Case Nos: C1/2014/2240, 2241, 2242,
2243, 2244, 2245, 2271 & 2272

Neutral Citation Number: [2014] EWCA Civ 1622

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Collins
[2014] EWHC 1840 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2014

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE RICHARDS
and
LORD JUSTICE SULLIVAN

- -

Between :

The Queen on the Application of	**Claimants/**
(1) Teresa Gudanaviciene	**Respondents**
(2) IS (by his litigation friend, the Official Solicitor)	
(3) Cleon Reis	
(4) B	
(5) Jacqueline Elizabeth Edgehill	
(6) LS	
- and -	
The British Red Cross Society	**Intervener**
- and -	
(1) The Director of Legal Aid Casework	**Defendants/**
(2) The Lord Chancellor	**Appellants**

- -
- -

Mr Martin Chamberlain QC, Ms Sarah Love and **Mr Malcolm Birdling** (instructed by **The Treasury Solicitor and Legal Aid Agency Central Legal Team**) for the **Appellants**
Mr Richard Drabble QC, Mr Ranjiv Khubber and **Mr Joseph Markus** (instructed by **Turpin Miller LLP**) for **Ms Gudanaviciene**
Ms Phillippa Kaufmann QC and Mr Chris Buttler (instructed by **Public Law Project**) for **IS**
Mr Richard Drabble QC, Mr Tim Buley and **Mr Alistair Mills** (instructed by **Duncan Lewis & Co**) for **Mr Reis**
Mr Paul Bowen QC and **Ms Alison Pickup** (instructed by **Islington Law Centre**) for **B**
Mr Ashley Underwood QC and **Mr Adam Tear** (instructed by **Duncan Lewis & Co**) for **Ms Edgehill**
Mr Paul Bowen QC and **Ms Catherine Meredith** (instructed by **ATLEU**) for **LS**
Mr Guy S Goodwin-Gill and **Ms Samantha Knights** (instructed by **Freshfields Bruckhaus Deringer LLP**) for **The British Red Cross Society**

Hearing dates : 27, 28, 29 and 31 October 2014

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Judgment

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Master of the Rolls:

INTRODUCTION

1. This is the judgment of the court to which each of its members has contributed.

2. These appeals all concern decisions by the Director of Legal Aid Casework ("the Director") to refuse applications for civil legal aid. The decisions were made under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") and in the light of the Lord Chancellor's Exceptional Funding Guidance (Non-Inquests) ("the Guidance"). In each case, the Director decided to refuse applications for exceptional case funding ("ECF") under section 10 of LASPO.

3. On 30 January 2014, Turner J ordered that the cases be listed together inter alia, because they raised common issues as to the circumstances in which the European Convention on Human Rights ("the Convention") and the EU Charter of Fundamental Rights ("the Charter") required the provision of legal aid in civil cases.

4. Collins J granted judicial review in each of the six cases that were before him. As we shall explain, the appellants have not pursued an appeal in the case of IS. But they appeal the decisions in the cases of Gudanaviciene, LS, Reis, B and Edgehill. The judge held that the Guidance was unlawful in that it misstated: (i) the circumstances in which legal aid in civil cases must be made available under section 10(3) of LASPO; (ii) the test for determining when article 6 of the Convention and article 47 of the Charter require the provision of legal aid in civil cases; and (iii) the circumstances in which article 8 of the Convention requires the provision of legal aid in civil cases generally and in immigration cases in particular. Applying what he considered to be the correct test to the facts of each case, he concluded in the cases of Gudanaviciene, Reis, B and Edgehill that the Convention required the provision of legal aid; and in the cases of IS and LS that the decisions should be reconsidered by the Director. In the case of B, he also found that civil legal aid should be made available because the services to which the application related were "in scope" i.e. they fell within para 30 of Part 1 of Schedule 1 to LASPO.

5. We shall summarise the issues that arise on these appeals after we have set out the relevant statutory material.

LASPO

6. Part 1 of LASPO deals with legal aid. Its effect is to limit the circumstances in which civil legal aid can be granted. Section 9 of LASPO 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.)"

7. The civil legal services described in Part 1 of Schedule 1 are therefore in scope for legal aid, subject to specific exclusions in Parts 2 and 3. Paras 30 and 32 of Part 1 are

relevant to the appeals in respect of B and LS respectively. We will set out the material parts of those paragraphs when considering their cases.

8. Section 10 of LASPO is central to these appeals. It is headed "Exceptional cases" and so far as material provides:

> "(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 subsection (2) … is satisfied.
>
> (2) This subsection 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 subsection (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 such a breach."

9. The Explanatory Notes to section 10(3) state:

> "107. It will be necessary to make legal services available to an individual where the withholding of such services would clearly amount to a breach of Article 6….. There will be a breach of the enforceable EU rights of the individual to the provision of legal services where the withholding of such services would be clearly contrary to the rights reaffirmed by Article 47 of the Charter of Fundamental Rights….
>
> 108. Subsection (3)(b) provides that an exceptional case determination may also be made where the Director considers that the failure to provide legal services would not necessarily amount to a breach of an individual's rights, but that it is

> nevertheless appropriate for the services to be made available, having regard to the risk of such a breach occurring."

10. Section 4 of LASPO requires the Lord Chancellor to designate a civil servant as Director. Section 4(2) obliges the Director to:

> "(a) comply with directions given by the Lord Chancellor about the carrying out of the Director's functions under this Part, and
>
> (b) have regard to guidance given by the Lord Chancellor about the carrying out of those functions."

The Guidance

11. Para 1 of the Guidance provides that the Director must have regard to the Guidance in determining whether civil legal services are to be made available under section 10(2) and (3) of LASPO and that as, in practice, applications will be considered by caseworkers on the Director's behalf, the guidance is addressed to caseworkers. Para 2 states that:

> "This guidance sets out some of the factors that caseworkers should take into account in deciding exceptional funding applications under section 10(2) and (3) of the Act. It is not intended to be an exhaustive account of those factors. In particular, it is not intended to replace the need for consideration of representations in individual cases and new case law that arises. Applications should be considered on a case by case basis. "

12. As regards section 10(3)(b) of LASPO, the Guidance states:

> "6. Section 10(3)(b) does not provide a general power to fund cases that fall outside the scope of legal aid. It is to be used for rare cases and provides that an exceptional case determination may be made where the risk of the breach of the rights set out in section 10(3)(a) is such that it is appropriate to fund.
>
> 7. The purpose of section 10(3) of the Act is to enable compliance with ECHR and EU law obligations in the context of a civil legal aid scheme that has refocused limited resources on the highest priority cases. Caseworkers should approach section 10(3)(b) with this firmly in mind. It would not therefore be appropriate to fund simply because a risk (however small) exists of a breach of the relevant rights. Rather, section 10(3)(b) should be used in those rare cases where it cannot be said with certainty whether the failure to fund would amount to a breach of the rights set out at section10(3)(a) but the risk of breach is so substantial that it is nevertheless appropriate to fund in all the circumstances of the case. This may be so, for example, where the case law is uncertain (owing, for example, to conflicting judgments)."

13. Section A is entitled "The right to legal aid under the ECHR". The Guidance states:

> "9. Whereas Article 6 ECHR provides a specific right to legal assistance in the context of criminal proceedings, the Convention contains no such specific right in relation to civil proceedings. Rather, the ECtHR has recognised that there are very limited circumstances in which the failure of the State to provide civil legal aid may amount to breach of an individual's rights under the European Convention on Human Rights.
>
> 10. Caseworkers will need to consider, in particular, whether it is necessary to grant funding in order to avoid a breach of an applicant's rights under Article 6(1) ECHR. As set out below, the threshold for such a breach is very high."

14. Under the heading "Article 6(1) ECHR", the Guidance states:

> "12. Article 6(1) guarantees the right to a fair hearing and the right of access to the court for the purposes of the determination of a person's civil rights and obligations. In certain very limited circumstances, legal aid may be required in order to guarantee the effective right of access to a court in civil proceedings."

15. Under the sub-heading "Will there be a breach of Article 6(1)?" appears the following:

> "18. Assuming that the proceedings in question involve the determination of a civil right or obligation, caseworkers should then go on to consider whether the failure to provide legal aid would be a breach of the applicant's rights under Article 6(1) ECHR.
>
> **The overarching question to consider is *whether the withholding of legal aid would make the assertion of the claim practically impossible or lead to an obvious unfairness in proceedings.*** This is a very high threshold" (original emphasis).

16. At paras 19 and following, the Guidance sets out the factors that should be taken into account. Para 19 states that no one of the factors is necessarily determinative and each case needs to be assessed on its particular facts and in the light of representations made by applicants.

17. Thus para 20 is headed "(a) How important are the issues at stake?" It states that caseworkers need to consider "whether the consequences of the case at hand are objectively so serious as to add weight to the case for the provision of public funds". Examples are given.

18. Para 21 is headed "(b) How complex are the procedures, the area of law or the evidence in question?" Examples are given of factual complexity, procedural complexity and legal complexity.

19. Paras 22 to 25 are headed "(c) How capable is the applicant of presenting their case effectively?" This section includes:

> "22. Caseworkers should consider whether the applicant would be incapable of presenting their case without the assistance of a lawyer. When considering this factor, caseworkers will need to bear in mind their assessment of case complexity, as this may affect the weight that needs to be given to some of the matters listed below.
>
> 23. In doing so, caseworkers should bear in mind that:
>
> - there is no requirement to provide legal aid to ensure total equality of arms between an applicant and opponent, so long as each side is afforded a reasonable opportunity to present their case under conditions that don't place them at a substantial disadvantage compared to the opponent;
>
> - most courts and, in particular, tribunals are well used to assisting unrepresented parties in presenting or defending their cases against an opponent who has legal representation."

20. Examples are then given of the questions that should be addressed in determining whether an applicant is capable of presenting his case effectively. Para 24 states that, in the case of a child applicant, certain questions (which are set out) may be relevant. Para 25 states that where the applicant is an adult who lacks capacity within the meaning of the Mental Health Act 2005 the caseworker should consider certain questions (which are set out).

21. The heading to paras 26 to 28 is "Article 8 ECHR". It states:

> "26. Applicants may seek to argue that the provision of legal aid is necessary in order to avoid a breach of the applicant's rights under Article 8 ECHR (right to respect for private and family life).
>
> 27. In the cases of *Airey v Ireland* and *P, C and S v United Kingdom*, the ECtHR found that the lack of an accessible legal procedure in certain types of family law proceedings did amount to a breach of Article 8 ECHR. Although caseworkers should consider each application on its individual facts, it would normally only be in circumstances closely analogous to these cases that the failure to provide legal aid would amount to a breach of Article 8 ECHR.

> 28. In those cases, the ECtHR also found that the failure to provide legal aid amounted to a breach of Article 6(1) ECHR. It is likely that cases in which an applicant seeks to rely on Article 8 would therefore fall more naturally to be considered under the Article 6(1) heading."

22. Section B is entitled "Enforceable EU rights to the provision of legal services". Paras 30 to 34 give guidance as to how to deal with claims that civil legal services should be made available by virtue of article 47 of the Charter.

