect on the ability of the Parole Board to make effective and timely decisions". The proposed changes would increase the cost of conducting parole reviews and the number of offenders who remained in prison longer than they would otherwise have needed, with a consequent cost for imprisonment overall. Under this head the Parole Board recognised the work which lawyers undertook to avoid a situation where the cases were deferred. The change in scope, it said, was likely to lead to an increase in the number of cases referred to it for a decision. A significant proportion of cases, where indeterminate sentence prisoners were challenging the reasons for return from open to closed conditions, would result in the case having to be referred, whereas historically a skilled prison lawyer could address the matter without recourse to the Parole Board.

14. In early July the Lord Chancellor appeared before the House of Commons Select Committee on Justice. He was asked by Jeremy Corbyn MP whether he accepted putting someone in prison was an enormous responsibility, that there was a duty of care on the Prison Service and the Ministry, and that prisoners had a right to make complaints, and if necessary, take a case to court if they felt badly treated in prison. The Lord Chancellor replied:

> "I suspect, Mr Corbyn, that this is an area where there is an ideological difference between us. I am absolutely of the view that somebody in prison should have the right to legal aid when it is a matter relating to their sentence and the length of time that they will spend in prison. When it is a matter relating to the conditions in the prison, or the choice of prison in which they are detained, we have a prison complaints system and a prisons ombudsman. To my mind, that is the route that we should follow. I do not believe that prisoners in jail should have the right to access legal aid to debate which prison they are put in."

Later he added that the taxpayer should not be funding legal aid for prisoners to litigate which prison they have been detained in or what the conditions were in their cell.

(b) "Next steps" and the Regulations

15. On 5 September 2013 the Government published its response to the April consultation and set out its proposals in "Transforming Legal Aid: next Steps" ("Next Steps"). In the Ministerial foreword the Lord Chancellor reiterated the value of legal aid and the need to maintain public confidence in it and to put it on a sustainable footing. The Ministry of Justice needed to reduce its budget by one third between 2010 and 2016, and no area of spending could be immune from scrutiny. He noted that detailed negotiations had been undertaken, in particular with the Law Society, and that there would be a panel of criminal lawyers to look at the efficiency of the legal process. He had decided to proceed with most of the measures proposed in April to bear down on the cost of legal aid and to ensure public confidence. There would be further consultation concerning a modified model of procurement for criminal legal aid.

16. As regards prison law Next Steps noted that the Government had amended its proposals to ensure that criminal legal aid remained available for all proceedings before the Parole Board where it had a power to direct release, as opposed simply to cases engaging article 5.4 of the ECHR. The Government also intended to retain sentence calculation cases within scope where the date of release was disputed. It agreed with those respondents who had stressed the importance of ensuring that there was a robust prisoner complaint system in place.

> "2.5 The proposals on amending the scope of criminal legal aid for prison law are intended to focus public resources on cases that are of sufficient priority to justify the use of public money. Alternative means of redress such as the prisoner complaints system should be the first port of call for issues removed from the scope of legal aid. In line with these principles we intend to proceed with the original proposals, subject to a number of adjustments. We intend to retain funding for proceedings before the Parole Board where the Parole Board has the power to direct release, as opposed to all cases that engage Article 5.4 ECHR. We also intend retaining sentence calculation matters within scope where disputed, as both these matters have a direct and immediate impact on the date of release."

17. Detailed responses to particular issues were set out in Annex B of Next Steps. As regards removal of matters regarding categorisation and licence conditions from the scope of criminal legal aid, Annex B stated that that was in line with the policy intention of providing legal aid where an individual's liberty was at stake. Respondents had specifically argued that recategorisation from category A was essential if prisoners on indeterminate sentences for public protection were to be released, and that prisoners could be housed in more secure conditions than necessary as a result of not being recategorised (with the resulting cost implications). The document read:

> "21 Categorisation matters should be resolved where possible using the prisoner complaints system or representations by prisoners for those in category A. As noted above, civil legal aid and judicial review may also be available … Any disagreement with the licence conditions set should be discussed between the offender and their offender manager, with relevant probation complaint system being used if no resolution can be reached. We consider these processes are sufficient to ensure that offenders' grievances will be properly considered and their rehabilitation will not be compromised."

