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Case No: CO/17247/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2014

Before :

LORD JUSTICE MOSES
MR JUSTICE COLLINS
MR JUSTICE JAY

- -

Between :

The Queen on the Application of the Public Law Project	**Claimant**
- and -	
The Secretary of State for Justice	**Defendant**
The Office of the Children's Commissioner	**Intervener**

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Mr Michael Fordham QC, Mr Ben Jaffey, Ms Naina Patel and Ms Alison Pickup (instructed by **Bindmans LLP**) for the **Claimant**
Mr James Eadie QC, Mr Patrick Goodall and Mr David Lowe (instructed by **the Treasury Solicitor**) for the **Defendant**
Mr Paul Bowen QC, Mr Eric Metcalfe and Ms Catherine Meredith (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Intervener**

Hearing dates: 3rd-4th April, 2014

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Judgment

Lord Justice Moses:

1. Part 1 of Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 identified those cases most in need of public funding. They are not cases in respect of which the United Kingdom is, by virtue of the Human Rights Act 1998 or under the common law right of effective access to the court, obliged to provide legal assistance. Such cases fall within Section 10 of LASPO. The Lord Chancellor now proposes by statutory instrument (the LASPO Act 2012 (Amendment of Schedule 1) Order 2014) to introduce a residence test. All those who fail that test will be, subject to exceptions, removed from the scope of Part 1, although they remain eligible if they fall within Section 10.

2. Accordingly, the effect of this amendment will be to exclude those who have a better than fifty-fifty chance of establishing a claim, the subject-matter of which is judged as

having the highest priority need for legal assistance, but without the means to pay for it, on the grounds that they lack a sufficiently close connection with the country to whose laws they are subject.

3. PLP contend that the proposed amendment is unlawful: the Lord Chancellor has no power to introduce such an amendment by way of delegated legislation and, in any event, such a discriminatory provision is contrary to common law or breaches Art. 6 read with Art. 14 of the Convention.

The Statutory Scheme

4. The provisions in Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which are relevant to this application came into force on 1st April 2013.

5. The Lord Chancellor's obligation under section 1(1), read in conjunction with section 1(2), is to secure that "civil legal services", as specified in section 9 or 10, or paragraph 3 of Schedule 3, are made available.

6. Section 9 deals with "general cases", and provides:

> "(1) Civil legal services are to be available to an individual under this Part if –
>
> (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 this Part (and has not withdrawn the determination).
>
> (2) The Lord Chancellor may by order –
>
> (a) add services to Part 1 of Schedule 1, or
>
> (b) vary or omit services described in that Part,
>
> (whether by modifying that Part or Part 2, 3 or 4 of the Schedule)."

7. The Director's function to determine whether the qualification criteria set out in more detail in section 11 are met arises only if the service in question is a civil legal service as described in Part 1 of Schedule 1 (or if he has made an exceptional case determination under s.10(2)). These qualification criteria fall under two headings, namely (i) the financial resources of the applicant for civil legal services (see section 21), and (ii) the range of factors listed in section 11(3) (the governing criteria being fully set out in regulations), including general resource considerations, the importance of the issue to the individual, and the merits of the case.

8. Section 23 regulates the terms on which an individual to whom services are made available under Part 1 may be required to pay for or make a contribution towards the cost of providing them. Under section 26, the general rule is that an adverse order for

costs against a person who has been granted civil legal aid in relevant civil proceedings must not exceed the amount which it is reasonable for him to pay, having regard to the financial resources of all the parties to the proceedings and their conduct.

9. Part 1 of Schedule 1 lists the civil legal services which are within scope, although each of the 46 services originally specified contains exclusions (save for paragraph 44, which relates to "cross border disputes", and says in terms that it has no exclusions), some of which are expressly described as either general or specific. Annexed to this judgment is a list of these 46 categories of service (but not the exclusions): it is readily apparent that all of them are priority categories where the applicant's need or level of vulnerability is at or near the highest end of the scale.

10. Section 41 supplements Section 9; it is applicable to all orders, regulations and directions made under Part 1. Section 41 provides, in material part:

> "(1) Orders, regulations and directions under this Part –
>
> (a) may make different provision for different cases, circumstances or areas,
>
> (b) may make provision generally or only for specified cases, circumstances or areas,
>
> (c) may make provision having effect for a period specified or described in the order, regulations or direction.
>
> (2) They may, in particular, make provision by reference to –
>
> (a) services provided for the purposes of proceedings before a particular court, tribunal or other person,
>
> (b) services provided for a particular class of individual, or
>
> (c) services provided for individuals selected by reference to particular criteria or on a sampling basis.
>
> …
>
> (4) Orders and regulations under this Part are to be made by statutory instrument.
>
> (5) A statutory instrument containing an order or regulations listed in sub-section (7) [which includes orders under section 9] … may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament."

11. Mr Eadie QC relies on section 41(2)(b) as being the principal source of the *vires* for the order which will implement the residence test. He submits that the power under section 9(2)(b) to vary or omit services included in Part 1 of Schedule 1 includes power to do so with reference to "a particular class of individual", normally a non-resident.

12. The scheme of LASPO is that general cases are governed by section 9 read in conjunction with Part 1 of Schedule 1, whereas exceptional cases are catered for separately by section 10, which provides so far as is material:

> "(1) Civil legal services other than services described in Part 1 of Schedule 1 are to be available to an individual under this Part if sub-section (2) … is satisfied.
>
> (2) This sub-section is satisfied where the Director –
>
> (a) has made an exceptional case determination in relation to the individual and the services, and
>
> (b) has determined that the individual qualifies for the services in accordance with this Part,
>
> (and has not withdrawn either determination).
>
> (3) For the purposes of sub-section (2), an exceptional case determination is a determination –
>
> (a) that it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of –
>
> (i) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or
>
> (ii) any rights of the individual to the provision of legal services that are enforceable EU rights, or
>
> (b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be a breach."

13. In short, the Director is obliged to make available civil legal aid where a failure to do so would in any individual case breach, or amount to a substantial interference with, the procedural safeguards guaranteed by Article 6 of the Convention, and has discretion to do so where a risk of such breach arises. The same reasoning applies if any other Convention right is in issue, but Article 6 seems the most obvious candidate.