23. Section C is entitled "Specific case types". Para 39 states that the Annex sets out further guidance in relation to specific types of case that may arise in applications for exceptional funding. The guidance given in relation to immigration cases is of particular relevance to the present appeals. It provides:

> "59. Proceedings relating to the immigration status of immigrants and decisions relating to the entry, stay and deportation of immigrants do not involve the determination of civil rights and obligations.
>
> 60. The Lord Chancellor does not consider that there is anything in the current case law that would put the State under a legal obligation to provide legal aid in immigration proceedings in order to meet the procedural requirements of Article 8 ECHR."

The issues

24. We will consider the issues in the order in which they are raised by the appellants' grounds of appeal. Ground 1 concerns the proper interpretation of section 10(3) of LASPO. The issue in Ground 2 is whether the Guidance is compatible with article 6 of the Convention and article 47 of the Charter. The issue in Ground 3 is whether the Guidance is compatible with article 8 of the Convention in immigration cases. Ground 4 relates to the case of Ms Gudanaviciene. Ground 5 relates to the case of IS and is no longer pursued. Grounds 6 to 9 relate respectively to the cases of LS, Mr Reis, B and Ms Edgehill.

GROUND 1: THE PROPER INTERPRETATION OF SECTION 10(3) OF LASPO

The submissions

25. Collins J held that (i) ECF is required under section 10(3)(a) when the applicant can establish "to a high level of probability" that without it there would be a breach of his procedural rights under the Convention or EU law (para 44 of his judgment); and (ii) the "risk" of a breach referred to in section 10(3)(b) was a "substantial risk that there will be a breach of the procedural requirements of" the Convention or EU law (para 50). Mr Chamberlain QC submits that, although the judge did not say so in terms, he also appears to have concluded that, where a "substantial risk" of a breach is established, the Director is under a duty to make an ECF determination (para 98).

26. Mr Chamberlain submits that the judge made the following errors. First, section 10(3)(b) confers a discretion; it does not impose a duty. Secondly, there is no warrant for adding a gloss to the wording of section 10(3)(a) and introducing the nebulous

concept of satisfaction "to a high degree of probability". The correct test for the application of section 10(3)(a) is that it applies only where it is *clear* that, without funding, there would be a breach. This flows from the statutory words "necessary" and "would be a breach". It is reinforced by the Explanatory Notes: "it will be necessary to make legal services available to an individual where the withholding of such services would *clearly* amount to a breach …" (emphasis added). Thirdly, even if section 10(3)(b) does impose a duty to fund whenever a risk of the relevant kind can be identified, the subsection does not require there to be a "substantial risk" or a "real prospect" of a breach. Construing the "exceptional cases" provision as requiring no more than a "real prospect" of a breach would undermine the statutory purpose of section 10, namely to provide civil legal aid only in *exceptional* cases (outside the "in scope" categories identified in Part 1 of Schedule 1). Mr Chamberlain submits that Coulson J expressed the point correctly in *M v Director of Legal Aid Casework* [2014] EWHC 1354 (Admin) at para 71:

> "In my judgment, Mr Eadie QC was right to say that the test for 'risk' required by Section 10(3)(b) must be considered by reference to the aim and purpose of LASPO itself. LASPO aims to make civil legal aid available in the particular cases identified in Part 1 of Schedule 1, and not otherwise, unless the provision of legal aid is necessary or appropriate within the definitions at Section 10(3). Those exceptional cases will therefore be limited; in my view, they can only arise either where it could definitely be said that a refusal of legal aid would give rise to a breach of the Convention; or where there was a significant risk or a very high risk of such a breach. However it is expressed, it must be a 'very high threshold': see paragraph 44 of the judgment of the Divisional Court in *Howard League* …. Any lesser test would, in my judgment, be contrary to the purpose and scheme of LASPO because, instead of the specific and defined cases in Part 1 of Schedule 1, it would create an almost limitless category of 'exceptional cases'."

27. Fourthly, the judge was wrong to apply a "substantial risk" or "real risk" test. This is the test applied by the ECtHR in relation to extradition or deportation cases and in the context of the operational duty to protect citizens from the criminal acts of third parties: see, for example, *Soering v UK* (1989) 1 EHRR 439 and *Osman v UK* (2000) 29 EHRR 245. It is not applied to impose a duty on a state to ensure that those within its jurisdiction are not exposed to a real risk of a breach of procedural rights by the organs of that very state. The Contracting States are obliged to ensure that they do not breach Convention rights.

28. Mr Drabble QC (supported by Mr Bowen QC) submits that the definition of the in scope categories set out in Part 1 to Schedule 1 is neutral in the sense that it tells one nothing about the width of section 10(3)(a) and (b). He contends that the question whether a refusal of legal aid *would be a breach* of an individual's Convention rights or enforceable EU rights must be answered by applying the approach to be derived from the ECtHR and the CJEU case-law respectively. There is no basis for saying that section 10(3)(a) requires a high threshold or a high standard of proof. Section

10(3)(b) caters for those cases where it is not possible to decide whether there *would be* a breach but there is a *risk* ("any risk", not a substantial risk) of a breach.

Discussion

29. We respectfully disagree with the passage in the judgment of Coulson J that we have quoted at para 26 above. The fact that section 10 is headed "exceptional cases" and that it provides for an "exceptional case determination" says nothing about whether there are likely to be few or many such determinations. Exceptionality is not a test. The criteria for deciding whether an ECF determination should or may be made are set out in section 10(3) by reference to the requirements of the Convention and the Charter. In our view, there is nothing in the language of section 10(3) to suggest that exceptional case determinations will only rarely be made.

30. Section 10(3) carefully describes the scope of the exceptional cases by reference to an individual's Convention or EU rights. Unsurprisingly, section 10(3)(a) obliges the Director to make an exceptional case determination if he is of the opinion that it is necessary to make the services available because failure to do so would be a breach of the individual's Convention or EU rights. Section 10(3)(b) gives him a discretion to make a determination if he considers it "appropriate" to do so having regard to the risk that failure to do so would be a breach. Whether the denial of legal aid would be a breach of Convention or EU rights can only be judged by reference to the principles enunciated by the ECtHR and the CJEU to which we shall come shortly.

31. We see no warrant for construing section 10(3)(a) as imposing a condition that an ECF determination should only be made where it can *definitely* be said (Coulson J's formulation) that refusal would be a breach; or where there is a "*high level of probability*" that refusal would be a breach (Collins J's test). There is no need to add a gloss to the wording of the statute "*would be a breach*". In deciding whether there would be a breach, the Director should apply the principles to be derived from the case-law (some of which is mentioned at para 27 of the Guidance). There is no need for elaboration. When determining whether a complaint of a breach of Convention rights has been established, the ECtHR does not ask itself whether there has definitely been a breach or whether there has been a breach to a high level of probability. It simply asks whether there has been a breach. In our view, this approach should inform the meaning of the words "would be a breach" in section 10(3)(a). We do not consider that the word "clearly" in the Explanatory Notes (see para 9 above) takes the argument any further. We should add that we accept the submission of Mr Chamberlain that the "*real risk of a breach*" is a concept which has no part to play in the exercise envisaged by section 10(3). Section 10(3)(a) speaks of the situation where a failure to make civil legal services available would be a breach, not where there would be a real risk of a breach. The concept of real risk has no part to play in the question whether the denial of legal aid would amount to a breach of an individual's procedural rights under the Convention or under article 47 of the Charter.

32. In short, therefore, if the Director concludes that a denial of ECF would be a breach of an individual's Convention or EU rights, he must make an exceptional funding determination. But as we shall see, the application of the ECtHR and CJEU case-law is not hard-edged. It requires an assessment of the likely shape of the proposed litigation and the individual's ability to have effective access to justice in relation to it. The Director may conclude that he cannot decide whether there would be a breach

of the individual's Convention or EU rights. In that event, he is not required by section 10(3)(a) to make a determination. He must then go on to consider whether it is appropriate to make a determination under section 10(3)(b). In making that decision, he should have regard to *any* risk that failure to make a determination would be a breach. These words mean exactly what they say. The greater he assesses the risk to be, the more likely it is that he will consider it to be appropriate to make a determination. That is because, if the risk eventuates, there will be a breach. But the seriousness of the risk is only one of the factors that the Director may take into account in deciding whether it is appropriate to make a determination. He should have regard to all the circumstances of the case.

GROUND 2: IS THE GUIDANCE COMPATIBLE WITH ARTICLE 6 OF THE CONVENTION AND ARTICLE 47 OF THE CHARTER?

33. So far as material, article 6 of the Convention provides:

> "(1) In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…."

34. Article 47 of the Charter provides:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

The ECtHR jurisprudence on article 6

35. It is necessary to examine a few cases. The first decision in which the ECtHR recognised that article 6 can require the provision of civil legal aid in certain circumstances was *Airey v Ireland* (1979) 2 EHRR 305. The court said:

> "24. … The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in

the sense of whether she would be able to present her case properly and satisfactorily.

Contradictory views on this question were expressed by the Government and the Commission during the oral hearings. It seems certain to the Court that the applicant would be at a disadvantage if her husband were represented by a lawyer and she were not. Quite apart from this eventuality, it is not realistic, in the Court's opinion, to suppose that, in litigation of this nature, the applicant could effectively conduct her own case, despite the assistance which, as was stressed by the Government, the judge affords to parties acting in person.

In Ireland, a decree of judicial separation is not obtainable in a District Court, where the procedure is relatively simple, but only in the High Court. A specialist in Irish family law, Mr. Alan J. Shatter, regards the High Court as the least accessible court not only because 'fees payable for representation before it are very high' but also by reason of the fact that 'the procedure for instituting proceedings ... is complex particularly in the case of those proceedings which must be commenced by a petition', such as those for separation.

Furthermore, litigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practices or, as in the present case, cruelty; to establish the facts, expert evidence may have to be tendered and witnesses may have to be found, called and examined. What is more, marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court.

For these reasons, the Court considers it most improbable that a person in Mrs. Airey's position … can effectively present his or her own case. This view is corroborated by the Government's replies to the questions put by the Court, replies which reveal that in each of the 255 judicial separation proceedings initiated in Ireland in the period from January 1972 to December 1978, without exception, the petitioner was represented by a lawyer ….

The Court concludes from the foregoing that the possibility to appear in person before the High Court does not provide the applicant with an effective right of access ….

26. …

It would be erroneous to generalise the conclusion that the possibility to appear in person before the High Court does not provide Mrs. Airey with an effective right of access; that conclusion does not hold good for all cases concerning 'civil

rights and obligations' or for everyone involved therein. In certain eventualities, the possibility of appearing before a court in person, even without a lawyer's assistance, will meet the requirements of Article 6 para. 1; there may be occasions when such a possibility secures adequate access even to the High Court. Indeed, much must depend on the particular circumstances.

> In addition, whilst Article 6 para. 1 guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations", it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme – which Ireland now envisages in family law matters … – constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court's function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 para. 1.
>
> …
>
> The conclusion appearing at the end of paragraph 24 above does not therefore imply that the State must provide free legal aid for every dispute relating to a 'civil right'.
>
> To hold that so far-reaching an obligation exists would, the Court agrees, sit ill with the fact that the Convention contains no provision on legal aid for those disputes, Article 6 para. 3 (c) dealing only with criminal proceedings. However, despite the absence of a similar clause for civil litigation, Article 6 para. 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case."