18. Annex B then turned to criminal legal aid advice and assistance for Parole Board proceedings: it would continue to be available where the board had the power to direct release. The document recognised that categorisation might be an important element of risk assessment. However, it was not necessarily or directly determinative of release for those determinate sentence prisoners eligible for consideration by the Parole Board for release prior to their automatic release date or for indeterminate sentence prisoners. It was a relevant factor, but not the sole consideration, and a small number of category A prisoners had been released by the Parole Board without being

recategorised to B or below. Civil legal aid for judicial review might be available in this area. Some Parole Board hearings did not engage article 5.4 of ECHR, in particular those for certain determinate sentence prisoners, but the Government considered that criminal legal aid should remain available for advice and assistance in relation to all proceedings before the Parole Board where it had the power to direct release. That included cases where the Parole Board had the power to direct release but decided not to do so, instead making a recommendation regarding categorisation.

19. There was reference in Annex B to the prison complaints system, which had recently been audited by the National Offender Management Service to assess its adequacy. The audit had concluded that the system was generally operating in accordance with the relevant Prison Service Instruction. A number of recommendations had been made and steps taken. There would soon also be thematic inspection of the complaints system by Her Majesty's Inspector of Prisons.

20. An equalities assessment was contained at Annex F to Next Steps. It referred to the point raised by some respondents about the non-availability of criminal legal aid for cases involving prisoner access to mother and baby units. The Government response was that prisoners would be able to use the prison complaints system and should issues not be resolved satisfactorily would still have recourse to the Prison and Probation Ombudsman.

21. Ten days after publication of Next Steps, the Howard League sought clarification of the position under it regarding Parole Board hearings for indeterminate sentence prisoners where they were referred before the expiry of the minimum term for advice on a move to open conditions: ("pre-tariff reviews"). The Government response was that all cases would be removed from the scope of criminal legal aid if the board did not have the power to direct release. When the Howard League submitted evidence to the House of Lords/House of Commons Joint Committee on Human Rights a few days later, it highlighted this change.

22. The Government laid the Criminal Legal Aid (General) (Amendment) Regulations 2013 before both Houses of Parliament on 4 November 2013 to give effect to its proposals. Under the Regulations the prison law changes would come into effect on 2 December. The Regulations were subject to the negative resolution procedure.

(c) The Joint Committee's report

23. The House of Lords/House of Commons Joint Committee on Human Rights launched its inquiry into the Government's proposals in mid July. It published its report on 11 December 2013: HL Paper 100, HC766. The report considered three of the proposals: the proposed introduction of a residence test for civil legal aid, the proposal that legal aid should be removed from all cases assessed as having a borderline prospect of success; and the subject matter of this judicial review, the proposed restriction on the scope of criminal legal aid available for prison law. The committee expressed regret that the Government appeared not to accept that its proposals engaged the fundamental common law right of effective access to justice, including legal advice where necessary. It also stated that it was disappointed by the Lord Chancellor's suggestion that it ought to have reported earlier following his proposals in Next Steps in September.

24. As regards the Government's prison law proposals, the Joint Committee summarised its conclusions as follows:

> "Amending the scope of criminal legal aid for prison law is not inherently incompatible with the right of access to court. Rather, the human rights question is whether the Government's proposals for doing so give rise to a reasonable chance or a serious possibility of breaches of the right of effective access to justice in particular cases. Our report considers whether the proposals constitute a proportionate means of achieving the Government's legitimate aim, having regard to the scope of the exceptions which the Government proposes to carve out of the limitation, the adequacy of alternative avenues of redress for prisoners, and any other safeguards designed to ensure that the right of access to justice is not infringed."