14. A number of points arise in relation to the provisions in issue. In many instances those who might benefit from the service specified are sections of the population with characteristics or attributes which define their need: e.g. children; vulnerable adults; disabled persons; those with mental health or mental capacity difficulties etc. The

point has already been made that Part 1 is subject to exclusions, and these are set out in Parts 2 or 3 of Schedule 1. Each of the Part 1 categories of service applies some or all of the exclusions (save for paragraph 44). The Part 2 exclusions are defined by reference to types of claim (e.g. property damage; defamation); the Part 3 by reference to types of advocacy service. The effect of falling within a Part 2 excluded service is that the services described in Part 1 are deemed not to include that service, unless Part 1 specifies otherwise.

15. The operation of the scheme may best be illustrated by taking a handful of examples. Paragraph 2 of Part 1 of Schedule 1 specifies "special educational needs" as being within scope. These are defined more precisely as matters arising under Part 4 of the Education Act 1996 and assessments of learning difficulties under the Learning and Skills Act 2000. These provisions confer relevant privileges, benefits and entitlements without reference to any residence criterion. The whole of Part 2 of Schedule 1 applies to paragraph 2, although the most relevant provisions are paragraphs 2, 3 and 18. Paragraph 18, which was added by secondary legislation which came into force on the same day as Part 1 of LASPO, is a general exclusion for judicial review proceedings in relation to "an enactment, decision, act or omission", although the exclusion is limited to applications for judicial review as defined by section 31 of the Senior Courts Act 1981; it does not apply to the procedure "after the application is treated under rules of court as if it were not such an application".

16. Paragraph 19 of Part 1 of Schedule 1 includes judicial review as a specified service, but it is hedged about with qualifications and limitations. Paragraph 19 is not subject to most of the Part 2 exclusions, including paragraph 18. For the avoidance of doubt, "judicial review" is defined in paragraph 19(10) in exactly the same terms as in paragraph 18 of Part 2, although in this context the effect is inclusionary rather than exclusionary. The point may be illustrated by examining a special needs case where the question arises of whether judicial review is (i) out of scope (because the case falls within paragraph 2 of Part 1, to which paragraph 18 of Part 2 applies) or (ii) within scope (because the case falls within paragraph 19 of Part 1, which is not subject to paragraph 18 of Part 2). The answer must be that the particular overrides the general, because paragraph 19 is designed to deal with judicial review claims not otherwise covered by a specific provision elsewhere in the Schedule. The application of these provisions is somewhat cumbersome, and becomes even more so when what Mr Fordham QC called the "reprieve" provisions are brought into consideration. Paragraph 19 is also subject to the qualification that judicial review proceedings which do not have the potential to produce a benefit for the individual, his family or the environment are excluded services, as are certain types of immigration and asylum decision.

17. Finally, paragraph 20 of Part 1 brings proceedings for *Habeas Corpus* within scope. This paragraph is subject to all the Part 2 exclusions, including paragraph 18, but in a case where legality of detention is the sole issue none of these would have any impact. In practice, because of the decisions taken in relation to "reprieves", civil legal aid is available to challenge legality of detention regardless of the remedy sought, even for those who fail the residence test.

18. Mr Fordham has provided examples of the valid exercise of the section 9 power either to add a service to Part 1 of Schedule 1 or to vary services. For instance, when Parliament enacted the Local Government Finance Act 2012 to insert new section

13A(9) (council tax reduction scheme) into the Local Government Finance Act 1992, the Lord Chancellor updated the Schedule by adding new paragraph 8A (appeals relating to council tax reduction schemes) by means of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2013 [2013 SI No. 748].

19. Exhibited to the second witness statement of Dr Elizabeth Gibby is the draft Statutory Instrument which the Lord Chancellor proposes to lay before Parliament in order to give effect to the residence test.

20. The draft instrument identifies its *vires* as being sections 9(2)(b), section 41(1)(a) and (b), (2)(a) and (b), and (3)(b) and (c) of LASPO. Mr Eadie agreed that the neatest fit was section 41(2)(b).

21. The legislative mechanism for introducing the residence test is intended to be by inserting a new paragraph 19 into Part 2 of Schedule 1, in other words, creating a further exclusion. The effect of this is to remove all those who fail to meet the residence test from the scope of Part 1 altogether (see the opening general words to Part 2), although such persons are now within the scope of section 10 (see section 10(1)).

22. An individual satisfies the residence test if he or she is lawfully resident (expressly defined as meaning that those who require leave to enter or remain must have it) in the United Kingdom, the Channel Islands, the Isle of Man or a British Overseas Territory, and one of three further conditions is also met.

23. The first condition is that the individual is less than 12 months old. The second condition is that the individual has at any time been lawfully resident for a period of 12 consecutive months without more than 30 absent days within that period. The period of time sought to be relied on can therefore have been decades in the past. The third condition relates to certain asylum claimants.

24. Article 3 of the draft instrument deals with the "reprieve" mechanisms. First, there are cases where the residence test will not apply because Part 1 will be amended so as to except paragraph 19 of Part 2: see, for example, paragraphs 1 (care of children) and 10 (unlawful removal of children). Secondly, there are cases where the residence test will apply only in part because the relevant paragraphs in Part 1 will be amended so as to make clear that paragraph 19 of Part 2 does not operate as an exclusion if certain criteria are satisfied: see, for example, paragraph 3 (abuse of child or vulnerable adult) where the residence test will apply to adults, but not to those who were children at the time the abuse occurred. Thirdly, paragraph 19 of Part 1, dealing with judicial review, will be amended so that paragraph 19 of Part 2 will not apply in certain specified situations: judicial review in respect of lawfulness of detention; proceedings before SIAC; and two specific asylum-type cases.

25. Mr Fordham has provided a detailed written analysis dealing with the Defendant's original inclusion rationales for each of the 46 categories in Part 1 of Schedule 1, and then the basis for the exclusion (by the application of the residence test) or the reprieve (by its disapplication), as the case might be. I refer to a handful of examples.

26. Paragraph 2, special educational needs, is now an excluded category for those who cannot satisfy the residence test. The point has already been made that Parliament has imposed duties on local authorities to assess and make provision for the needs of children and young persons in their area, irrespective of immigration status. The Government originally proposed to remove all education cases from the scope of LASPO but decided, in the light of the responses to the consultation paper, to retain civil legal aid for this group. The Government's reasoning was that most special educational needs cases could be brought under the Equality Act 2010 which remains in scope; that this group is particularly vulnerable and their cases tend to be complex; and that the futures of children would suffer.