36. In *X v UK* (1984) 6 EHRR 50, the applicant was involved in an employment dispute with his employer. His union refused to support his complaint before the Industrial Tribunal. He therefore invoked his rights under article 6(1) of the Convention saying that, without legal representation, he could not have a fair hearing. His complaint was dismissed as manifestly unfounded. The Commission said at para 3 of its judgment:

> "….the Commission recalls that unlike the situation concerning criminal proceedings (cf. Art 6(3)(c)) the Convention does not guarantee as such a right to free legal aid in civil cases. Only in exceptional circumstances, namely where the withholding of legal aid would make the assertion of a civil claim practically impossible, or where it would lead to obvious unfairness of the

> proceedings, can such a right be invoked by virtue of Art. 6(1) of the Convention (cf *Airey v Ireland*, 2 EHRR 305)".

37. In the subsequent Strasbourg case-law, there seems to have been no further reference to *X v UK,* but there has been regular reference to, and application of, the approach set out in *Airey v Ireland*: see, for example, *Munro v UK* (1984) 10 EHRR 516, *Stewart-Brady v UK* (1997) 24 EHRR CD 38, *McVicar v UK* (2002) 35 EHRR 22, *P,C and S. v UK* (2002) 35 EHRR 31, *Steel and Morris v UK* (2005) 41 EHRR 22 and *AK and L v Croatia* (App No 37956/05), 8 January 2013.

38. In *P,C and S*, the principles were expressed with a slightly different emphasis. At para 89, the court said that failure to provide an applicant with the assistance of a lawyer may breach article 6(1) where:

> "… such assistance is indispensable for effective access to court … by reason of the complexity of the procedure or the type of case ….
>
> Thus, though the pursuit of proceedings as a litigant in person may on occasion not be an easy matter, the limited public funds available for civil actions renders a procedure of selection a necessary feature of the system of administration of justice, and the manner in which it functions in particular cases may be shown not to have been arbitrary or disproportionate, or to have impinged on the very essence of the right of access to court".

39. At para 90, the court said:

> "Secondly, the key principle governing the application of Article 6 is fairness. In cases where an applicant appears in court notwithstanding lack of assistance of a lawyer and manages to conduct his or her case in the teeth of all the difficulties, the question may nonetheless arise as to whether this procedure was fair. There is the importance of ensuring the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, *inter alia,* by being able to put forward the matters in support of his or her claims. Here, as in other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures."

40. In *Steel and Morris,* the court said:

> "61. The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.

> 62. The right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate. It may therefore be acceptable to impose conditions on the grant of legal aid based, inter alia, on the financial situation of the litigant or his or her prospects of success in the proceedings. Moreover, it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary."

Discussion

41. Mr Chamberlain submits that an analysis of the facts in *Airey, P,C and S* and *Steel and Morris* gives a good indication of the types of circumstances required to establish that a failure to provide legal aid gives rise to a breach of article 6(1). He says that such an analysis justifies the statement at para 18 of the Guidance that article 6(1) imposes a "very high threshold".

42. It is clear that para 18 of the Guidance is based on *X v UK.* Mr Drabble submits that there is no support for the *X v UK* test and that it is an aberration within an otherwise consistent strand of Strasbourg authority. We accept that the precise words adopted in *X v UK* have not been adopted elsewhere in the Strasbourg jurisprudence. In particular, the phrase "practical impossibility" does not appear elsewhere. Rather, the key question is said to be whether legal aid is necessary for "effective access to the court". The cases set out the kind of factors which are relevant for a resolution of this issue. But the phrase "obvious unfairness" (as a summary) is wide enough to capture the guidance given in the jurisprudence. Indeed, as we have seen, the ECtHR said in *P,C and S* at para 90 that the "key principle governing the application of article 6 is fairness". Accordingly, we do not accept that the *X v UK* test is an aberration. There is no real inconsistency between it and the test which is set out, admittedly in more detail, in the *Airey* line of authority. This should not be surprising, since the Commission in *X v UK* referred to and purported to apply *Airey.* The *Airey* approach (as developed in the subsequent case-law) is consistent with, but more comprehensive than, the *X v UK* approach. It should be regarded as articulating the relevant law.

43. It is in any event wrong to focus solely on para 18 of the Guidance. As we have seen, paras 19 to 24 set out in some detail the factors that should be taken into account in determining whether the withholding of civil legal aid would be a breach of article 6(1). We have summarised these at paras 17-20 above. They fairly reflect the factors that the Strasbourg jurisprudence states are relevant to an assessment of whether the failure to provide civil legal aid would be a breach of article 6(1). We do not understand Mr Drabble and Mr Bowen to contest this. They do not identify any particular factors which have been omitted.

44. They do, however, say that the Guidance fails accurately to reflect the article 6(1) jurisprudence because it sets the bar too high for the grant of ECF. It is necessary to repeat the relevant passages. Para 7 states that section 10(3)(b) of LASPO should be used "in those rare cases where it cannot be said with certainty whether the failure to

fund would amount to a breach". The only example given of a case where funding may be appropriate is where the case law is uncertain "(owing, for example, to conflicting judgments)". In our view, this misinterprets section 10(3)(b). The discretion conferred by this provision is not so severely circumscribed. There is no basis for saying that it may only be exercised in such rare circumstances. The extreme nature of the single example that is given shows how rarely the Guidance contemplates that it will be appropriate to make an exceptional case determination under section 10(3)(b). Para 9 states that the ECtHR has recognised that there are "very limited" circumstances in which the failure to provide legal aid may amount to a breach of Convention rights. Para 10 states that the threshold for a breach of an applicant's rights under article 6(1) is "very high". Para 12 states that in certain "very limited" circumstances, legal aid may be required in order to guarantee right of access to a court in civil proceedings. Para 18 states that the *X v UK* test is a "very high threshold".

45. In our judgment, the cumulative effect of these passages is to misstate the effect of the ECtHR jurisprudence. As we have seen, the Guidance correctly identifies many of the particular factors that should be taken into account in deciding whether to make an exceptional case determination, but their effect is substantially neutralised by the strong steer given in the passages that we have highlighted. These passages send a clear signal to the caseworkers and the Director that the refusal of legal aid will amount to a breach of article 6(1) only in rare and extreme cases. In our judgment, there are no statements in the case-law which support this signal. For the reasons stated earlier, we do not consider that the reference in *X v UK* to "exceptional circumstances" provides support for it.

46. The general principles established by the ECtHR are now clear. Inevitably, they are derived from cases in which the question was whether there was a breach of article 6(1) in proceedings which had already taken place. We accept the following summary of the relevant case-law given by Mr Drabble: (i) the Convention guarantees rights that are practical and effective, not theoretical and illusory in relation to the right of access to the courts (*Airey* para 24, *Steel and Morris* para 59); (ii) the question is whether the applicant's appearance before the court or tribunal in question without the assistance of a lawyer was effective, in the sense of whether he or she was able to present the case properly and satisfactorily (*Airey* para 24, *McVicar* para 48 and *Steel and Morris* para 59); (iii) it is relevant whether the proceedings taken as a whole were fair (*McVicar* para 50, *P,C and S* para 91); (iv) the importance of the appearance of fairness is also relevant: simply because an applicant can struggle through "in the teeth of all the difficulties" does not necessarily mean that the procedure was fair (*P,C and S* para 91); and (v) equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent (*Steel and Morris* para 62).

47. Although the Strasbourg case-law does not contain statements which provide *explicit* support for the very high threshold articulated in the Guidance, Mr Chamberlain submits that the outcomes of the cases demonstrate that the threshold is indeed very high. It is, therefore, necessary to return to the cases. In *Airey* the applicant wished to petition for a judicial separation in the Irish High Court. She lacked the means to employ a lawyer and legal aid was not available. The ECtHR held that there had been

a violation of article 6(1). At the relevant time, divorce was constitutionally prohibited and a judicial decree of separation was required for a spouse to be relieved of the duty of cohabitation. Decrees of separation were obtainable only in the High Court and the evidence was that in each of the 255 separation proceedings initiated in Ireland in the 7 years prior to the hearing in Strasbourg, the petitioner was represented by a lawyer. We have set out the relevant parts of the court's reasons for concluding that there had been a violation of article 6(1). The court concluded on the facts of that case that it was "most improbable" that a person in Mrs Airey's position could effectively present her case. Mr Chamberlain submits that this was an extreme case. We would not dissent from this assessment.

48. As we have seen, *X v UK* involved an employment dispute which the applicant wished to bring to an Industrial Tribunal. The Commission was of the opinion that the applicant could have brought his case without legal representation. Of particular significance is the statement at para 4 that Industrial Tribunal proceedings "are designed to be conducted in a practical and straightforward manner without too much emphasis on formalities". The contrast with *Airey* is striking.

49. In *Munro,* the applicant was denied legal aid to pursue libel proceedings arising from a finding by the Industrial Tribunal that he had been constructively dismissed. The Commission distinguished *Airey,* holding that the applicant had not shown that he was hindered in his access to court by the absence of legal aid. One of the factors that influenced the Commission was that there had already been a hearing before the Tribunal which considered the same substantive issues as would have been considered in the defamation proceedings.

50. In *McVicar,* the applicant was defendant in libel proceedings brought by a comparatively wealthy individual. The applicant complained that the denial of legal aid violated his article 6(1) rights. He was faced with the burden of having to prove that the allegations he had made were true. In order to do so, (i) he called witness and expert evidence some of which was excluded as a result of his failure to comply with the rules of court and (ii) he cross-examined the plaintiff's witnesses and experts in the course of a trial which lasted more than 2 weeks. He had no formal legal training, but he was a well-educated and experienced journalist who was said to be capable of formulating a cogent argument. In this respect, his position could be contrasted with that of Mrs Airey. The court considered that the rules pursuant to which the evidence was excluded were clear and unambiguous. So far as the law of defamation was concerned, the court did not consider it to be sufficiently complex to require a person in the applicant's position to have legal assistance. The court took other factors into account including the fact that an individual's emotional involvement in a defamation case is less than that in an application for judicial separation. In all the circumstances, the applicant was not prevented from presenting his defence effectively by reason of his ineligibility for legal aid.

51. In *P,C and S,* before the birth of P's child S, the local authorities expressed concern about her previous conviction in the US and sought to initiate care proceedings in relation to the unborn child. P was suffering from a mental illness known as Munchhausen's syndrome. On the birth of S, the child was removed from P and her husband C and freed for adoption. Initially, P was represented by counsel. But the judge permitted the lawyers to withdraw from the case. The outcome of the proceedings was that S was ordered to be removed from the care of P and C. The

ECtHR decided that there had been a breach of article 6(1). It held that the proceedings were of "exceptional complexity" extending over a period of 20 days; the documentation was voluminous; there was "highly complex expert evidence" relating to the fitness of P and C to parent their daughter; and the hearing raised difficult points of law. In short:

> "The complexity of the case, along with the importance of what was at stake and the highly emotive nature of the subject-matter, [led the] Court to conclude that the principles of effective access to court and fairness required that P receive the assistance of a lawyer."

