

**EXPLANATORY MEMORANDUM TO**  
**THE CIVIL LEGAL AID (MERITS CRITERIA) (AMENDMENT) (NO. 2)**  
**REGULATIONS 2015**

**2015 No. 1571**

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

- 2.1 This instrument amends The Civil Legal Aid (Merits Criteria) Regulations 2013 (“the Merits Criteria Regulations”). The Merits Criteria Regulations relate to the merits criteria which the Director of Legal Aid Casework (“the Director”) at the Legal Aid Agency (LAA) must apply when determining whether an applicant qualifies for civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”).

- 2.2 On 15 July 2015 the High Court handed down its judgment in *IS v The Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 Admin (‘the IS case’). The Court made a declaration that the Merits Criteria Regulations are unlawful in the respects and to the extent set out in the Court’s judgment. The court gave the Government permission to appeal. The purpose of this instrument is to amend the Merits Criteria Regulations to reflect the judgment pending the decision of the Court of Appeal.

- 2.3 The amendments made by this instrument will mean that, in cases where an application for full representation is subject to an assessment of its prospects of success, legal aid may now be provided for some cases assessed as having “borderline” or “poor” prospects of success. The Director will need to be satisfied that it is necessary to determine (or in the case of a risk of a breach, appropriate to determine) that the prospects of success test is met to prevent a breach (or the risk of a breach), of the legal aid applicant’s rights under the European Convention on Human Rights or enforceable EU rights.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 This instrument will come into force on Monday 27 July 2015. An urgency statement was presented to Parliament pursuant to section 41(9) of LASPO on Tuesday 21 July 2015. The Lord Chancellor considers it desirable for this

instrument to come into force without delay for the reasons given in that statement.

#### **4. Legislative Context**

- 4.1 The Merits Criteria Regulations set out the merits criteria that must be applied by the Director when determining whether an applicant qualifies for civil legal services (i.e. civil legal aid) under Part 1 of Schedule 1 to LASPO. Broadly speaking, these criteria provide the basis for deciding whether it is justified to provide, or to continue to provide, public funds in an individual case. 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.
- 4.2 The procedure by which the Director makes determinations, and any rights of review or appeal, are set out in the Civil Legal Aid (Procedure) Regulations 2012 (“the Procedure Regulations”).
- 4.3 As set out, we are making the Regulations to comply with a judgment of the High Court, pending a decision on appeal.

#### **5. Territorial Extent and Application**

- 5.1 This instrument extends to England and Wales.

#### **6. European Convention on Human Rights**

- 6.1 The Parliamentary Under Secretary of State, Andrew Selous, has made the following statement regarding Human Rights:
- 6.2 In my view the provisions of the Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2015 are compatible with the Convention rights.

#### **7. Policy background**

- 7.1 In order to be granted civil legal aid, an applicant’s case must satisfy the merits criteria as set out in the Merits Criteria Regulations. The merits criteria are divided into two main sections: general merits criteria and specific merits criteria. The specific merits criteria disapply, modify or supplement the general criteria in specific categories of cases.
- 7.2 For applications for full representation (a specific type of civil legal service) the Merits Criteria Regulations include a requirement that a prospects of success test is met.
- 7.3 In relation to prospects of success, the Director is required to assess the likelihood that an individual who has made an application for civil legal services will obtain

a successful outcome at a trial or other final hearing in the proceedings to which the application relates. Usually the Director will first require the applicant's solicitor to give an assessment of the prospects of success. This is then endorsed or rejected by the LAA.