27. It is not difficult to identify those on whom the application of the residence test would have a direct impact. Families of recently arrived children with special educational needs, whose access to education depends on proper provision being made to meet their additional needs, will be unable to access legal help and advice. A concrete example given by Coram Children's Legal Centre in its response to the consultation paper is the case of L, who had recently arrived in the UK for the purposes of refugee family reunion with her husband, and who would be unable to access legal advice in relation to the failure of the local authority to assess the needs of her autistic eight year old son because she had only been in the UK for three months.

28. Paragraph 5 covers legal advice in relation to detention and treatment under the Mental Health Act 1983 and decisions about incapacitated persons under the Mental Capacity Act 2005. Mr Fordham has identified a wide-ranging subject-matter under these statutory provisions. The coercive powers of public authorities under the Mental Health Act apply irrespective of immigration status, and persons can be detained and/or subject to community treatment provisions regardless. Further, immigration detainees may be transferred from immigration detention into hospital for treatment under section 47, and the jurisdiction of the Court of Protection does not depend on immigration status. The Government decided to include paragraph 5 within Part 1 of Schedule 1 owing to the obvious importance of the issue, the inability of such vulnerable persons to represent themselves, the lack of alternative sources of funding, and insufficient alternative forms of advice and assistance.

29. The reprieve from the residence test only applies to cases concerned with detention under the Mental Health Act 1983 or deprivation of liberty under the Mental Capacity Act 2005. It follows that individuals who lack mental capacity and are protected persons for litigation purposes, and therefore unable to litigate without a litigation friend, but who cannot meet the residence test, will be unable to access legal advice and representation. The Defendant has relied to some extent on the role of the Official Solicitor, but as the latter has convincingly explained in his witness statement dated 24th February 2014 this misunderstands a number of matters including the inability of protected persons to litigate without a litigation friend, and the improbability of a litigation friend being prepared to act in a case in which the party would meet the legal aid merits test but where no legal aid is available. Such an individual would be thrown back onto the possibility of obtaining exceptional funding under section 10.

30. Ms Nicola Mackintosh QC of Mackintosh Law gives the example of P, a severely learning disabled adult, who had been "forced to live in a dog kennel outside the house, had been beaten regularly by his brother and mother, and starved over an extensive period of time". With the benefit of legal aid and the involvement of the

Official Solicitor, proceedings in the Court of Protection resulted in a determination that it was in P's best interests to live separately from his family in a small group home with his friends and peers and 24-hour care. Yet, as Ms Mackintosh explains it would have been impossible to ascertain whether P met the residence test:

> "We were told both that he did not have a passport and (by his family) that he did have one but that it had been lost. P did not know if he did have a passport. It was also not possible to confirm that he had been lawfully in the UK for a continuous period of 12 months at some point in the past …"

Ms Mackintosh gives other examples of incapacitated individuals who either would not have passed the residence test, or for whom it would have been impossible to prove that they did, and whose welfare would have continued to be seriously jeopardised in the absence of proceedings.

31. Finally, some reference must be made to judicial review, which has been reprieved in part. The constitutional importance of judicial review does not require elaboration, but it is worth drawing attention to the fact that the residence test will exclude from access to legal aid individuals resident abroad who have been subject to serious abuses at the hands of UK forces. Cases such as those brought by Mr Al Skeini, whose judicial review claim established important principles relating to the jurisdiction of the ECHR in the instance of the operations of British armed forces personnel overseas, and Mr Ali Zaki Mousa, who successfully challenged on Article 3 grounds the independence of the Iraqi Historic Allegations Team set up to investigate allegations of abuse by British forces against Iraqi civilians, would fail to satisfy the residence test.

32. Looking at all the disparate cases reviewed in Mr Fordham's Annex document, it is apparent that some may come within the scope of section 10 of LASPO, but that others will not. Thus, section 10 cannot be a complete answer to this application, and Mr Eadie does not submit that it is.

Ultra Vires

33. The claimant contends that LASPO confers no power to introduce the criterion of residence. If it is lawful at all to introduce such a criterion, it must be done by primary legislation.

34. If the introduction of a residence test by secondary legislation exceeds the power to make delegated legislation conferred by the statute, it will be ineffective. The power to make delegated legislation must be construed in the context of the statutory policy and aims such legislation is designed to promote. Accordingly, PLP's submission requires analysis of those statutory provisions which are said to confer the power to introduce a residence test, and of LASPO, read as a whole, in order to identify its objective.

35. The two statutory provisions which the Lord Chancellor contends confer power to introduce the residence test by secondary legislation are s.9(2) of LASPO and s.41(2)(b) (set out above at paragraphs 6 and 10). Section 41 falls within that part of the statute which is headed "Supplementary".

36. The Lord Chancellor contends that the power conferred by s.9 and supplemented by s.41 is a power to restrict services by a reference to a particular class of individual, namely, those who are non-resident as defined in the draft instrument.

37. Analysis of Part 1 of Schedule 1 shows that the statute seeks to confine civil legal services which the Lord Chancellor must secure to cases which are judged to be of the greatest need. Those cases are identified by reference not only to the circumstances which an individual might face but also by reference to personal characteristics or attributes, for example, children or those suffering from mental ill health. But whether defined by reference to their status or by reference to their circumstances, Part 1 of Schedule 1 seeks to identify those individuals and their circumstances having the greatest need for civil legal services. Leaving aside questions of financial resources and merits, no example can be found within the primary legislation of a distinction drawn between those entitled to civil legal services and those who are not on grounds other than assessment of need. The purpose lying behind the identification of services in Part 1 of Schedule 1 is to identify need. Thus, Parliament has chosen to exercise a judgement according to the criteria of need and not on any other basis.

38. That that is the correct analysis of the objective lying behind the structure of the Act is confirmed by the Ministry of Justice's decision document of June 2011 which described the LASPO reforms as "fundamental reform to ensure access to public funding in those cases which require it". In the statutory guidance to which the Director of Legal Aid Casework must have regard (s.4(3)(b)) the Lord Chancellor announced that he had "re-focussed limited resources on the highest priority cases". In its decision document dated 20 September 2013 the Ministry of Justice described LASPO as "targeting legal aid at the most serious cases which have sufficient priority to justify the use of public funds".