The Joint Committee welcomed in principle the Government's indication that civil legal aid would continue to be available to bring judicial review in relation to prison law matters. That would preserve the possibility of access to court, although the Committee was concerned about future funding for judicial review: para 168. It also welcomed the commitment from the Lord Chancellor to put the Prisoner and Probation Ombudsman on a statutory footing: para 177. It did not consider that there was a problem with the internal prisoner complaints system but improvements could be made: para 180. In some cases only the retention of legal aid would prevent infringement of prisoners' rights of access to the court: para 181.

25. The Joint Committee report noted that there were very few cases involving Mother and Baby Units and the Government assurance that the best interests of the child were to be paramount. However, it commented that in this context there might be cases where legal representation would be desirable, such as those which were urgent or which involved third party evidence: para 195. In the light of the paramountcy test, and the limited number of children involved, it concluded that the Lord Chancellor should urgently consider exempting mother and baby unit cases from his proposal.

26. The Parole Board had in a submission drawn the Joint Committee's attention to what the Government was now proposing, namely narrowing the scope of funded prison work. The Joint Committee urged the Government to reconsider the practicality of the prison law changes for hearings where previously lawyers would have remained present, even if they were small in number: para 213. As regards prisoner categorisation, the Committee noted that it engaged the common law right to liberty since it could affect the likelihood of a prisoner being released. The Government should look again at its proposals and give full consideration of the potential for increased costs if prisoners remained in too high a category, at greater expense to the public purse: para 218.

27. The Government responded to the Joint Committee's report in February this year: Cm 8821. The introduction to the response reiterated the intention to target limited public resources at cases which most justified it, ensuring the public could have confidence in the legal aid scheme, and that legal aid was a vital part of the justice system. It asserted that there was no basis in common law that a litigant was in general entitled

to a state subsidy in respect of lawyers' fees. The Government agreed that some further modifications to the proposed residence test were justified.

28. In relation to the prison law changes the response asserted that legal aid provision was sufficient, that the internal complaints mechanism was robust and subject to further monitoring by the inspectorate, and that the changes did not interfere with the prisoner's rights of access to the court. Dealing with mother and baby units, the response referred to the information provided to women prisoners about them; the requirement that each women's prison must appoint a mother and baby unit liaison officer to assist mothers to complete their application; and the procedure whereby a decision to admit was taken by the governor on the recommendation of an admission board chaired by an independent chair. The response noted that civil legal aid would continue to be available and that no mother and baby unit cases had been funded by criminal legal aid since July 2010 (the point at which providers had to obtain prior approval before starting such work).

29. In dealing with the Joint Committee's discussion of parole hearings, the response stood firm, explaining that it was both fair and practical to remove Parole Board hearings where the board did not have the power to direct release, since the matters to be excluded were not of sufficient priority to justify the use of public money. It added:

> "A Parole Board hearing is invariably inquisitorial and the Government does not accept that it requires a legal representative to ensure fairness for the prisoner. It is the Parole Board that leads the process, and its highly skilled members, with expertise in risk assessment, are adept at eliciting and assessing the information relevant to the matter under consideration."

The Government was confident that the Parole Board would continue to ensure that its procedures were fair and would be able to deal with sensitive information where a prisoner did not have legal representation. While the Government acknowledged that categorisation might be an important element of a prisoner's risk assessment by the Parole Board, it did not consider that it was necessarily or directly determinative of release, even for category A prisoners. There were alternative means of redress such as the prisoner complaints system.

(d) The House of Lords debate

30. Although the Criminal Legal Aid (General) (Amendment) Regulations 2013 had come into effect, Lord Pannick moved a motion of regret in the House of Lords on 29 January 2014. He gave four examples of where, in his view, the Regulations were flawed. The first was the removal of criminal legal aid for Parole Board pre-tariff reviews and return to open condition cases (where indeterminate sentence prisoners were removed from open conditions and advice was sought of the board if they should be returned). The Parole Board, said Lord Pannick, had expressed concern. The second example concerned decisions on category A prisoners, the third, the exclusion of mother and baby units and the fourth, segregation decisions. Lord Pannick expressed scepticism as to whether prisoners could operate the internal prison

complaints system, stated that the ombudsman system was slow and costly, and asserted that the Regulations would not in fact save public money.