52. In *Steel and Morris,* the applicants were refused legal aid to contest a libel claim. Although they had some help from volunteer lawyers, they represented themselves for the bulk of the proceedings which lasted 303 days. Damages were awarded against them. Their complaint that their article 6(1) rights had been violated was upheld by the ECtHR. The court applied the *Airey* test to the facts of the case. As regards what was at stake for the defendants, the proceedings were not determinative of important family rights and relationships, but the defendants were acting to protect their right to freedom of expression and the financial consequences for them of losing were high when compared to their low incomes. The proceedings were on a different scale of magnitude from those in *McVicar.* The case was also legally far from straightforward. The court took into account the considerable latitude afforded to the applicants by the domestic courts. However, in an action of this complexity, neither the sporadic help given by volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person "was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel". Finally, the court said at para 69:

> "the disparity between the respective levels of legal assistance enjoyed by the applicants and McDonald's was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness, despite the best efforts of the judges at first instance and on appeal."

53. The last ECtHR authority to which we should refer is *AK and L.* This case concerned proceedings by which AK was divested of her parental rights in respect of her son L. She had a mild mental disability, a speech impediment and limited vocabulary. The court first considered the complaint of a breach of article 8 and concluded that there had been a breach. It then addressed the complaint of a breach of article 6(1) and held that no separate issue arose in relation to article 6(1). The finding of a breach was based on the importance of the proceedings for AK's right to respect for her family life and the fact that she could not properly understand the full legal effect of the proceedings and adequately argue her case.

54. We have been referred to some domestic authorities. The only one which we should mention is *Perotti v Collyer-Bristow* [2003] EWCA Civ 1521, [2004] 2 All ER 189. The Court of Appeal had to consider in what circumstances article 6(1) prevented a court from continuing to hear a case in which one side was unrepresented. The principal judgment was given by Chadwick LJ. The court held that on the facts of that case the claimant would not be denied effective access to the courts if he were not

represented. At para 31, Chadwick LJ said that a litigant who wishes to establish that without legal aid his right to effective access will have been violated "has a relatively high threshold to cross". At para 32, he said:

> "The test under art 6(1), as it seems to me, is whether a court is put in a position that it really cannot do justice in the case because it has no confidence in its ability to grasp the facts and principles of the matter on which it has to decide. In such a case it may well be said that a litigant is deprived of effective access; deprived of effective access because, although he can present his case in person, he cannot do so in a way which will enable the court to fulfil its paramount and over-arching function of reaching a just decision. But it is the task of courts to struggle with difficult and ill-prepared cases; and courts do so every day…..If it cannot [reach a just decision] the litigant is effectively deprived of proper access to the courts."

55. The phrase "relatively high threshold" (itself somewhat vague) should be contrasted with the phrase "very high threshold" which is used in the Guidance. It is also to be noted that Chadwick LJ makes no reference to factors such as the importance of what is at stake and overall fairness. We should add that, in using the phrase "a just decision", we think that Chadwick LJ must have intended to include both procedural justice (fairness) and substantive justice (reaching the correct result). We do not consider that the decision in *Perotti* adds to what can be derived from the Strasbourg jurisprudence.

56. It can therefore be seen that the critical question is whether an unrepresented litigant is able to present his case effectively and without obvious unfairness. The answer to this question requires a consideration of all the circumstances of the case, including the factors which are identified at paras 19 to 25 of the Guidance. These factors must be carefully weighed. Thus the greater the complexity of the procedural rules and/or the substantive legal issues, the more important what is at stake and the less able the applicant may be to cope with the stress, demands and complexity of the proceedings, the more likely it is that article 6(1) will require the provision of legal services (subject always to any reasonable merits and means test). The cases demonstrate that article 6(1) does not require civil legal aid in most or even many cases. It all depends on the circumstances. It should be borne in mind that, although in the UK we have an adversarial system of litigation, judges can and do provide assistance to litigants in person. The outcomes in *X v UK, Munro* and *McVicar* show that it is not a requirement of article 6(1) that legal services be provided in all but the most straightforward of cases. On the other hand, the outcomes in *Airey, P,C and S, Steel and Morris* and *AK and L* do not show that legal services are required only in such extreme cases as these. In short, we do not accept the submission of Mr Chamberlain that these decisions justify the passages in the Guidance which we have criticised at paras 44-45 above.

The CJEU jurisprudence

57. Mr Chamberlain submits that (i) in situations where a Charter right corresponds with a Convention right, it was the intention of the Praesidium that the protections conferred by the former were to be co-extensive with the protections conferred by the

latter (as interpreted by the case-law of the ECtHR); and (ii) article 47(2) and (3) of the Charter were intended to correspond with article 6(1) (save that the former were not limited in scope to situations involving the determination of civil rights and obligations). It follows that the level of procedural protection provided by article 47 of the Charter corresponds to that provided by article 6(1) of the Convention.

58. Mr Drabble does not seriously take issue with this, although he points out that the EU law principle of effectiveness may be wider than the requirements of article 6 of the Convention and he draws attention to the observations of Advocate-General Jaaskinen in *Donau Chemie* [2013] CMLR 19 at para 47. We doubt whether there is any material difference between article 47(3) of the Charter and article 6(1) of the Convention for present purposes. It is to be noted that article 52(3) of the Charter provides that, in so far as the Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the Convention. We are reinforced in the view that there is no such difference by what was said by the CJEU in *DEB Deutsche Energiehandels v Bundesrepublik Deutschland* [2011] CMLR 21 at paras 45 to 53 of its judgment. After reviewing some of the ECtHR jurisprudence, the court said:

> "60. In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.
>
> 61. In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts."

59. It follows that what we have said in relation to article 6(1) of the Convention applies with equal force to article 47(3) of the Charter.

GROUND 3: IS THE GUIDANCE COMPATIBLE WITH ARTICLE 8 OF THE CONVENTION IN IMMIGRATION CASES?

The appellants' submissions

60. Mr Chamberlain submits as follows. There is no Strasbourg authority which has decided that article 8 alone requires the provision of civil legal aid in an immigration case. There is a good reason for this. The decision of the Grand Chamber of the ECtHR in *Maaouia v France* (2001) 33 EHRR 42 makes it clear that decisions

relating to the entry, stay and deportation of immigrants do not involve the determination of civil rights. They are, therefore, outside the scope of article 6(1) of the Convention. This is so notwithstanding that the decisions in question may "incidentally ha[ve] major repercussions on the applicant's private and family life or on his prospects of employment" (para 38).

61. The implications of the decision by the ECtHR to exclude immigration decisions from the scope of article 6(1) were considered by the House of Lords in *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110. This case concerned an appeal by three individuals who were subject to deportation proceedings on national security grounds, all of whom alleged that their deportation would be contrary to their rights under article 3. They challenged the fact that SIAC had used closed material in reaching its conclusions. They accepted that article 6 did not apply since the deportation orders did not involve the determination of civil rights. They argued, however, that since their substantive rights under article 3 were at stake, they were entitled to have the issue of the interference with those substantive rights determined in accordance with a procedure that satisfied article 6. This argument was rejected. In his skeleton argument, Mr Chamberlain submits that, if reliance on article 3 did not suffice to confer on the appellants in *RB* procedural guarantees akin to those which would have arisen under article 6 (had the determination of a civil right been at stake), it is difficult to envisage circumstances in which reliance on article 8 could achieve a similar result.

62. Despite this apparently uncompromising approach, Mr Chamberlain accepts that (i) in general, the procedural obligations of article 8 can require the provision of civil legal aid if that is necessary in order to ensure that those affected by the decision to be taken are involved in the decision-making process as a whole to a degree that is sufficient to provide them with the requisite degree of protection of their interests; and (ii) in particular, these article 8 procedural obligations can in principle exist in immigration cases. He submits that the focus of the procedural aspect of article 8 is on the decision-making process *viewed as a whole,* as opposed to the right to a fair hearing *per se* (which is the focus of article 6(1)). Collins J was, therefore, wrong to say at para 50 of his judgment that in general immigration cases (as opposed to national security immigration cases) there was no good reason to apply a lower procedural standard for article 8 than for article 6.

63. Mr Chamberlain submits that it follows that paras 26 to 28 of the Guidance regarding the procedural obligations imposed by article 8 and their application in an immigration context are correct. He accepts, however, that paras 59 and 60 of the Guidance are incorrect and will need to be amended. The Lord Chancellor has not proposed an amended version of these paragraphs. Mr Chamberlain told us that an amendment will be formulated in the light of any guidance that we give in this judgment.

Discussion

64. The principal contrary submissions were advanced by Ms Kaufmann QC in her skeleton argument in the appeal of IS. Although the appellants have withdrawn their appeal in the case of IS, Ms Kaufmann's submissions remain before us because they were adopted by Mr Bowen on behalf of his clients. It will also be necessary to refer to the facts of IS because they are illustrative of the kind of case in which the

appellants accept that the procedural obligations imposed by article 8 require the provision of civil legal aid.

65. It is not in dispute that in non-immigration cases there are procedural requirements inherent in article 8. In *W v UK* (1998) 10 EHRR 29, the ECtHR said at para 64:

> "In the Court's view, what therefore has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of Article 8."

66. This statement of the law has often been repeated by the ECtHR. Effective involvement in the decision-making process may require the grant of legal aid. We have already considered some of the relevant authorities in our consideration of the article 6(1) issue. In *Airey v Ireland,* having decided that there was a breach of article 6(1), the ECtHR went on to hold that the applicant was denied an "effectively accessible" legal procedure to enable her to petition for a judicial separation and that this also constituted a breach of article 8. In *P,C and S v UK,* having decided that there was a breach of article 6(1), the ECtHR said:

> "136. The Court does not propose to attempt to untangle these opposed considerations, which raise difficult and sensitive issues concerning S.'s welfare. It considers rather that the complexity of the case, and the fine balance which had to be struck between the interests of S. and her parents, required that particular importance be attached to the procedural obligations inherent in Article 8 of the Convention. It was crucial for the parents in this case to be able to put forward their case as favourably as possible, emphasising for example whatever factors militated in favour of a further assessment of a possible rehabilitation, and for their viewpoints on the possible alternatives to adoption and the continuation of contact event after adoption to be put forward at the appropriate time for consideration by the court.
>
> 137. The lack of legal representation of P. during the care proceedings and of P. and C. during the freeing for adoption proceedings, together with the lack of any real lapse of time between the two procedures, has been found above to have deprived the applicants of a fair and effective hearing in court. Having regard to the seriousness of what was at stake, the Court finds that it also prevented them from being involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests under Article 8 of the Convention. Emotionally involved in the case as they were, the applicant parents were

> placed at a serious disadvantage by these elements, and it cannot be excluded that this might have had an effect on the decisions reached and the eventual outcome for the family as whole."

67. In the result, the court found that there had been a breach of article 8. As Ms Kaufmann says, although the ECtHR adopted the formula of "sufficient involvement in the decision-making process" (*W v UK*) rather than "effective access" (*Airey*), the effect was the same in that case.