39. If any further confirmation is needed as to the purpose lying behind LASPO it is to be found in the first witness statement of Dr Gibby, Deputy Director of Legal Aid and Legal Services Policy. She charts the history of the legal aid policy from the consultation paper in November 2010 which describes the reform as aimed at ensuring that legal aid would be targeted, in the future, at those who needed it most. From September 2012 the Department worked on achieving the Lord Chancellor's five priorities, amongst which was ensuring that the system was cost-effective and focussed on those cases "which really needed it". In its Equality Statement, annexed to its Consultation Response Document dated 5 September 2013, the Lord Chancellor identified the primary objective of the reform package as being :-

> "to bear down on the cost of legal aid, ensuring that every aspect of expenditure is justified and that we are getting the best deal for the taxpayer. Unless the legal aid scheme is targeted at the persons and cases where funding is most needed, it will not command public confidence or be credible…the reforms seek to promote public confidence in the system by

> ensuring limited public resources are targeted at those cases which justify it and those people who need it…"

It concluded that:-

> "The primary responsibility of the MoJ in administering the legal aid system must be to provide fair and effective legal aid to those clients most in need."

40. The statutory provisions, read as a whole, demonstrate that that which the Lord Chancellor had publicly and repeatedly avowed, was to be achieved by a process whereby services were identified according to his assessment of where civil legal aid was most needed. No other criterion emerges from analysis of the statutory provisions. The power to add, vary or omit services under s.9 as supplemented by s.41 is to serve and promote the object of the statute. The secondary legislation provides an opportunity for the Lord Chancellor to add, vary or omit those cases when, from time to time, he judges that a greater need has arisen or a lesser need has emerged for distribution of civil legal aid. The power cannot be construed in a way which widens the purposes of the Act or departs from or varies its primary objective (see, e.g., *Utah Construction and Engineering PTY Limited v Pataky* [1966] AC 629 at 640 and *Bennion on Statutory Interpretation 5th Edition* section 59, pages 262-263). The discretion is conferred to promote the policy and objects of the Act and not to introduce a different objective.

41. These are not revolutionary principles. The Government itself has invoked them. In its Delegated Powers Memorandum for the House of Lords Delegated Powers and Regulatory Reform Committee, dated 21 June 2011, the Government described the power as follows:-

> "The power extends to modifying any Part of Schedule 1. The power will allow for services to be omitted from Schedule 1 if they are no longer needed, or it is no longer appropriate for them to be listed. For example, if particular court proceedings are moved to a tribunal, it may cease to be appropriate to provide funding for advocacy for those proceedings and so an amendment to Part 3 of Schedule 1 would be needed. The power can also be used to add new exceptions listed in Part 1. It is appropriate for there to be a limited power to amend Schedule 1 to allow it to be kept up to date. As this is a power to amend primary legislation, it is drawn as narrowly as possible."

This point was repeated by the Government in its memorandum dated 7 November 2011. The power was described by the Government in its response to the report of the House of Lords Select Committee on the Constitution in December 2011 as a focussed power to omit services where, for example, funding may no longer be necessary.

42. The proposal to introduce a criterion of residence strikes a discordant note. Whereas there had hitherto been unanimity in the expressions of the purposes of the statute and

the power conferred to further its purpose, the residence test introduces a criterion which has nothing to do with need. The Lord Chancellor asserts:-

> "The residence test is a proportionate means of achieving the legitimate aim set out in paragraph 6.3. By targeting funding at those with a strong connection to the UK, the residence test ensures that limited public resources are spent appropriately, (*Transforming Legal Aid: Next Steps* 5 September 2013)."

But the reference back to 6.3 is a reference back to a description of the purpose of targeting cases at those people who are most in need to which I have already referred. No one can pretend that removing legal aid from non-residents is a means of targeting legal aid at those most in need. Non-residents who fall within those cases identified as being of greatest need are not in any less need by reason of their status as non-residents. The purpose of introducing a residence test is not to identify those cases of the greatest need, but rather to restrict the distribution of legal aid to those who have the closest connection with the United Kingdom. But at this stage of the argument the question is not whether that is a legitimate purpose but whether it is a purpose which can be identified from the primary legislation. In short, does the purpose of the proposed secondary legislation widen or depart from the purposes to be identified from LASPO?

43. There is no dispute as to the purpose of the introduction of the residence test. It is designed to ensure that those on whom civil legal aid is conferred "have a strong connection with the UK" (this is made clear in a number of the documents setting out the reasons for the decision to introduce the secondary legislation); they can be summarised by reference to the document dated 5 September 2013, *Transforming Legal Aid: Next Steps*:-

> "2.11 The purpose of this proposal is to ensure that only individuals with a strong connection to the UK can claim civil legal aid at UK taxpayers' expense."

That connection is to be demonstrated by establishing a period of twelve months of previous lawful residence which demonstrates "a meaningful connection with the UK" (paragraph 114, page 85). This test has nothing to do with need or an order of priority of need. It is, entirely, focussed on reducing the cost of legal aid.

44. It is true that if the purpose of LASPO is correctly identified, as Mr Eadie on behalf of the Lord Chancellor would have it, as saving public funds and "seeking to further prioritise the expenditure of limited public resources in a time of real financial stringency", then restricting legal aid not only to those with the greatest need but to those with the stronger connection to the United Kingdom, falls within the purpose of LASPO. But, in my judgment, it is not possible to spell out of the statute so broad and general a purpose. As I have said, the criteria adopted by the statute are limited to criteria by which those in the greatest need of civil legal aid are identified.

45. Of course, it might have been possible to draft primary legislation (I say nothing about its legality) which has the broader ambition of cutting the cost of legal aid by permitting the Lord Chancellor to adopt criteria irrespective of need. But it is clear to me that the statute has neither such overriding ambition nor purpose. It does precisely

what the Government announced it was intended to do, namely, to allocate civil legal aid to those in the greatest need. It would be startling if the statute contained the power to introduce secondary legislation with a wider purpose in precise contradiction to the public announcements of government that it was intended to allow services to be omitted if they are no longer needed, or it is no longer "appropriate" for them to be listed, a power it described as being drawn "as narrowly as possible". On the contrary, the Lord Chancellor now asserts a power to introduce secondary legislation which excludes, from those adjudged to have the highest priority need, those whose need is just as great, but whose connection with the United Kingdom is weaker.

46. Mr Eadie sought to bolster the Lord Chancellor's argument by reference to the fact that secondary legislation removing a class of individual from the scope of Schedule 1 Part 1 could only be made by affirmative resolution (section 41(5)). Thus Parliament had drawn attention to the particular nature of such an amendment and the Lord Chancellor has subjected his proposals to the specific scrutiny of Parliament. The Lord Chancellor has squarely confronted what he is doing and has accepted the political cost. This, so it is argued, powerfully rebuts any suggestion that the Lord Chancellor is seeking to introduce a discriminatory measure without drawing attention to it, without the opportunity for Parliamentary examination and through a statutory back-door.