31. In the two hour debate on the motion some 15 members of the House of Lords participated and were critical of the Regulations. Baroness Kennedy mentioned mother and baby units, Lord Hope expressed concern at how many vulnerable prisoners were being treated and Lord Ramsbotham (the former Chief Inspector of Prisons) opined that ideology seemed to be the driving force behind the proposal. Baroness Stern, with a long experience in criminal justice matters, spoke. The report of the Joint Committee on Human Rights and the Howard League were quoted in the course of the debate. The Minister of State at the Ministry of Justice, Lord Faulks QC, responded for the Government along the lines of the Government's response to the Joint Committee's report. The motion was withdrawn without the House dividing.

Statutory framework and policy

32. Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 deals with legal aid. Section 4 provides for the appointment of a director of legal aid casework. Criminal legal aid is covered by sections 13 to 20 of the Act. Section 15(1) enables regulations to provide that prescribed advice and assistance is to be available to individuals including those individuals described in subsection (2), if prescribed conditions are met and the director has determined that the individual qualifies for such advice and assistance in accordance with the regulations. Under section 15(2) the individuals covered include those who have been subject to criminal proceedings. When making regulations under this section the Lord Chancellor must have regard in particular to the interests of justice, and the regulations must require the director to make determinations under them having regard to those interests: sections 15(3)-(4). Section 16 deals with representation for criminal proceedings. Section 18 authorises the director to determine whether an individual qualifies for representation for the purposes of criminal proceedings and a determination under section 16 must specify the criminal proceedings: 18(1)(2). Regulations may make provision about the making and withdrawal of a determination by the director under section 16: section 18(3). Section 21(2) enables regulations to be made about when an individual's financial resources are such that the individual is eligible. Section 41 of the Act is a general provision dealing with regulations made under Part 1. They are to be made by statutory instrument and are generally to be subject to the negative procedure.

33. The Criminal Legal Aid (General) Regulations 2013, SI 2013 No 9 make provision for determinations in relation to whether an individual qualifies for criminal legal aid under Part 1 of the 2012 Act. Part 4 of the regulations covers the making and withdrawal of determinations about advice and assistance for criminal proceedings. In particular Regulation 12 sets out the prescribed conditions contemplated by section 15 of the Act. In its original form it read as follows:

> "12.— Prescribed conditions
>
> (1) The conditions set out in paragraph (2) are prescribed for the purposes of section 15(1) of the Act.
>
> (2) The conditions are that an individual must—

..

(d) require advice and assistance regarding a sentence;

…

(f) require advice and assistance regarding the individual's treatment or discipline in a prison, young offender institution or secure training centre (other than in respect of actual or contemplated proceedings regarding personal injury, death or damage to property);

(g) be the subject of proceedings before the Parole Board;

(h) require advice and assistance regarding representation in relation to a mandatory life sentence or other parole review…"

34. The amendments introduced by the Criminal Legal Aid (General) Regulations 2013 mean that these provisions in Regulation 12 now read as follows:

"12.— Prescribed conditions

(1) The conditions set out in paragraph (2) are prescribed for the purposes of section 15(1) of the Act.