68. In *AK and L v Croatia,* the court started with a consideration of article 8. Having found a violation of article 8, it held that no separate issue arose under article 6. As we have already said, AK had mild mental disability, speech impediment and limited vocabulary. A welfare centre issued proceedings to divest A.K. of her parental rights in respect of her son L. She was unrepresented in the proceedings. At para 63, the court repeated the formulation set out in *W v UK* and held that, in the absence of legal representation, there was a breach of article 8. At para 72 it said:

> "… the national authorities should have ensured that, in view of the importance of the proceedings at issue for her right to respect for her family life, the first applicant's interests were adequately protected in the proceedings at issue. That the first applicant could not properly understand the full legal effect of such proceedings and adequately argue her case and thus protect her rights and interests as the biological mother of L. is evidenced by her above-described personal circumstances."

69. There is no reason in principle why the article 8 test articulated by the ECtHR in cases such as *W v UK* should not apply in immigration cases. So much is now common ground. The fact that immigration decisions do not involve the determination of civil rights means that article 6(1) cannot be invoked in relation to such decisions. But it does not follow that the procedural obligations of article 8 do not apply to immigration decisions. Mr Chamberlain is right to concede that article 8 can apply in immigration cases. Article 8 is frequently engaged in immigration decisions. The procedural protections inherent in article 8 are necessary in order to ensure that article 8 rights are practical and effective. The necessity for this is at least as important in immigration cases as in any other cases. Indeed, the *W v UK* test has been applied by the ECtHR in immigration cases: see *Ciliz v Netherlands* [2000] ECHR 29192/95 at para 66 and *Senigo Longue v France* (application no. 19113/09, judgment dated 10 July 2014) at para 63.

70. It is true that the test for article 8 as it is stated in the Strasbourg jurisprudence (whether those affected have been involved in the decision-making process, viewed as a whole, to a degree sufficient to provide them with the requisite protection of their interests) differs from the test for article 6(1) (whether there has been effective access to court). The article 8 test is broader than the article 6(1) test, but in practice we doubt whether there is any real difference between the two formulations in the context with which we are concerned. There is nothing in the Strasbourg jurisprudence to which our attention has been drawn which suggests that the ECtHR considers that there is any such difference. In practice, the ECtHR's analysis of the facts in the case-law does not seem to differ as between article 6(1) and article 8. This is not

surprising. The focus of article 6(1) is to ensure a fair determination of civil rights and obligations by an independent and impartial tribunal. Article 8 does not dictate the form of the decision-making process that the state must put in place. But the focus of the procedural aspect of article 8 is to ensure the effective protection of an individual's article 8 rights. To summarise, in determining what constitutes effective access to the tribunal (article 6(1)) and what constitutes sufficient involvement in a decision-making process (article 8), for present purposes the standards are in practice the same.

71. As Ms Kaufmann submits, the significance of the cases lies not in their particular facts, but in the principles they establish, viz: (i) decision-making processes by which article 8 rights are determined must be fair; (ii) fairness requires that individuals are involved in the decision-making process, viewed as a whole, to a degree that is sufficient to provide them with the requisite protection of their interests: this means that procedures for asserting or defending rights must be effectively accessible; and (iii) effective access may require the state to fund legal representation.

72. Whether legal aid is required will depend on the particular facts and circumstances of each case, including (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity. The following features of immigration proceedings are relevant: (i) there are statutory restrictions on the supply of advice and assistance (see section 84 of the Immigration and Asylum Act 1999); (ii) individuals may well have language difficulties; and (iii) the law is complex and rapidly evolving (see, for example, per Jackson LJ in *Sapkota v Secretary of State for the Home Department* [2012] Imm AR 254 at para 127).

73. We can now turn to the relevant parts of the Guidance. We have set out paras 26 to 28 at para 21 above. It is to be inferred that these paragraphs are *not* intended to apply to immigration cases. That must follow from the fact that paras 59 and 60 expressly deal with immigration and state that legal aid is not required in immigration proceedings. The effect of paras 59 and 60, therefore, is that legal aid is not available in any immigration cases, regardless of the circumstances. For the reasons that we have given, this is not correct.

74. It is nevertheless worth making two points about paras 26 to 28. First, we do not accept that it would normally only be in circumstances "closely analogous" to *Airey* and *P,C and S* that failure to provide legal aid would amount to a breach of article 8. There is no support for this statement in the Strasbourg jurisprudence which has repeatedly applied the test stated in *W v UK.* There is no basis in the case-law for applying this test in a manner which is materially different from the manner in which article 6(1) would be applied if a determination of civil rights and obligations were involved. The *W v UK* test requires a consideration of all the circumstances of the case. Secondly, we agree with the statement in para 28 that "it is likely that cases in which an applicant seeks to rely on Article 8 would therefore fall more naturally to be considered under the Article 6(1) heading". For the reasons we have given above, we consider that this fairly reflects the approach of the ECtHR.

75. Para 59 is plainly correct: immigration decisions do not involve the determination of civil rights and obligations. But para 60 is wrong as Mr Chamberlain has conceded.

For the reasons that we have given, the *W v UK* test should be applied in immigration proceedings.

76. What guidance is it appropriate to give as to the circumstances in which article 8 requires the provision of legal aid in immigration cases? We have already set out at para 72 above some of the relevant circumstances. In addressing these, it will often be helpful to take into account the factors set out at paragraphs 19 to 24 of the Guidance in relation to article 6(1). In carrying out this exercise in relation to article 8, the decision-maker should not apply a "very high threshold" for the reasons that we have given in rejecting such a threshold in relation to article 6(1).

77. Deportation cases are of particular concern. It will often be the case that a decision to deport will engage an individual's article 8 rights. Where this occurs, the individual will usually be able to say that the issues at stake for him are of great importance. This should not be regarded as a trump card which usually leads to the need for legal aid. It is no more than one of the relevant factors to be taken into account. The fact that this factor will almost invariably be present in deportation cases is not, however, a justification for giving it reduced weight.

The case of IS

78. As we have said, it is now conceded that the judge was right to allow the application for judicial review of the refusal to grant ECF in the case of IS. IS is a Nigerian national who has lived in the UK for at least 13 years. He is blind, has profound cognitive impairment and is unable to care for himself. He lacks litigation capacity and is represented through the Official Solicitor. Legal aid was sought to enable him to apply to the Home Office to regularise his immigration status and thereby qualify for mainstream community care and health services. The application was refused by the Director on the grounds that article 8 was not engaged.

79. Collins J quashed the decision to refuse legal aid on the grounds that (i) the Guidance on article 8 was wrong; and (ii) the Director had wrongly found that article 8 was not engaged. The judge said at para 73: "I can only say that I believe that legal aid should be granted to this extremely vulnerable person since without it he will not be able to achieve an effective exercise of his article 8 rights". He did not, however, find that a refusal would necessarily breach article 8 and remitted the matter to the Director for reconsideration. On 18 August 2014, the Director formally determined that IS qualified for legal aid to regularise his immigration status.

80. The case of IS is extreme. It is impossible to see how a man suffering from his disabilities could have had any meaningful involvement in the decision-making process without the benefit of legal representation.

GROUND 4: THE CASE OF MS GUDANAVICIENE

81. The factual background to the case of Teresa Gudanaviciene (referred to by Collins J as TG) is set out in paras 54-56 of Collins J's judgment:

> "54. I shall refer to this claimant as TG. She is a national of Lithuania who came to this country in 2010 to work here. She was in a relationship with a partner who had a drink problem

and was abusive and violent towards her. In September 2012 she was convicted of an offence of wounding her partner with intent contrary to s.18 of the Offences against the Person Act 1861. She had stabbed her partner with a kitchen knife and it was obviously fortunate that she had not killed him. However, it is apparent from the judge's sentencing remarks that the jury had, it would seem in a rider to its decision, said that she had been under pressure and had been provoked by her partner's conduct. The judge said that having regard to this and her family responsibilities he would pass a sentence which was 'about six to twelve months lighter' than he had originally envisaged. He imposed a sentence of 18 months imprisonment.

55. The Secretary of State for the Home Department decided that the claimant should be deported. Regulation 19(3) of the Immigration (European Economic Area) Regulations 2006 enables removal to be carried out if the Secretary of State has decided that it is justified 'on grounds of public policy, public security or public health in accordance with Regulation 21'. Regulation 21(5) provides that any such decision must comply with the principle of proportionality and must be based exclusively on the person's personal conduct. Regulation 21(5)(c) provides:-

> 'the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.

And Regulation 21(5)(e) states that a person's previous criminal convictions do not in themselves justify the decision.

56. The claimant has a two year old daughter of whom her former partner is the father. The decision to deport recognised the need to safeguard the child's welfare in accordance with s.55 of the 2009 Act. Her daughter is in foster care. The only report is in the form of a statement from a senior social worker whose report was made at a time when the claimant was still in prison: she has since been granted bail. The view expressed was that her father had problems in relating to his daughter and children's services had concerns for her safety and development should she be placed with her father. While there had been no opportunity to make a full assessment of the claimant's capability as a carer of her daughter, such contact sessions as had been possible showed that the claimant appeared to be the most obvious choice of sole carer."

82. The deportation decision referred to in para 55 of Collins J's judgment was made on 10 December 2012. Para 30 of the decision letter said:

"It is considered that the combination of your criminal conduct in terms of the risk of serious harm to the public and your

> propensity to reoffend make it reasonable to strike a fair balance between the best interests of your daughter and the weight attached to the necessary action of deportation. It is considered that this can be achieved by expecting you to return to Lithuania and maintain relationship with your child and partner by modern means of communication."

83. TG is an EU citizen. She appealed under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") to the First-tier Tribunal. It is common ground that her case falls within article 47 of the Charter. She applied for ECF on 22 May 2013. Her application was refused on 12 July and the refusal was confirmed, following a review, on 26 July 2013.

84. Collins J considered that the flaws in the Secretary of State's decision were "all too obvious":

> "58. … There is no evidence that the claimant has a propensity to reoffend. She has been living in a safe house for victims of domestic violence and completed courses designed to assist such victims. Further life with her former partner is not likely. The suggestion that she can maintain a relationship with her daughter from Lithuania is hardly in the daughter's best interests. It must be apparent that she has a very strong case so far as merits of the appeal are concerned."

85. In para 59 Collins J said that TG "has very poor command of English and, as must be obvious, she will be emotionally involved in the appeal so that she cannot approach it in an objective fashion."

86. Against this background, Collins J said that the reasons given by the Director in the review decision letter for refusing ECF were "thoroughly unsatisfactory":

> "60. … It is said that the issues are not complex and the tribunal 'will take account of the relevant case law and legislation, including EU law and the facts of the case'. But the test under Regulation 21(5)(c) is key and it will be necessary to produce evidence to deal with the risk of harm. That does not now exist to any meaningful extent and it is difficult to follow how without assistance the claimant can be expected to obtain the necessary evidence, let alone make representations on the issue. Furthermore, there is no evidence as to whether the daughter will be able to be cared for if she were to go to Lithuania with her mother and what provision will be made for her daughter's future here. All this additional evidence cannot be obtained by the tribunal, particularly as the proceedings are adversarial. The suggestions in the refusal letter that 'any further evidence in respect of your client's family or criminal case is accessible by your client and can be submitted to the First Tier Tribunal for their consideration' and 'Your client can with the assistance of an interpreter, further address any question of the First Tier Tribunal and provide further factual

> information towards the proportionality of the decision to deport' are little short of absurd. It reflects the flawed guidance on the high level of the threshold and the exclusion of Article 8."