47. The fact that the delegated legislation will be subject to greater scrutiny than if it was introduced by the process of negative resolution is plainly relevant to consideration of whether the power conferred is wide enough. Absence of Parliamentary scrutiny underlies the principle that fundamental rights cannot be overriden by general words (*R v Home Secretary Ex p. Simms* [2000] 2 A.C.115 at 131F) and Parliamentary scrutiny of general legislative measures is often enough to satisfy the requirements of procedural fairness (*Bank Mellat v HM Treasury (No.2)* [2013] UKSC 38 at paragraph 44).

48. But in the instant case it is not enough to assert that the measure will be subject to scrutiny by Parliament, if, on a true construction of the statutory powers in their context, no power to introduce such a measure can be found.

49. Section 41 is, as the heading to that congeries of sections heralds, supplementary. Supplementary means what it says: it is added to the power in s.9 to fill in details or machinery for that which the Act, and in particular s.9(2), does not itself provide. It enables that which the Act empowers to be effective. But s.41 cannot by itself create a new and radically more extensive set of powers additional to those contained in s.9(2) (see, e.g., *Daymond v South West Water Authority* [1976] AC 609 at 644 and *R v Customs and Excise Commissioners ex parte Hedges and Butler Limited* [1986] 2 All ER 164 (cited by *Bennion q.v. supra* at page 256)). The essential power conferred is to add, vary or omit services as identified in Part 1 of Schedule 1. The introduction of the secondary legislation restricting the provision of those services to residents maintains and preserves such services as the Lord Chancellor considers demonstrate the greatest need, but merely deprives non-residents of the opportunity to take advantage of them. It is true that by way of supplementary provision services may be added, varied or omitted by reference to a particular class of individual, but that is only because the nature of the service may itself be identified by reference to a particular class of individual. For example, amongst the listed priority areas are victims of domestic violence (P 12) and such victims in the area of immigration. The

definition of domestic violence was updated (2013 Order SI 2013/748). Those categories are examples of cases of need identified by reference to a class of individual. But the identification of a particular class of person is merely designed to identify those with a need judged to have priority.

50. For those reasons, I conclude the instrument is *ultra vires* and unlawful. I conclude that LASPO does not permit such a criterion to be introduced by secondary legislation. It extends the scope and purpose of the statute and is, accordingly, outwith the power conferred by s.9 as supplemented by s.41. But I need to emphasise at this stage that my reasoning is confined to construction of the statute and the powers that it confers without reference to the issue as to whether the power for which the Lord Chancellor contends offends the principle of legality. The argument advanced on behalf of PLP included submissions that to construe the power with sufficient breadth to enable the criterion of residence to be introduced, affects and interferes with fundamental rights of access to the court. That principle, it contended, affords another reason for restricting the scope of s.9 and s.41. That issue does not form the basis of my conclusion that the statutory instrument is outwith the powers of LASPO.

Discrimination

51. It is important to focus on PLP's essential complaint. It is that, by introducing the residence test, the Lord Chancellor has unlawfully discriminated between those whose cases fall within Schedule 1 categories. This, PLP contends, amounts to unlawful discrimination in the context of three key constitutional values: access to justice, equal treatment before the law and the rule of law itself.

52. Both sides recognised the importance of the context in which the discrimination took place. The context is a vital factor in determining the standard of scrutiny to be deployed when considering the justification offered for what is agreed to be a discriminatory test (*Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1545). There was a fundamental dispute as to the correct identification of the context: whether the provision of legal assistance, other than in the fulfilment of a duty, was to be regarded as a measure akin to the distribution of social welfare. If legal assistance which a state chooses to provide may be regarded as analogous to social welfare benefits, as the Lord Chancellor contended, then the legality of a residence test is more easily established.

53. The obligation of a state to provide legal assistance in some circumstances was not in dispute. The principle is now well established both in domestic and Strasbourg jurisprudence. The right to legal aid can be invoked by virtue of Art. 6(1) of the Convention (*Pine v Law Society (No 1)* [2001] EWCA Civ 1574). The duty to provide legal aid in some cases is no more than an aspect of the principle that the state is under an obligation not to impede access to court. Section 10 of LASPO is the provision adopted to meet the United Kingdom's obligation to provide legal assistance in those cases where a failure to do so would risk a breach of Convention or EU rights.

54. It is necessary to appreciate that PLP does not and could not complain that the proposed introduction of a residence test breaches any *obligation* to provide legal assistance. There is no such test in s.10 cases. The real question raised by the instant

case is whether, once the United Kingdom has chosen to provide legal assistance in cases where it was under no duty to do so, it may refuse such assistance to those who would otherwise qualify save for the fact that they do not meet a residence test.

55. In *R v Lord Chancellor ex p Witham* [1998] QB 575, what was at stake was an Order of 1996 which increased fees to the extent that those on very low incomes were unable to vindicate their rights in court (at 579). The Order turned people away from the door of the court, a breach of a constitutional right which could only be achieved by express provision (at 586). Questions relating to legal aid only arose because Mr. Richards for the Lord Chancellor had argued that court fees were analogous to legal aid, and that it was at the Lord Chancellor's discretion to decide what litigation should be supported by taxpayers' money. Laws J rejected the analogy. But that case was not concerned with discrimination and does not assist in determining whether the selection of those eligible for legal aid on the discriminatory basis of residence is lawful.

56. The constitutional right of access to the courts was further considered by the Court of Appeal in *R (Children's Rights Alliance for England) v Secretary of State for Justice* [2013] 1 WLR 3667. Again, the case is not concerned with discrimination. It decided that the obligation to provide a right of access to the courts did not include an obligation to find and provide information as to legal rights to those with potential claims. The constitutional duty was described by the Court as a duty not to "place obstacles in the way of access to justice" (at paragraph 39). That description of the nature of the duty, that it is a duty not to impede access to the court, is binding on this court but does not lead to any particular conclusion as to the legality of discrimination on the basis of residence in the provision of legal aid.

57. Absent any legal obligation to provide legal aid, the principle that the state must not impede access to the courts does not carry the argument forward. It does not help to determine the legality of the basis the Lord Chancellor has chosen to adopt to discriminate between those cases of the highest priority need, in respect of which legal assistance should be afforded, and those cases in respect of which such assistance should be denied. In short, the legality of the introduction of a residence test cannot be tested by reference to the obligation, in some cases, to provide legal assistance.