(2) The conditions are that an individual must—

…

(d) require advice and assistance regarding—

(i) the application of the provisions in Chapter 6 of Part 12 of the Criminal Justice Act 2003 or in Chapter 2 of Part 2 of the Crime (Sentences) Act 1997, which determine when a prisoner is either entitled to be released by the Secretary of State or eligible for consideration by the Parole Board 2 for a direction to be released; or

(ii) the application of the provisions in Chapter 2 of Part 5 of the Powers of Criminal Courts (Sentencing) Act 2000, which determine when an offender is entitled to be released by the Secretary of State…

(f) require advice and assistance regarding a disciplinary hearing in a prison or young offender institution where—

(i) the proceedings involve the determination of a criminal charge for the purposes of Article 6(1) of the European Convention on Human Rights; or

> (ii) the governor has exercised the governor's discretion to allow advice and assistance in relation to the hearing;
>
> (g) be the subject of proceedings before the Parole Board where the Parole Board has the power to direct that individual's release…"

Paragraph 12(2)(h) was omitted and a definition of "governor" added in paragraph 12(3). Regulation 7 provides that the amendments made by regulation 4 do not apply to cases in which an application for advice and assistance was made prior to 2nd December 2013.

35. Prison Service Instruction 02/2012 sets out the guidance on systems for prison complaints and Prison Service Instruction 58/2010 deals with the Prisons and Probation Ombudsman. The guidance for mother and baby units is in Prison Service Instruction 54/2011.

Failure to consult

36. The claimants submit firstly that the Lord Chancellor's April 2013 consultation was flawed with respect to criminal legal aid funding for Parole Board hearings for pre-tariff reviews and return to open condition cases. The consultation made clear that the proposed changes to criminal legal aid would not affect their funding, specifically at paragraph 3.20. Parole Board review matters were defined in Annex B. The claimants' understanding, and that of other bodies such as the Parole Board, was that parole reviews would remain in scope. Consequently, the claimants did not make any representations on the matter. Yet Next Steps in September 2013 announced for the first time the proposal that this was not the case and that two important categories of case would no longer fall within the scope of legal aid, pre-tariff reviews and return to open conditions cases. Government policy, enshrined in Regulation 12(ii)(g) of the Criminal Legal Aid (General) Regulations 2013, constituted a change from the original proposal in the April 2013 consultation which was fundamental but which had not been the subject of consultation. A decision fundamentally different from that which was consulted upon was contrary to the common law duty of fair consultation contained in the authorities: R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213 and R (Smith) v East Kent Hospital NHS Trust [2002] EWHC 2640 (Admin).

37. In our judgment this ground of challenge is not arguable. First, we find it somewhat difficult to understand how the claimants, or indeed the Parole Board, read the April 2013 consultation in the way they did. Paragraphs 3.4 and 3.14 make clear how the Lord Chancellor proposed to restrict the scope of criminal legal aid advice and assistance for prison law, including advocacy assistance. The relevant proposal was to confine it to where article 5.4 ECHR was engaged, "the right to have ongoing detention reviewed". It is common ground that pre-tariff reviews and return to open conditions cases are not within the purview of article 5.4. Parole Board review matters were dealt with in paragraph 3.20, but the paragraph read that criminal legal aid advice and assistance would remain available in this regard "as these cases concern decisions about ongoing detention". The attempt to read into that paragraph the reference to "Parole Board cases" in Annex B will not wash. That part of Annex B was explicitly a description of the then coverage of criminal legal aid contracts for

prison law matters. Neither pre-tariff reviews nor return to open conditions cases concern ongoing detention. It seems to me that from April that the Government was proposing that they would no longer be in scope.

38. In any event, if that is wrong the authorities make clear that the common law duty of consultation is triggered only in relation to a fundamental change. The claimants accept that this is the test. They also accept that the number of pre-tariff reviews and return to open condition cases constitute a limited aspect of the Parole Board's workload (the Lord Chancellor says 3 percent). Nonetheless, they contend that there is no logical correlation between the volume of cases and their importance. While that is true we cannot see that this was more than a limited modification of the April 2013 proposals, if indeed it was a modification. It certainly does not cross the "fundamentally different" threshold.