87. Collins J concluded that the Director should be directed to grant legal aid to TG:

> "62. The decision in TG's case shows how the very high threshold applied by the Guidance can produce a perverse decision. Even on that high threshold, the decision was in my judgment unreasonable in Wednesbury terms but, on the correct approach, it is indefensible. It is accepted that if as a matter of law I were to take the view that an adverse decision could not be made I should direct the Director to grant legal aid (subject to the means test being satisfied, as I think it is) since the merits test is clearly met. Unless proper evidence is obtained on risk of harm and in relation to the future care of the claimant's daughter, she will not obtain a just result and on the evidential matters the tribunal cannot help her. Furthermore, competent solicitors may be able to persuade the Home Office that the decision should be withdrawn so that costs are saved to an even greater extent."

88. Mr. Chamberlain submitted that Collins J gave undue prominence to the question of TG's ability to approach her appeal objectively, which is but one factor in the assessment under article 6(1) of the Convention (and likewise under article 47 of the Charter), and was unduly and unfairly pejorative as to the extent to which the First-tier Tribunal, with the help of an interpreter, would be able to hear her appeal fairly on the material before it. The key question in TG's appeal was whether her personal conduct represented "a genuine present and sufficiently serious threat affecting one of the fundamental interests of society" (see regulation 21(5)(c) of the EEA Regulations). This was a question of fact which the tribunal would readily be able to determine given that all of the relevant facts were patent from the material already before the tribunal, viz: TG had only one criminal conviction, and that one conviction was for criminal conduct which was not at the most severe end of the scale, and which was directed against one person, her former partner, in the context of a tumultuous and violent relationship which had now ended.

89. Mr. Drabble QC supported the Judge's reasoning and submitted that TG required legal aid in order to enable her to properly present her case to the tribunal. Collins J had accepted that TG had a very poor command of English. This meant that she would not be able to read the appeal materials, let alone understand and be able to construct cogent submissions on the key issues in the appeal. The Home Office appeal bundle was produced only in English. While the tribunal would provide an interpreter, it would not provide translation services. TG would not be able to produce a written statement of her evidence in accordance with the tribunal's practice let alone obtain, marshal and evaluate relevant evidence to the appeal. She would not be able to produce a skeleton argument, outlining her arguments on the law and the facts. She would not be able to read or understand the leading authorities applicable to the deportation of EU citizens, and her difficulties would be compounded by the fact that one of the key issues in the appeal would be the implications for the best interests of

her daughter if she were removed. Her emotional involvement in these issues meant that TG would not be able to objectively consider relevant matters.

90. In our judgment, without legal aid TG would not be able to present her case effectively and without obvious unfairness. It is not in dispute that TG's appeal to the Tribunal is of vital importance to her and her daughter. There is some force in Mr. Chamberlain's submission that TG's case is a straightforward one. Collins J concluded that the flaws in the Secretary of State's decision are "all too obvious". Mr. Chamberlain's submission that the key question in TG's appeal was whether her personal conduct represented "a genuine present and sufficiently serious threat affecting one of the fundamental interests of society" is correct, as is his submission that this is a question of fact. It is also true that this is the kind of factual question which the Tribunal would readily be able to determine if all of the relevant evidence was placed before it. Mr. Chamberlain's submission overlooks the fact that in order to ensure that all of the relevant evidence is placed before the Tribunal TG will have to be able to identify this key question; and to produce evidence, and make submissions as to present risk. TG could not safely assume that the Secretary of State's contentions in the deportation decision that there was a "risk of serious harm to the public and …[a] propensity to reoffend" would be rejected, and her appeal would succeed simply upon the basis of the facts which were patent from the material already before the Tribunal.

91. There is another key question on which it is essential that evidence is obtained: is TG capable of caring for her daughter, and if so, what would be in the best interests of her daughter? We do not accept Mr. Chamberlain's submission that Collins J gave undue prominence to the question of TG's ability to approach her appeal objectively, and was unduly and unfairly pejorative as to the extent to which the Tribunal, with the help of an interpreter, would be able to hear the appeal fairly on the material before it. There can be little doubt that if the only evidence as to TG's ability to care for her daughter, and as to what would be in her daughter's best interests was given by TG herself, that evidence would be criticised before the Tribunal by the Secretary of State's representative as lacking in objectivity. The fact that there would be an interpreter at the hearing of the appeal would not overcome the difficulties that TG, with her very poor command of English, would face in preparing her case, in identifying the key issues (above) and obtaining the evidence in relation to those issues, prior to the hearing. The process before the Tribunal is an adversarial one. While the Tribunal is able to, and does, assist those Appellants who are unrepresented, it is able to do so only upon the basis of the evidence that is placed before it. It is plain that, without legal advice, TG would not begin to know how to prepare her appeal, and in the absence of such preparation would be unable to present it effectively.

GROUND 6: THE CASE OF LS

92. LS's case falls to be considered within the framework of international legal instruments directed towards the prevention and combatting of trafficking in humans and the protection and promotion of the rights of victims of trafficking ("VOTs"). The instruments of particular relevance are the Council of Europe Convention on Action against Trafficking in Human Beings, 2005 ("the Trafficking Convention") and Directive 2011/36/EU of 5 April 2011 ("the Trafficking Directive").

93. Article 10(2) of the Trafficking Convention requires member states to adopt such legislative or other measures as may be necessary to identify VOTs, and in particular to "ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence … has been completed by the competent authorities". It also imposes a requirement, to which we will return, in respect of the provision of assistance to such a person.

94. In fulfilment of its international obligations, the UK has established the National Referral Mechanism ("NRM") as the means of identifying whether an individual is a VOT. The NRM process involves the following stages:

i) An organisation designated as a "first responder", having identified a potential VOT, completes a detailed referral form containing the individual's personal details, a series of tick boxes setting out "indicators" (general indicators, indicators of forced labour, indicators of domestic servitude, indicators of sexual exploitation), and a section for evidence to support the reasons for referral. The completed form must be signed by the individual to confirm his or her consent to the referral (if the person is an adult). Bodies authorised to act as first responders include local authorities, police forces and a number of charitable organisations such as the Salvation Army, Migrant Help, Kalayaan, Barnardos and the NSPCC.

ii) The completed referral form is transmitted to a "competent authority". There are two competent authorities, namely the UK Human Trafficking Centre ("UKHTC") and UK Visas and Immigration ("UKVI"), formerly the UK Border Agency. Referral forms are sent in the first instance to UKHTC, which either deals with the matter itself or forwards the papers to be dealt with by UKVI. It appears that UKVI deals with cases where there are immigration issues involving individuals from outside the European Economic Area.

iii) The relevant competent authority decides whether there are "reasonable grounds" to believe that the individual is a VOT. The threshold applied by the case worker is whether from the information available so far he or she suspects (but cannot prove) that the individual is a potential VOT. There is a target of 5 days for a decision on that question. If the decision is affirmative, the individual is allocated a place within safe accommodation, if required, and is granted a recovery and reflection period of 45 days. As described below, an affirmative decision also engages a right to legal aid in relation to the making of applications for leave to enter or remain in the United Kingdom.

iv) An affirmative reasonable grounds decision is followed by a period of further information gathering. The competent authority then reaches a "conclusive determination" as to whether the individual is or is not a VOT. The target is to reach such a decision within the 45 day recovery and reflection period.

95. A fuller account of the international legal framework and of the system operating in the UK is to be found in the judgment of the Divisional Court in *R (Atamewan) v Secretary of State for the Home Department* [2013] EWHC 2727 (Admin); see also the judgment of Lord Hughes JSC in *Hounga v Allen* [2014] UKSC 47, [2014] 1 WLR 2889, at paras 60-66.

96. The effect of section 9(1) of LASPO is that legal advice and assistance in relation to VOTs or those claiming to be VOTs is within scope for legal aid in the circumstances set out in para 32 of Part 1 of Schedule 1. Para 32 reads in material part:

> "**32. Victims of trafficking in human beings**
>
> (1) Civil legal services provided to an individual in relation to an application by the individual for leave to enter, or to remain in, the United Kingdom where –
>
> > (a) there has been a conclusive determination that the individual is a victim of trafficking in human beings, or
> >
> > (b) there are reasonable grounds to believe that the individual is such a victim and there has not been a conclusive determination that the individual is not such a victim."

Para 32(6)-(8) makes clear that the references to "reasonable grounds to believe" and to a "conclusive determination" are to the corresponding decisions made by a competent authority under the NRM process described above.

97. Para 32 does not provide for the grant of legal aid for advice and assistance to a person claiming to be a VOT prior to an affirmative reasonable grounds decision. That stage remains out of scope. The only way in which legal aid may be made available for it is by the grant of ECF.

98. That brings us to LS's application for ECF, the background to which is summarised as follows in paras 74-76 of Collins J's judgment:

> "74. The claimant, a Nigerian citizen, was violently assaulted in a family dispute following his father's death. He was badly injured and his brother was killed. The assailants were given short prison sentences and the claimant was anxious to leave Nigeria before their release, fearing further violence. His uncle arranged with an agent for him to travel to the UK on a false passport. He arrived here in January 2004 and was introduced by the agent to a restaurant owner, Comfort Afolabi. She used his fear of the authorities and threats to inform that he was here unlawfully and so would be returned to Nigeria to compel him to work for her in appalling circumstances. He was paid very little – certainly insufficient to provide for a living wage – and slept on a mattress in the cooler room of the restaurant. He met a lady who is now his partner and by whom he has had three children. His partner and the children have been given indefinite leave to remain and the third child is considered to be a British citizen.
>
> 75. In the circumstances, he contended that he was a victim of trafficking (VOT). The circumstances in which he was required to work for Ms Afolabi amount to slave labour.

> Encouraged by his partner, he escaped from the restaurant in January 2009 and went to live with his partner. Ms Afolabi apparently died in the summer of 2009. His fear of being deported if he approached the authorities led him to delay taking any action until April 2013 when he approached the Anti-Trafficking and Labour Exploitation Unit (ATLEU), which operates in North London. ATLEU were acting for his partner in relation to support for her children and her immigration position. She too was a VOT.
>
> 76. An application for ECF was made by ATLEU on his behalf on 17 June 2013. This was said to be for the purposes of preparing an application under Article 8 of the ECHR and making a referral to the competent authority to enable a positive decision in relation to his claim to be a VOT. It was said that a failure to grant ECF would breach or create a risk of breach of his Article 4 and 8 rights and violate his EU law rights as a VOT. The application followed a request from the Public Law Project (to which ATLEU had referred his case) for a preliminary view on ECF. There was a negative response. A review was carried out and the answer remained negative. The reasons were given in a letter of 28 June 2013."