58. This case *is*, however, concerned with those cases where there is no legal right to legal aid but the Lord Chancellor has chosen to recognise those cases of highest priority need which, by reason of that need, merit legal assistance. After all, the very fact that Parliament has drawn a distinction between section 10 cases and cases whose subject-matter is identified in Schedule 1 demonstrates that the focus of this application is on cases where, in recognition of need, the United Kingdom is prepared to provide legal assistance without being under any obligation to do so.

59. Invoking the principle that the state is under no obligation to provide legal aid in all circumstances, is, therefore, of no assistance. Where a litigant has a right to legal aid, that right will be met, at least if it is properly applied, by section 10. Mr Eadie QC, for the Lord Chancellor, relied on *Granos Organicos Nacionales* (App. 19508/07) for the proposition that the right of access to a court is not absolute and may be subject to restrictions "intended to meet the legitimate concern of controlling the use of public funds for sponsoring private litigation". But that does not help in deciding which

restrictions may lawfully be adopted. They must not be arbitrary and must not be disproportionate. So much is well established (*Granos* at paragraph 51, *PC and S v UK (*App. no. 5647/00) at paragraph 90). But what of residence as a test for distinguishing between those cases of highest priority which should have the benefit of legal assistance and those which should not?

60. It is and was beyond question that the introduction of such a test is discriminatory. The test is more likely to be satisfied by a United Kingdom national than a national of another member state (a reference to the habitual residence test in *Patmalneice v SSWP* [2011] 1 WLR 783 at paragraph 35). The Government has accepted that it will be "easier for UK citizens to satisfy than other nationals" and that it "falls within the ground of national origin as specified in Article 14". Indeed, that is its declared purpose. "We have made it absolutely clear", said the Parliamentary Under-Secretary of State, "that for the residence test it is important that they are our people - that they have some link to this country" (18 March 2014). That is the justification for the test that is proffered, that it is designed to restrict legal assistance to those with a closer connection to the United Kingdom than foreigners. The Lord Chancellor has said as much to the Joint Committee on Human Rights: "I am treating people differently because they are from this country and established in this country or they are not" (26 November 2013). Unrestrained by any courtesy to his opponents, or even by that customary caution to be expected while the court considers its judgment, and unmindful of the independent advocate's appreciation that it is usually more persuasive to attempt to kick the ball than your opponent's shins, the Lord Chancellor has reiterated the rationale behind the introduction of the residence test, in the apparent belief that the Parliamentary Under-Secretary had not been as clear as he thought he had been :

> "Most right-minded people think it's wrong that overseas nationals should ever have been able to use our legal aid fund anyway, and when it comes to challenging the action of our troops feelings are particularly strong…We are pushing ahead with proposals which would stop this kind of action and limit legal aid to those who are resident in the UK, and have been for at least a year. We have made some exceptions for certain cases involving particularly vulnerable people, such as refugees who arrive in the UK fleeing persecution elsewhere. But why should you pay the legal bill of people who have never even been to Britain?
>
> And yes, you've guessed it. Another group of Left-wing lawyers has taken us to court to try to stop the proposals" (Daily Telegraph 20 April 2014, sixteen days after the argument had been concluded).

61. Since it is not disputed that the residence test is discriminatory, the question remains whether that discrimination is lawful. That depends, to a great extent, on the correct identification of the benefit from which non-residents are to be excluded. It matters not whether one describes non-residents as a different case or the absence of residence as a rational justification for discrimination. The considerations are the same and much turns on the question whether, in the field of litigation supported by taxpayers'

money, to use Laws J's description in *Witham*, it is legitimate to require residence to be established.

62. The Lord Chancellor founds his defence on the proposition that legal assistance, in those cases where the law does not impose a duty to provide it, is no more than a form of social welfare or benefit. If that is the correct category into which such legal assistance is to be placed, there is little doubt he is right.

63. Legal assistance provided other than as a matter of obligation is no different, so the Lord Chancellor argues, from other "measures of economic or social strategy":

> "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is manifestly without reasonable foundation" (*Stec v UK* at paragraph 52).

64. *Stec* concerned earnings-related additional state benefit, which was less valuable to women than men for historical reasons, relating to the differential retirement age. Light touch control by the courts, apparent in a test which requires no more than "some rational justification", stems from the wide margin of appreciation afforded to the High Contracting Parties in the context of the distribution of welfare benefits. In *R (Carson) v Work and Pensions Secretary* [2006] 1 AC 173 the denial of a social security benefit on the ground that the claimant was living abroad was held not to be discrimination on the grounds of race or sex (at paragraph 15). The position of a non-resident was materially and relevantly different from that of a UK resident (at paragraph 25). Lord Hoffmann continued:

> "Once it is conceded that people resident outside the UK are relevantly different and could be denied any pension at all, Parliament does not have to justify to the court the reasons why they are paid one sum rather than another. Generosity does not have to have a logical explanation. It is enough for the Secretary of State to say that, all things considered, Parliament considered the present system of payments to be a fair allocation of available resources " (at paragraph 26).

65. The ECrtHR (*Carson v UK* (2009) 48 EHRR 41 Appn No. 42184/05) agreed that there had been no violation of Art. 14, read with Art. 8. A non-resident was not in a relevantly similar situation to a resident in relation to the distribution of pensions, despite her contributions of National Insurance during her working life (at paragraph 84). The pension system, said Strasbourg, was designed to serve the needs of those resident in the United Kingdom:

> "it is hard to draw any genuine comparison with the position of pensioners living elsewhere, because of the range of economic and social variables which apply from country to country" (at paragraph 86).

66. There is by now a substantial body of jurisprudence to show that discriminatory selection in relation to the distribution of benefits, such as housing benefit capped in relation to large lone parent families (*R (JS) v SSWP)* [2014] PTSR 23, [2014] EWCA Civ 156) or the provision of health care to non-residents (*R (A) v Secretary of State for Health* [2010] 1 WLR 279), was a matter for the judgment of Parliament and the Government (see also Baroness Hale's adoption of the *Stec* approach in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18, [2012] 1 WLR 1545).