39. Moreover, we cannot contemplate a court granting a remedy even if there was a breach of the duty to consult. Almost immediately after publication of Next Steps in September the first claimant made the Lord Chancellor aware of its concern in relation to these matters. It highlighted that concern in its submissions to the House of Lords/House of Commons Joint Committee on Human Rights. In other words, it had the opportunity to make its views known to the Lord Chancellor, albeit after the consultation, and did so. That would be an important aspect in the discretion to grant a remedy in judicial review. In addition, we simply cannot see that if the consultees had expressed their views on these two matters the outcome would have been any different: the policy imperatives for limiting criminal legal aid for prison law cases were extremely strong, as the Lord Chancellor made clear throughout the consultation process and after.

Substantive grounds

40. The claimants substantive challenge focuses on the removal from the scope of criminal legal aid in prison law cases in seven areas: pre-tariff reviews before the Parole Board, eligibility of women prisoners for mother and baby units, segregation and placement in closed supervision centres, category A reviews, access to offending behaviour courses, resettlement on leaving prison, and disciplinary proceedings where no additional awards may be awarded.

(a) Risk of unfairness

41. The claimants' primary contention is that the removal of criminal legal aid in these cases is bound to lead to unfair decision making. On their behalf Ms Kaufmann submitted that in certain circumstances a common law right of fairness will require legal assistance, and where persons cannot afford it that may require the state to provide them with publicly funded legal services. She underlined the importance of the interests at stake, the link to future detention, the article 8 ECHR interests (e.g. affecting a mother's ability to care for a baby; the conditions of confinement in the case of segregation); that prisoners given their background are generally incapable of making informed representations themselves; and that prisoners are unlikely to be able to afford private legal services or to have access to other sources of advice and assistance.

42. These points were developed in the claimants' grounds in relation to each of the seven categories removed by the Regulations from the scope of criminal legal aid. Ms Kaufmann referred us to the witness statements of two former prisoner governors, Professor John Podman and Christopher Sheffield OBE. Professor Podman refers to the role of lawyers in giving prisoners a sense of fairness when they do not have faith in Independent Monitoring Boards and the ombudsman. Mr Sheffield reinforces the importance of a system in prisons which is fair and perceived to be such. Lawyers have been important in providing an avenue to obtaining reports of other experts. Ms Kaufmann also took us to the case studies in the submission of the Association of Prison Lawyers to the Government's April 2013 consultation where legal representation produced a beneficial result for a prisoner. These included cases where prisoners were not capable of carrying forward matters themselves, were not aware of a cause for complaint, or required expert evidence or where judicial review was not available. Overall the claimants' submission was that the Regulations inevitably deprive some prisoners of legal assistance where it is essential to ensure procedural fairness. Consequently, the Regulations create an unacceptable risk of unfair and therefore unlawful decision making.

43. Ms Kaufmann rested her case on R (Refugee Legal Centre) v Secretary of State for the Home Department [2004] EWCA Civ 1481; [2005] 1 WLR 2219. This seems to be the only decision where a risk of unfair decision-making – as opposed to the risk of unlawfulness – has been invoked as a basis for judicial review. There the Court of Appeal considered a challenge to a fast track system for considering asylum applications at an immigration centre. The test, said Sedley LJ for the court, was whether the system provided a fair opportunity to asylum seekers to put their case: [6]. (In Sedley LJ's judgment there are references to "fairness" and "due process", what traditionally has been known as natural justice). Sedley LJ said that one approach to potential unfairness was to provide access, retrospectively, to judicial review. He continued:

> "[7]…The other, of which this case is put forward as an example, is appropriate relief, following judicial intervention to obviate in advance a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself. In other words it will not necessarily be an answer, where a system is inherently unfair, that judicial review can be sought to correct its effects.
>
> [8] The choice of an acceptable system is in the first instance a matter for the executive, and in making its choice it is entitled to take into account the perceived political and other imperatives for a speedy turn-round of asylum applications. But it is not entitled to sacrifice fairness on the altar of speed and convenience, much less of expediency; and whether it has done so is a question of law for the courts. Without reproducing the valuable discussion of the development of this branch of the law in Craig, Administrative Law, 5th ed (2003), ch 13, we adopt Professor Craig's summary of the three factors which the court will weigh: the individual interest at issue, the benefits to be derived from added procedural safeguards, and the costs to