99. The application for ECF and the reasons for refusal are considered in greater detail below. ATLEU had in fact provided legal services to LS prior to the application and it continued to do so following the refusal. It provided such services at risk, on the basis that it could recover payment (backdated as appropriate) if but only if ECF were eventually granted.

100. A request for a referral was made first to Islington London Borough Council, the local housing authority. It was met with a response from a housing officer that it was not her job to make a referral and she had never heard of such a thing. That prompted a pre-action protocol letter to the Council, threatening judicial review of the refusal to refer. The problem was resolved, however, by ATLEU making contact with the Salvation Army which agreed to make the referral. The referral led to an affirmative "reasonable grounds" decision, engaging a right to legal aid pursuant to para 32(1)(b) of Part 1 of Schedule 1 to LASPO. That was followed, however, by a conclusive determination that LS was not a VOT, at which point the right to legal aid pursuant to para 32(1)(b) came to an end. It took the competent authority much longer to reach the reasonable grounds decision and the conclusive determination than the respective targets of 5 and 45 days.

101. The challenge to the refusal of ECF takes one back to the start of the process we have just described. The two relevant grounds of challenge advanced before Collins J were (i) that article 12(2) of the Trafficking Directive conferred a right to legal aid for advice and assistance in relation to an NRM referral at the early stage left out of scope by LASPO, and (ii) that the grant of legal aid at that stage was necessary to avoid a breach of LS's rights under article 8 ECHR. The judge found against LS on the construction of article 12(2) of the Trafficking Directive. It is contended by way of a respondent's notice that he was wrong to do so. As to article 8, the judge found that the refusal of ECF was based on the Guidance which put the threshold far too high.

He could not say, however, whether a decision to refuse based on the correct approach to article 8 would necessarily be wrong. He therefore quashed the decision and directed its reconsideration. The appellants contend that article 8 did not require the grant of legal aid and that the judge was wrong to quash the decision.

Does article 12(2) of the Trafficking Directive confer a right to legal aid at the stage left out of scope by LASPO?

102. The case advanced by Mr Bowen QC on behalf of LS is that article 12(2) of the Trafficking Directive confers an entitlement to legal aid for advice and assistance in relation to an NRM referral. That provision reads:

> "Article 12
>
> **Protection of victims of trafficking in human beings in criminal investigation and proceedings**
>
> …
>
> (2) Member States shall ensure that victims of trafficking in human beings have access without delay to legal counselling, and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources."

103. In our judgment, the provision does not confer the right for which Mr Bowen contends. First, as is made clear by the heading to the article and by the content of the directly related recital (19), article 12 is concerned essentially with criminal investigations and proceedings. Whilst in that context it extends to claims to compensation (and the recital indicates that it also covers claims for compensation against the state), it is not a provision of general applicability. It has no application to the present case, which does not involve criminal investigations or criminal proceedings or (at least as regards the application for ECF) a claim to compensation. The process of referral to a competent authority to establish status as a VOT is an altogether different context.

104. Secondly, article 11 of the Trafficking Directive spells out when assistance and support must be provided to a person claiming to be a VOT:

> "Article 11
>
> **Assistance and support for victims of trafficking in human beings**
>
> 1. … [criminal proceedings]
>
> 2. Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication

> for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3.
>
> …
>
> 5. The assistance and support measures referred to in paragraphs 1 and 2 shall be provided on a consensual and informed basis, and shall include at least standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate."

Thus, by the express wording of article 11, confirmed by the content of the directly related recital (18), the requirement is to provide assistance and support measures once a reasonable grounds decision has been made. Had the intention been to require such measures prior to a reasonable grounds decision, article 11 would have so provided.

105. Thirdly, that interpretation of the Directive accords with the provisions of the Trafficking Convention, to which the Directive is intended in part to give effect. Chapter III of the Trafficking Convention is headed: "Measures to protect and promote the rights of victims, guaranteeing gender equality". It includes the following provisions:

> "**Article 10 – Identification of the victims**
>
> …
>
> 2. Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.
>
> …
>
> **Article 12 – Assistance to victims**
>
> 1. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:

…

d. counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;

e. assistance to enable their rights to be presented and considered at appropriate stages of criminal proceedings against offenders …

2. Each Party shall take due account of the victim's safety and protection needs ….”

Thus, the primary obligation to ensure the provision of relevant counselling and assistance applies by article 12(1) to “victims”: this plainly refers to persons whose VOT status has been established (“victim” is defined by article 4(e) as “any natural person who is subject to trafficking in human beings as defined in this article”). The obligation is extended by article 10(2) so as to cover persons in respect of whom the competent authorities have reasonable grounds to believe that they are victims. It is not, however, extended to any earlier stage of the process.

106. Fourthly, in recognition of the difficulty of a submission that *anyone* claiming to be a VOT should be entitled to legal aid for advice and assistance at an earlier stage of the process, Mr Bowen submitted that such a right exists where there is a “credible suspicion” or “credible information” that the person concerned is a VOT. That, however, introduces a test which is not to be found either in the Trafficking Directive or in the Trafficking Convention and which it would be difficult to apply in practice. By contrast, a reasonable grounds decision by a competent authority provides a clear-cut basis for engaging the duty to provide advice and assistance in accordance with both instruments.

107. Mr Bowen's skeleton argument renewed at some length an argument which had been rejected by Collins J, that a right to legal aid arises as a component of the state's duty to investigate credible claims of human trafficking pursuant to article 4 ECHR (the prohibition of slavery and forced labour) and article 5 of the Charter (the equivalent prohibition, including in article 5(3) an express prohibition of trafficking in human beings). In his oral submissions, however, Mr Bowen indicated that he was now relying on those provisions as part of the context for the interpretation of article 12(2) of the Trafficking Directive, not as engaging a separate entitlement to legal aid. We have taken them into account accordingly but we do not consider them to give any material support to the interpretation for which Mr Bowen contends.

108. Mr Bowen's skeleton argument also contained an argument that, if a right to legal aid at the referral stage is not conferred directly by article 12(2) of the Trafficking Directive, the right may arise under article 47(3) of the Charter and article 41 of the Charter. In his oral submissions he indicated that he was not dropping the argument but he did not want to press it. In our judgment, the argument takes LS nowhere. The provisions of the Charter in question cannot give rise to some form of implied right under the Directive. If article 47(3) is considered as an independent source of rights, it is difficult to see how LS, as a Nigerian national who came to the UK from Nigeria, could rely on it; but even if he could, it would add nothing material to the position

under article 8 ECHR, upon which we can therefore concentrate. Article 41 is of no assistance, since it is addressed to EU institutions and cannot be relied on against national authorities (see Joined Cases C-141/12 and C-372/12, *YS v Minister voor Immigratie, Inegratie en Asiel*, CJEU judgment of 17 July 2014).

109. Mr Bowen submitted that the interpretation of the Trafficking Directive for which he contended was *acte clair* in his favour, but he requested a reference for a preliminary ruling under article 267 TFEU if and to the extent that we considered the matter not to be *acte clair*. In our judgment, his interpretation of article 12(2) of the Trafficking Directive is clearly wrong and there is no other material issue of interpretation on which a decision is needed. In those circumstances the question of an article 267 reference does not arise.

The application of article 8 to LS's case

110. We turn to the application of article 8 ECHR, which was the basis on which Collins J decided the case in LS's favour.

111. For that purpose it is necessary to say a little more about the application for, and refusal of, ECF. A detailed request for a preliminary view was submitted in May 2013 by the Public Law Project on behalf of LS. It stated that he required exceptional funding for legal advice on preparing an application under article 8 and in approaching social services to make a referral through the NRM for a reasonable grounds decision on whether he was a VOT. If he made an article 3 or asylum claim he was likely to be detained and fast tracked. It was in his best interests to approach the authorities for a decision on whether he was a VOT before making such a claim. On balance it would be best to apply for ECF so that a number of steps could be taken, including (a) an approach to social services to make a referral under the NRM; (b) obtaining evidence in support of the article 8 claim; (c) seeking evidence to support a possible article 3 claim; and (d) an application, supported by evidence, under article 3 and/or for asylum, and under article 4 and article 8: ECF would be required for (a) and (b), but (c) and (d) would be in scope for legal aid if an affirmative reasonable grounds decision was taken in time.

112. The request advanced arguments as to entitlement to legal aid under the Trafficking Directive. It also pointed out that victims of trafficking are likely to be vulnerable and may require support and encouragement to overcome their fear of approaching the authorities. It argued that the identification of historic victims of trafficking was a complex matter and that it was necessary for LS to have legal advice and assistance in preparing his NRM referral.

113. The arguments under article 8 focused on family life and in particular on the risk of LS being permanently separated from his partner and their two children (with a third due), all of whom had recently been granted indefinite leave to remain. It was said that the "status" of LS and his partner as VOTs (though that, of course, in relation to LS, had not been established) raised complex issues for the purposes of article 8 and the maintenance of immigration control, that there were complex issues surrounding the children's best interests and his partner's support needs, that expert advice was needed to ensure that LS's application took account of the content of, and evidence in support of, the applications of his partner and the children, and that there might be relevant social services records to be retrieved and analysed. LS was said to be a

destitute VOT unlawfully present in the UK; the point was again made that VOTs are vulnerable; and it was also stated that they may suffer from mental health concerns which should be explored by professionals.

114. The request for a preliminary view resulted in a negative decision. This was followed by a formal application by ATLEU in the same terms as the request for a preliminary view, and by an application by the Public Law Project for an internal review of the decision on the preliminary view. The applications were dealt with by way of a review decision dated 28 June 2013 maintaining the refusal. The decision letter was signed by the Head of the Exceptional Cases Team, himself a qualified lawyer. Under the heading of merits criteria, he considered that LS, having been advised by ATLEU on the best way forward, would now have the requisite knowledge to approach social services to make an NRM referral. Under the heading of exceptional criteria, he gave the following reasons in relation to article 8:

> "I have had regard to the applicant's family situation. I note that he has two minor children, aged 2 and 4, and a third due. I note that his ex-partner and the children have been granted ILR. However, I note that the applicant is first proposing to approach the authorities for a decision on whether he is a victim of trafficking before making an asylum claim. I note that there are no asylum proceedings underway at this stage and there is currently no deportation decision, which would affect the applicant's Article 8 rights. At this point in time, Article 8 is therefore not engaged.
>
> In any event, even if Article 8 were engaged, I do not consider that this would give the applicant a right to legal aid funding. I refer you to paragraph 60 of the Lord Chancellor's Guidance …."

115. Collins J found that LS's article 8 rights were very much in issue at the stage for which ECF was sought and that the decision was flawed by reliance on the Guidance. But the arguments before the judge ranged much wider than the particular errors in the decision, covering a variety of points foreshadowed in the application for ECF. They led him to observe, when quashing the decision and directing its reconsideration, that "there are powerful arguments based on the vulnerability of the claimant which show that legal aid was not only desirable but necessary to enable [LS's] overall rights, which could not be divorced from the VOT application, to be made effective" (para 87). On behalf of the appellants, Mr Chamberlain takes issue with those arguments and submits that the judge should have concluded that article 8 did not require the grant of ECF and should therefore have declined to quash the decision.