67. So the question resolves itself into whether the provision of legal assistance other than in fulfilment of a legal obligation is analogous to the payment of welfare benefits. If it is analogous, then a residence test, whereby those whose greater connection with this country may be identified, can be justified without difficulty. It is a crude test but is, nonetheless, a means whereby those who are more likely to have made an economic contribution and are more closely connected socially may be distinguished. In *Patmalniece* the justification for the introduction of a habitual residence test was that those who claim social assistance in a host member state "should have achieved a genuine economic tie with it or a sufficient degree of social integration" (at paragraph 48). Such integration may be measured by a residence test.

68. But is legal assistance provided other than under obligation in a similar category? Is the fact that, like the pension in *Carson*, it may be denied altogether enough? The refusal of legal aid to participate in an inquest required no greater justification than the need to harbour scarce resources (*R (Patel) v Lord Chancellor* [2010] EWHC 2220 (Admin) (at paragraph 38). That shows, submits Mr Eadie, that the introduction of a residence test needs no greater justification.

69. What must be justified, however, is not the denial of legal aid but discrimination between those who are eligible and those who are not in cases of equal need. The discriminatory test of residence cannot be justified on the basis that there was no obligation on the state to provide legal aid at all; it is the difference in treatment which must be justified (*A (No.1) v Secretary of State* [2005] 2 AC 68:

> "Any discriminatory measure inevitably affects a smaller rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. What has to be justified is not the measure in issue but the difference in treatment between one person or group and another." (at paragraph 68).

70. If the Lord Chancellor had wished he could have denied all civil legal assistance to anyone save in respect of those where he was under a legal duty to provide such assistance. But he has not chosen to restrict legal assistance to cases falling within s.10. He has chosen to go further and must, therefore, act lawfully in the manner in which he makes his choices. The issue is not whether there is a right to legal aid in cases falling outwith section 10 LASPO, but whether it is legitimate to introduce a discriminating distinction within the Schedule 1 listed priority cases.

71. These cases seem to me to be different from the distribution of welfare benefits because the Government has already reached the conclusion that certain categories of case demonstrate such a high priority of need as to merit litigation supported by taxpayers' subsidy.

72. *Ex hypothesi*, the 'foreign' claimants' cases have merit and the claimants cannot afford to pay for advice or representation. Their cases are of the greatest importance, as judged by the Lord Chancellor, otherwise they would not have found their way into Schedule 1. As the then Lord Chancellor put it to the House of Lords Select Committee on the Constitution (Government Response December 2011):

> "Legal Aid will be a key element in ensuring access to justice in some cases, but in many cases justice can and should be afforded without the assistance of a lawyer funded by the taxpayer. Fundamental rights to access to justice…are protected by this Bill in relation to legal aid, through both the areas retained in scope in Schedule 1 to the Bill and through the exceptional funding provision".

73. In June 2011, the Ministry of Justice identified the four principal considerations leading to inclusion (Response to Consultation) :

i) the importance of the issue, e.g. cases involving the individual's life, and where the individual faces intervention from the state or seeks to hold the state to account.

ii) The litigant's ability to present their own case…where litigants bringing proceedings were likely to be from a predominantly physically or emotionally vulnerable group;

iii) The availability of alternative sources of funding; and

iv) The availability of other sources of resolution.

74. Those considerations led the Government to choose to subsidise the meritorious cases of the impecunious in relation to the subject-matter identified in Schedule 1 of LASPO.

75. As the second consideration shows and, in any event, is obvious, absent legal assistance litigants will be substantially hampered in vindicating their rights. That is, in part, accepted by the Government who have acknowledged that if litigants choose to represent themselves that could lead to an increased burden on the HMCTS but that "individuals may choose not to tackle the issue at all" (*Transforming Legal Aid: Next Steps* Sept 2013 paras 25-29). The Government thus accept that the absence of legal assistance will put off some litigants from pursuing meritorious claims acknowledged to be of the highest priority. It is important not to underestimate the impact of this disadvantage. Those who do not satisfy the residence test will be deprived of the protection of costs in section 26 of LASPO.

76. Those who have a better than 50% chance of success but cannot afford legal representation or advice in order to vindicate their rights, within a category of greatest need, are to be refused legal aid because they lack a sufficient connection with the state to whose laws they are subject. In the paradigm case, it is the state or its agents who have breached their rights. What a non-resident claimant seeks, just as much as a resident, is judicial protection. If his case would fall within Schedule 1 Part 1, apart from the residence criterion, his underlying legal rights and underlying need for help

are the same whether he is resident or not. He may seek to vindicate rights under United Kingdom law or defend himself against a wrongful exercise of power by UK authorities. Those who have a better than 50% chance of establishing that they have been subjected to breaches of the law, even when contrary "to the most fundamental human rights" by UK actions abroad (see the objection of 145 Treasury Counsel in a letter to the Attorney-General dated 4 June 2013) are to be denied legal assistance. They are to be hampered in seeking judicial protection solely on the grounds of residence.

77. The consequence of the residence test is to hamper a non-resident claimant, when compared to a resident claimant, in seeking to vindicate domestic rights which domestic public authorities are under a domestic legal obligation to secure. The rationale behind the inclusion of cases within the priority areas was, in many cases, the need to hold the state to account, check the exercise of executive power and to ensure that power is exercised responsibly (see, e.g., the Government's initial proposal for reform). That need for legal assistance is no less in the case of a non-resident and arguably, in a foreign land speaking a foreign language, all the greater. Lord Bingham (in *A*) cited Lord Scarman (in *ex parte Khawaja* ([1984] AC 74, 111-2):

> "every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection."

78. In such a context, when what is at stake is the protection which domestic law affords to all who fall within its jurisdiction, it seems to me that the provision of legal assistance is far from analogous to the distribution of welfare benefits. Moreover, it is difficult to see how the rationale that legal assistance should be confined to those with a closer connection than non-residents, can possibly be applied to those who are subject to the laws of a state and seek no more than its protection. On what basis is a greater tie or greater integration sought when the claimant merely wishes to avoid a discriminatory handicap?

79. The answer, so the Lord Chancellor says, is that there may be greater savings. PLP points to substantial evidence that the extent of the savings is unknown, cannot be assessed and may be illusory. Indeed, satellite litigation in which claimants seek to contend for their entitlement to assistance under section 10 (see, e.g., the comprehensive judgment as to the policy under section 10 in *Gudanaviciene v Director of Legal Aid Casework and Others* [2014] All ER (D) 123) may prove far more expensive, in the long run, than letting represented litigants get on with the substantive case. That seems to me to miss the essential point. It is for the Lord Chancellor to make a prediction as to how to husband scarce resources.