> the administration of compliance. But it is necessary to recognise that these are not factors of equal weight. As Bingham LJ said in Secretary of State for the Home Department v Thirukumar [1989] Imm AR 402 , 414, asylum decisions are of such moment that only the highest standards of fairness will suffice; and as Lord Woolf CJ stressed in R v Secretary of State for the Home Department, Ex p Fayed [1998] 1 WLR 763 , 777, administrative convenience cannot justify unfairness. In other words, there has to be in asylum procedures, as in many other procedures, an irreducible minimum of due process."

(Chapter 13 of Professor Craig's book to which Sedley LJ referred in paragraph 8 was entitled "Natural Justice: Hearings"). Sedley LJ went on to hold that the fast track system did ensure an applicant fairness provided it operated so that there was a recognition of the circumstances where an enlargement of the prescribed period would be needed.

44. We do not regard it as arguable that the very high threshold established in the Refugee Legal Centre case is met here. There has to be a proven risk of procedural unfairness – due process unfairness – inherent in the system itself. (We assume for the purposes of these applications that the level of risk has to be "unacceptable": see the discussion of this test in the context of a risk of unlawfulness in R (Tabbakh) v Staffordshire and West Midlands Probation Trust and the Secretary of State for Justice [2013] EWHC 2492 (Admin), presently on appeal). That is quite apart from the "first instance" considerations, the political and financial imperatives referred to by Sedley LJ at paragraph 8. These obtain in this case and we return to them below. In our view the claimants simply have not gone anywhere near suggesting an unacceptable risk of procedural injustice "which inheres in the system itself". That is certainly not the conclusion of the Joint Committee, on which considerable reliance is placed. The claimants' evidence refers to a number of cases where, under the current arrangements, legal and expert assistance has undoubtedly assisted the prisoner. However, that does not accord with the requirements set out by Sedley LJ in the Refugee Legal Centre case.

45. In a sense the claimants face the problem of prematurity as did the claimant in R (on the application of Unison) v Lord Chancellor [2014] EWHC 218 (Admin), [90]; they are addressing the situation which will operate, as they see it, once criminal legal aid for prison law is withdrawn. Moreover, there is force in Mr Eadie QC's submission that the alternative mechanisms enabling prisoners to put their point of view means that any risk of procedural injustice is not inherent in the system itself. That system involves the internal complaints system which has been strengthened, the inquisitorial procedure adopted by the Parole Board and the role of the Prisons and Probation Ombudsman which the Government is committed to putting on a statutory basis. Finally, we note that civil legal aid for a claim in judicial review will continue to be available. All of these have drawbacks and gaps. In particular cases none may match the assistance which has been provided by lawyers, including those from the claimants, under the existing system of criminal legal aid for prison law. At present, however, we cannot see that it is arguable that there is an unacceptable risk of unfairness inherent in the system.

(b) Access to justice

46. The claimants contend that in denying prisoners advice and assistance under the criminal legal aid system the Regulations give rise to an unacceptable risk of interference with their rights of access to justice, guaranteed by the common law and article 6 ECHR. The submission is that the claimants will be simply unable to access a lawyer to bring their case in court. Judicial review is no substitute since the funding for it is not sufficient and in any event it acts retrospectively. In this regard the claimants invoke paragraph 168 of the report of the House of Lords/House of Commons Joint Committee on Human Rights, referred to earlier.

47. This ground is not arguable. There is no corollary to the common law right of access to a court of a right to legal aid: R v Lord Chancellor ex parte Witham [1998] QB 575, 581. The Strasbourg article 6 ECHR jurisprudence is clear that the provision of legal aid of this character is not mandatory, except in exceptional cases: Airey v Ireland (1979-80) 2 EHRR 305; Hooper v United Kingdom [2005] 41 EHRR 1. In any event the context of the present claim is not in relation to access to the courts but to proceedings before bodies such as the Parole Board, prison disciplinary hearings and the independent reviewer for access to mother and baby units. Legal aid for judicial review remains. For the reasons given already we do not see that it can be argued that the removal from scope of these aspects of prison law will lead to an unlawful interference with prisoners' rights of access to the courts.