- 7.4 There are certain categories of case where the prospects of success test do not apply. These are certain public family cases, mental health cases and those stemming from certain international treaty obligations.
- 7.5 Those applications that are subject to the prospects of success test must, generally, have at least a 50% chance of success to receive legal aid funding for full representation (i.e. they must have a "moderate" or better prospects of success<sup>1</sup>). Under the existing Merits Criteria Regulations, civil legal aid for full representation is not currently available where a case has borderline or poor prospects of success.
- 7.6 That summarises the position on what we call 'in scope' matters.
- 7.7 The Exceptional Case Funding (ECF) scheme is provided for by section 10 of LASPO. For matters which are not within the scope of the general civil legal aid scheme, ECF may be available where: (i) failure to provide legal aid would breach the applicant's ECHR rights or his or her enforceable EU rights; or (ii) in the light of the risk of such a breach, it is appropriate to provide legal aid. Applications for ECF are subject to the same means and merits tests as applications for in-scope matters.
- 7.8 The operation of the ECF scheme was recently successfully challenged by way of judicial review in the IS case. Judgment was handed down on 15 July 2015 by Mr Justice Collins. He held that the Merits Criteria Regulations are unlawful in the respects and to the extent set out in the Court's judgment. The judgment states that "in deciding whether or not to grant legal aid the State is entitled to apply merits criteria" and that "a manifestly unwinnable case should justify refusal of legal aid". He went on however to hold that "the requirement that in all cases there must be an even or greater than even chance of success is unreasonable". This finding applies in respect of all legal aid applications subject to the prospects of success test, not merely those made under the ECF scheme.
- 7.9 The effect of the judgment in the IS case is that it would be unlawful to refuse to provide legal aid in some cases where prospects are below 50%. These are cases where failure to determine that the prospects of success test is met would breach, or risk breaching, the applicant's rights under the ECHR or enforceable EU law. The judgment accepts, however, that there can still be a lower prospects of success threshold under which cases would not need to be funded.

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<sup>1</sup> Under Regulation 5 of the Merits Criteria Regulations, cases can be classified as "very good", "good", "moderate", "borderline" or "poor" in terms of their chance of obtaining a successful outcome. There is a further category "Unclear" where the Director cannot put the case into any of the categories in Regulation 5 because, in all the circumstances of the case, there are identifiable investigations which could be carried out, after which it should be possible for the Director to make a reliable estimate of the prospects of success.

- 7.10 The Merits Criteria Regulations as presently drafted do not permit the LAA to fund where the prospects of success test is not met.
- 7.11 The Government has sought and been given permission to appeal the judgment. We have carefully considered the appropriateness of the current arrangements pending that appeal. In light of the judgment there is a risk that under the current Merits Criteria Regulations the LAA could take an unlawful decision if it refused to provide legal aid in some cases where prospects are below 50%.
- 7.12 To minimise the risks to the administration of the legal aid scheme the Government considers that it is necessary to make the amendments to the Merits Criteria Regulations set out in this instrument.
- 7.13 This instrument provides for additional circumstances in which the prospects of success test can be met. It provides that the test can now also be met if the prospects of success are “borderline” or “poor” (but not where prospects are “very poor”), provided the Director is satisfied that there would otherwise be a breach, or risk of a breach, of the applicant’s rights under the ECHR or under enforceable EU law.
- 7.14 To achieve this, the instrument, firstly, amends the classification of the different prospects of success categories in regulation 5 of the Merits Criteria Regulations.
- 7.15 Regulation 5 of the Merits Criteria Regulations currently provides that, where the Director assesses the prospects of success of an application for civil legal aid, the Director must classify the prospects as “very good”, “good”, “moderate”, “borderline”, “poor” or “unclear”.
- 7.16 When the Merits Criteria Regulations require the Director to consider the prospects of success test in relation to an application for civil legal aid, the test is currently only met if the Director is satisfied that the prospects are either very good, good or moderate. This instrument changes the basis on which the Director can determine, where applicable, that the prospects of success test is met – enabling the test to be met in some cases with borderline or poor prospects of success. Regulation 2 of this instrument amends the merits criteria as follows.
- 7.17 Regulation 2(2) amends the definition of “poor” prospects of success under regulation 5 of the Merits Criteria Regulations, to mean that a case has a 20% or more chance of obtaining a successful outcome, but less than a 50% chance. Regulation 2(2) also creates a new “very poor” category, which is where there is less than a 20% chance of obtaining a successful outcome.
- 7.18 Regulation 2(4) substitutes a new regulation 43 which provides that the prospects of success test can be met in cases which are borderline or poor, but that it is necessary to determine the test is met to prevent a breach of the applicant’s ECHR or enforceable EU rights. New regulation 43 also provides that the Director can determine that the test is satisfied in borderline or poor cases where he considers it

appropriate to do so, taking into account the facts of the individual case and the risk of a breach.