80. But there is a logically prior question. It is whether discrimination in the provision of legal services may be justified simply on the ground of the need to save money. It could be so justified if the context was the distribution of welfare benefits. But, as I have sought to demonstrate, the instant cases are not within that category.

81. The context is the vindication of legal rights and the mere fact that the Government could, in non-s.10 cases, refuse all legal assistance to anyone, irrespective of

residence, is no answer to the allegation of discrimination on the grounds of residence.

82. The mere saving of cost cannot justify discrimination. In the part-time judges' pension case *MOJ v O'Brien* [2013] UKSC 6, [2013] 1 WLR 522 the Supreme Court said:

> "Hence the European cases clearly establish that a member state may decide for itself how much it will spend upon its benefits system, or presumably upon its justice system, or indeed upon any area of social policy. *But within that system*, the choices it makes must be consistent with the principles of equal treatment and non-discrimination. A discriminatory rule or practice can only be justified by reference to a legitimate aim other than the simple saving of cost. No doubt it was because the Court of Justice foresaw that the ministry would seek to rely upon considerations of cost when the case returned to the national courts that it took care to reiterate that budgetary considerations cannot justify discrimination" (at paragraph 69).

83. The vital distinction in this case, recognised by the Supreme Court, lies between the making of a choice by the State as to whether to provide legal assistance in some cases, and discrimination between those eligible once a choice to provide legal assistance in those cases has been made. Within the system provided in Schedule 1 of LASPO, the United Kingdom is not permitted to discriminate against non-residents on the grounds that to do so might save costs.

84. The other justification advanced is public confidence in the legal aid system. The Lord Chancellor had previously justified the restrictions on legal assistance by reference to commanding public confidence and ensuring credibility by targeting those people and cases where "funding is most needed" (*Transforming Legal Aid: Next Steps* (e.g., paragraphs 1.5, 6.3 and 20.9, 5 September 2013). It is not clear to me how the need to engender public confidence could form part of the justification for discrimination. Feelings of hostility to the alien or foreigner are common, particularly in relation to the distribution of welfare benefits. But they surely form no part of any justification for discrimination amongst those who, apart from the fact that they are 'foreign', would be entitled to legal assistance. Certainly it is not possible to justify such discrimination in an area where all are equally subject to the law, resident or not, and equally entitled to its protection, resident or not. In my judgement, a residence test cannot be justified in relation to the enforcement of domestic law or the protection afforded by domestic law, which is applicable to all equally, provided they are within its jurisdiction. In the context of a discriminatory provision relating to legal assistance, invoking public confidence amounts to little more than reliance on public prejudice.

85. I reach that conclusion without any reliance on the decision of the Second Section of the ECrtHR in *Yula v Belgium* (No. 45413/07 10 March 2009). Mr Eadie warned that this case was an unreliable foundation for PLP's case. The claimant had been refused, on the grounds of non-residence, what is described as "legal aid" in a paternity suit. These included the filing costs, the costs of a guardian to represent the child, and the costs of a blood test. In a judgment which is not replete with reasoning, the court

pointed to serious questions of family law to be resolved which would have a "definitive effect" on the claimant and others. It looked for "particularly compelling reasons" to justify a difference of treatment and referred to *Niedzwiecki v Germany* (2006) 42 EHRR 33. *Niedzwiecki* concerned a refusal of child benefit to aliens who were unlikely to stay permanently in Germany. It seems to me unnecessary to consider how far these two cases can stand with *Stec*. PLP in the instant case has no need to rely on them in circumstances where the UK has chosen to provide legal assistance in certain cases of high priority need but to withhold it even in those cases, on the grounds of non-residence.

86. Nor does there seem any need to be precise as to how stringent the court should be in its scrutiny of the justification. Whether the test requires "some rational justification" or is a more stringent test, the possibility of saving expense is not an aim which can be legitimately relied upon to justify discrimination.

87. Nor has it proved necessary to consider the proposed application form to apply for exceptional funding under section 10. Mr Eadie QC, on behalf of the Lord Chancellor, accepted that it was far too complicated and needs simplification and revision if it was going to be of any assistance to residents, let alone a "foreigner".

88. It does not seem to me necessary to choose between the many different ways in which PLP seeks to advance the same argument, whether it is equal treatment under the common law, or a breach of Art. 14, read with Art 6. I conclude that residence is not a lawful ground for discriminating between those who would otherwise be eligible for legal assistance by virtue of Schedule 1 LASPO.

Mr Justice Collins:

89. I agree.

Mr Justice Jay:

90. I also agree.

ANNEX

Paragraph in Part 1 Schedule 1	Service	Excluded by residence test, except R = reprieved
1	Care, supervision and protection of children	R
2	Special educational needs	
3	Abuse of child or vulnerable adult	R (child)
4	Working with children and vulnerable adults	
5	Mental health and mental capacity	R(detention)
6	Community care	R (Children Act 1989)
7	Facilities for disabled persons	
8	Appeals relating to welfare benefits	
8A	Appeals relating to council tax deduction schemes	

9	High Court inherent jurisdiction: children and vulnerable adults	R (child)
10	Unlawful removal of children	R
11	Family homes and domestic violence	R
12	Victims of domestic violence and family matters	R
13	Protection of children and family matters	R
14	Mediation in family disputes	R
15	Children who are parties to family proceedings	R
16	Forced marriage	R
17	EU and international agreements concerning children	R
18	EU and international agreements concerning maintenance	R
19	Judicial review	R (detention/ certification/certain asylum claims)
20	Habeas corpus	R
21	Abuse of position or powers by public authority	
22	Breach of Convention rights by public authority	
23	Clinical negligence and severely disabled infants	R
24	Special Immigration Appeals Commission	R
25	Immigration: detention	R
26	Immigration: temporary admission	R
27	Immigration: residence etc. restrictions	R
28	Immigration: victims of domestic violence and ILR	R
29	Immigration: victims of domestic violence and residence cards	R
30	Immigration: right to enter and remain	R
31	Immigration: accommodation for asylum-seekers	
32	Victims of trafficking in human beings	R
33	Loss of home	
34	Homelessness	
35	Risk to health or safety in rented home	
36	Anti-social behaviour	
37	Protection from harassment	
38	Gang-related violence	
39	Sexual offences	
40	Proceeds of crime	
41	Inquests	
42	Environmental pollution	
43	Equality	
44	Cross-border disputes	R

45	Terrorism prevention and investigation measures etc.	
46	Connected matters	