(c) Discrimination

48. Since article 6 is not engaged it is not possible for the claimants to maintain that removal from scope of criminal legal aid represents an interference with article 14.

(d) Irrationality

49. There are two road blocks to this head of challenge. First, these claims are effectively an attack on the Regulations, which embody the policy. Albeit subject to the negative procedure, the Regulations were debated in Parliament. That being the case the Lord Chancellor is allowed a considerable margin of appreciation even where human rights are engaged: R (Asif Javed) v Secretary of State for the Home Department [2001] EWCA Civ 789, [2002] QB 129; Bank Mellat v HM Treasury [2013] 3 WLR 179, [44], per Lord Sumption; R (on the application of SG) v Secretary of State for Work and Pensions [2013] EWHC 3350 (QB), 108, per Lord Dyson. That margin is underlined because this is an area concerning the allocation of public resources: R (Patel) v Lord Chancellor [2010] EWHC 2220, [38]-[39], R (T) v Secretary of State for the Home Department [2003] UKHRR 1321, [11].

50. Ms Kaufmann realistically acknowledged the high hurdle which she needed to cross in order to establish that the policy contained in the Regulations under challenge are irrational.

51. One aspect of her submissions was on the Lord Chancellor's reference to an "ideological" position, for example, in his evidence to the Justice Committee which we quoted earlier. We simply say that this is to misunderstand the character of political debate. A major focus of the claimants' submissions on irrationality was the Lord Chancellor's claim that the changes would increase public confidence in the

legal aid system and to reduce public spending. The claimants' case was that neither of those aims would be met by the restriction of public funding for these areas of prison law. In relation to public confidence, the claimants contend that there is no rational connection between cuts to prison legal aid and public confidence in the system and that no evidence has been provided that the public lack confidence in the existing arrangements for funding. To the contrary, it is said, unfairness and costly mistakes will undermine public confidence. Secondly, poor quality, unfair and erroneous decision making will lead to higher public expenditure: for example, prisoners who remain with category A status and who should be in category B cost more. There is support for that, it is said, in Lord Reed's dicta in R (Osborn and Booth) v Parole Board [2013] UKSC 61; [2013] 3 WLR 1020, [72]. The claimants filed evidence from Dr Nick Armstrong who estimates that the costs of cuts to criminal legal aid for prison law could be over £10 million as against the Lord Chancellor's estimate that there will be savings of some £4 million.

52. These assertions about cost may be true – we do not pretend to know – but in this regard the courts must defer to the judgment of the Lord Chancellor. There is no legal basis for any suggestion that the Lord Chancellor has to prove to us that making the changes will in fact reduce costs and increase public confidence. The legal threshold is quite properly high and his conclusions that they will cannot be said to be irrational in the public law sense. These are areas of political judgment and prediction into which the courts cannot venture.

(e) Ultra vires

53. Finally, the claimants submit that the Lord Chancellor's decision to remove areas of prison law from criminal legal aid as a result of the Regulations is ultra vires his statutory and constitutional role under the Constitutional Reform Act 2005 to uphold the rule of law. As a legal submission this goes nowhere.

Conclusion

54. We can well understand the concerns ventilated through these claims. A range of impressive commentators have argued that the changes to criminal legal aid for prison law in the Criminal Aid (General) (Amendment) Regulations 2013, SI 2013, No 2790 will have serious adverse effects for prisoners. But we simply cannot see, at least at this point in time, how these concerns can arguably constitute unlawful action by the Lord Chancellor. For the time being the forum for advancing these concerns remains the political. Permission is given to cite this judgment.