- 7.19 Regulations 2(5)-(11) make similar substitutions to the prospects of success test which applies for specific categories of case as set out elsewhere in the Merits Criteria Regulations. For example, regulation 2(8) amends the prospects of success test that applies for applications for full representation in relation to domestic violence cases.
- 7.20 The instrument sets out transitional arrangements to make it clear which decisions the amendments will apply to after the instrument comes into force. In summary, the amendments apply to the following decisions if they are made on or after 27 July 2015:
- a) a determination that civil legal services (i.e. civil legal aid) is to be made available to an individual or legal person;
  - b) a decision to withdraw civil legal aid;
  - c) a decision by the Director pursuant to carrying out a review<sup>2</sup>; and
  - d) reconsideration of a determination pursuant to referral by an adjudicator under regulation 46(3) or (4) of the Procedure Regulations.
- 7.21 These regulations are being brought into force as promptly as possible. We recognise that there has been a short intervening period between the judgment in the IS case and the coming into force of these regulations. Given this short interim period, the risk of the LAA acting unlawfully is very low.
- 7.22 The amendments made by this instrument would result in a number of additional cases qualifying for civil legal aid but only to the extent that a refusal to fund due to the prospects of success test would result in a breach (or a risk of a breach) of ECHR or enforceable EU rights. The Government will consider the extent to which these amendments to the Merits Criteria Regulations remain appropriate following the outcome of the appeal.

## **8. Consultation outcome**

- 8.1 There was no consultation undertaken for this instrument. The judgment in the IS case sets out the extent to which the current Merits Criteria Regulations are unlawful. We consider that consultation on how the Government should respond to this judgment was therefore unnecessary and would have created additional and unacceptable delay before amendments could be made.

## **9. Guidance**

- 9.1 Existing guidance for LAA staff from the Lord Chancellor (which is publicly available via gov.uk) will be amended as soon as possible to reflect the changes to

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<sup>2</sup> A person can apply for a review under regulations 27(2), 44(3) and 69(3) of the Procedure Regulations.

the Merits Criteria Regulations. In view of the very short time period between handing down of the judgment in the IS case and the coming into force of this instrument, it has not been possible to publish amended guidance simultaneously.

## **10. Impact**

- 10.1 An Impact Assessment has been prepared specifically for this instrument.
- 10.2 In summary, we have estimated that funding additional cases where the prospects of success are borderline or poor, could result in additional costs to the legal aid fund of up to £15m per year in steady state. This is an indicative analysis based on a range of scenarios but does attempt to account for the possible behavioural impact of increased applications for civil legal aid representation and exceptional case funding. These behavioural impacts and potential scenarios are inherently uncertain and may not be realised, and the additional costs to the legal aid fund could therefore be considerably lower. If the behavioural impacts have been underestimated additional costs will be higher. There are areas of additional cost which have not been factored into the analysis directly, such as controlled immigration work, increased administration costs for the LAA and increased cost orders against the LAA where cases are unsuccessful. These could all result in additional cost to the legal aid fund.
- 10.3 Civil legal aid providers may experience an increase in demand for their services. There is no impact on business, charities or voluntary bodies, other than where it affects a contractual relationship between the LAA and providers of legal aid services or the payment arrangements for barristers.

## **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 the contractual relationship between the LAA and providers of legal aid services or the payment arrangements for barristers.
- 11.3 The Ministry of Justice has not taken any specific steps to minimise the impact of these amendments on firms employing up to 20 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. As set out above, we will review the amendments to the Merits Criteria Regulations following the outcome of the Government's appeal.

### **13. Contact**

Tom Bainbridge at the Ministry of Justice (tel: 020 3334 6504 or email: [tom.bainbridge1@justice.gsi.gov.uk](mailto:tom.bainbridge1@justice.gsi.gov.uk)) can answer any queries regarding the instrument.