116. One issue arises out of the accepted fact that many VOTs are vulnerable and may be reluctant to come forward to identify themselves as such without some encouragement. Mr Chamberlain deals with that by pointing to the existence of a wide range of charities with considerable expertise in dealing with approaches from vulnerable people, including a number of charities which are themselves first responders. Mr Bowen submits, however, that such encouragement needs to come from a legal adviser with whom the individual is able to build up a relationship of

trust, and that the solicitor within ATLEU who dealt with LS was able to provide him with the reassurance he needed only because she had the expertise to give him relevant legal advice. Such advice can lawfully be given only by a qualified solicitor or barrister or by a person accredited to Level 2 of the competency levels established by the Office of the Immigration Services Commissioner ("the OISC"); yet none of the first responders is registered with OISC to the necessary level.

117. A related question is whether expert legal advice is needed at an early stage so that a person claiming to be a VOT can make an informed decision as to whether to seek an NRM referral at all. By such a referral (for which a signed consent is required, if an adult) the individual makes himself or herself known to the competent authority and may be at risk of detention and removal if at the end of the process he or she is not found to be a VOT. For someone in LS's position the relevant competent authority would be UKVI, which would also be responsible for taking any immigration decision; and there is some evidence (which does not appear to be contentious and to which we therefore think it permissible to refer although it is drawn from a Select Committee report) that UKVI makes affirmative conclusive determinations of VOT status in a far lower percentage of cases than does UKHTC. Mr Bowen submits that all this underlines the importance of receiving advice about available options before agreeing to a referral. Matters that such advice would need to address include the NRM process itself, the evidence required to establish VOT status, the rights that would follow from establishing VOT status, any additional or alternative bases on which leave to remain might be sought (such as asylum and articles 3, 4 and 8 ECHR), and the overall likelihood of detention and removal, including timescales. It is submitted that these issues engage complex questions of law and policy guidance and that balancing the risks and the potential benefits involves a complex calculus requiring expert advice.

118. Those submissions can be illustrated by the evidence of Miss Kate Roberts of Kalayaan, one of the first responders. She states that the present regime leaves Kalayaan in an invidious position. It is authorised to identify potential VOTs and to make an NRM referral yet it is not able to give potential VOTs with irregular immigration status advice on issues of the kind referred to above. She continues:

> "24. As a result we are increasingly finding that it is not possible for our clients to access any immigration advice prior to a referral into the NRM. In our experience clients who have breached the immigration rules in escaping their alleged traffickers … are understandably reluctant to consent to a referral into the NRM before they have some understanding of potential future immigration options.
>
> 25. As Kalayaan's OISC exemption does not cover advice at this level and legal aid is denied until a Reasonable Grounds decision has been made many of those who we internally identify as trafficked do not consent to a referral and lose contact with us, going underground, potentially to be further exploited. It is likely that were these individuals able to access legal aid and the resulting advice prior to an NRM referral they would be more likely to instruct a solicitor, consent to a referral and thus remain (to some extent) visible and supported. There

> remains a large discrepancy between numbers of clients who Kalayaan staff internally identify as trafficked (86 new clients in 2013) and those referred into the NRM (21 referrals during 2013)."

119. Mr Chamberlain points out that the NRM process has been established to comply with the United Kingdom's obligation under the Trafficking Convention to identify VOTs. In his submission, the argument that people who *ex hypothesi* are genuine VOTs require legal aid at an early stage so as to have expert advice on the risks they face if their VOT claims are rejected would risk undermining the very reason for having an NRM process. Mr Bowen responds with the submission that a genuine VOT will be more likely to enter the NRM process if given specialist legal advice and that it is the lack of such advice that is likely to cut across the UK's obligations under the Trafficking Convention.

120. A further issue concerns the actual process of NRM referral. Mr Chamberlain submits that it is possible for a person in the position of LS to present himself to a first responder and seek a referral without legal advice. The process is not overly complex or legalistic. The form requires completion of basic personal details, the ticking of boxes identifying the presence of relevant indicators, and the provision of supporting evidence. Even if, as a matter of practice, referrals are often accompanied by expert evidence and/or representations, there is no reason why a first responder cannot make a referral in the absence of either, simply on the basis of the individual's own account of his history and the first responder's observations from any interview conducted with the individual. LS himself has been in the UK for about a decade and speaks English, so that it would have been possible for him to provide the relevant information. The fact that ATLEU encountered difficulty in getting the local authority to make a referral on LS's behalf, with a consequent delay in the referral process, does not support the proposition that the process is inherently complex and requires legal assistance, nor does the fact that in his case there were subsequent delays in reaching a reasonable grounds decision. The reasonable grounds decision itself is an initial assessment on the basis of the form and any readily available evidence. The threshold is a low one and legal aid is available thereafter if the threshold is crossed.

121. Mr Bowen, on the other hand, submits that the requirement for legal advice and assistance extends to the referral process itself, both for the purpose of identifying a first responder willing and able to make the referral (a point illustrated by the local authority's denial of responsibility) and in order to ensure that a properly reasoned and evidenced case in support of VOT status is put forward to the competent authority. He also submits that the need for such advice and assistance does not diminish after the referral, all the more so if, as happened in LS's case, there is going to be a long delay before a reasonable grounds decision is taken.

122. In summary, Mr Bowen submits in respect of the specific case that given what was at stake for LS and his children, the complexity of the law and policy guidance and his inability to navigate the process without advice and assistance, he was precluded from effective participation in the decision-making process without specialist advice and assistance from an experienced legal adviser, which was available to him only by the route of ECF. Refusal of ECF breached or ran a risk of breaching his article 8 rights. Mr Chamberlain, by contrast, submits that it was possible for LS to access and

participate in the NRM process without legal advice or assistance and that the refusal of ECF was lawful.

123. In our judgment, although the Director's decision in respect of LS was flawed by its reliance on the Guidance, his conclusion that failure to provide legal aid would not be a breach of LS's Convention rights was correct. Our reasons, in summary, are as follows:

i) The issue of VOT status and the related issues of family life under article 8 are plainly of great importance to LS. We take the view, however, that an individual in his position does not require legal advice and assistance in order to be involved in the VOT decision-making process, seen as a whole, to a degree sufficient to provide him with the requisite protection of his interests under article 8. The identification of a first responder willing and able to make a referral may not be free from difficulty but there is nothing to show that the particular problem experienced in LS's case is a widespread one. The referral form is designed to identify relevant issues and to prompt the provision of supporting evidence without the need for legal advice or assistance: a first responder can reasonably be expected to be able to complete it through questioning of the individual. Complex issues can no doubt arise but there was no particular complexity about this case. The process up to and including the making of a reasonable grounds decision is relatively straightforward, and an affirmative reasonable grounds decision engages a right to legal aid thereafter. Legal advice and assistance in relation to the referral process may be very helpful and lead to a fuller submission but it cannot be said to be necessary in circumstances such as those of LS.

ii) A more difficult question (though this line of argument was not in fact the basis of LS's application for ECF) is whether an individual needs legal advice at the pre-referral stage in order to encourage him to come forward and in order to enable him to make an informed decision on whether to agree to a referral. There is force in the argument that without legal advice some (perhaps many) potential VOTs will keep away from the NRM process when they would otherwise have entered it. It would be surprising, however, if article 8 required legal aid to be made available in the ordinary course to enable a person claiming to be a VOT to decide whether to enter the NRM process with a view to making good the claim. It would be all the more surprising in circumstances where the relevant international instruments make an affirmative reasonable grounds decision the trigger for the provision of legal aid. We do not consider that there is any general requirement to provide legal aid at the prior stage or that the particular circumstances of LS's case necessitated it.

124. We therefore take the view that Collins J was wrong to quash the decision and to direct reconsideration of the application for ECF. The appropriate course would have been to refuse relief as a matter of discretion. We allow the appeal accordingly.

GROUND 7: THE CASE OF MR REIS

125. The factual background to the case of Cleon Reis is set out in paras 88-90 of Collins J's judgment:

"88. The claimant is a Portuguese national now 28 years' old. He entered this country with his mother in December 1998 when he was 12 years' old and has lived here ever since. He has since about 2002 committed a considerable number of criminal offences which have increased in seriousness. His first custodial sentence appears to have been one of 9 months and 2 weeks in a young offenders' institution in 2006 for various offences committed, some while on bail, for driving vehicles taken without consent dangerously and while disqualified. In 2007 he was again convicted of driving whilst disqualified and received a suspended prison sentence. He breached this order and in June 2008 was sentenced to 20 months imprisonment for burglary and theft. He was then warned by the Home Office that deportation would not be pursued then, but that he must note that it had been considered. He took no notice. In November 2009 he was convicted of aggravated vehicle taking, causing damage to a vehicle in excess of £5000, and driving whilst disqualified. For these offences, he was sentenced to 15 months imprisonment. The damage to the vehicle was caused when he attempted to escape from the police and was involved in a high speed chase. While the offences are not of the most serious and he did not commit any offence which directly involved violence to an individual, nonetheless the offending was persistent and its seriousness increased.

89. The Recorder who sentenced him in 2009 referred to his appalling record and concluded:-

> 'It is clear that you … are easily influenced by friends and criminally minded peers and it is also clear that you have shown a significant ability to act without any consideration towards others and other people's property to the extent that you put other road users at significant personal risk.'

90. On 29 July 2010 the Secretary of State for the Home Department notified the claimant that she had decided to make a deportation order. It was asserted that he had not resided here, having regard to his custodial sentences, for at least 5 years so that he was not entitled to the level of protection appropriate to that. The First Tier Tribunal accepted that he had but nonetheless dismissed his appeal. His application for leave to appeal to the Upper Tier Tribunal was refused. He sought judicial review of that refusal raising a point which had not been clearly made that he qualified for the highest level of protection by virtue of 10 years residence. Leave was granted by Walker J, following refusal on the papers by me, in May 2012. On 13 May 2013 the Secretary of State for the Home Department agreed to reconsider the question of deportation and so the judicial review was brought to an end. On 20 May 2013 she decided to make a deportation order."

126. Mr. Reis is an EU citizen. He appealed to the First-tier Tribunal under the EEA Regulations. It is common ground that his case falls within article 47 of the Charter. Collins J said that the key question in Mr. Reis's appeal was whether he was entitled to the protection afforded to EU citizens who have resided in the UK for a continuous period of five years, or to the greater protection afforded to EU citizens who have resided in the UK for at least 10 years, and the answer to that question depended upon whether, and the extent to which, Mr. Reis's time spent in custody in the UK could properly be regarded as counting towards a continuous period of residence (para 91).

127. Having referred to a number of domestic authorities which considered this issue (para 92), Collins J considered Mr. Chamberlain's submission that the law was now clear following the decision of the CJEU in Case C-400/12, *Secretary of State for the Home Department v MG* [2014] 1 WLR 2441 ("*MG*"). Collins J set out paras 35 and 36 of the judgment in *MG* and said in para 93:

> "It follows that to assess whether there has been 10 years continuous residence prior to the decision to deport (in the case prior to May 2013) the First Tier Tribunal will have to consider all the circumstances to decide whether enhanced protection has been established."

128. In paras 94 and 95 he said:

> "94. … The guidance issued by the CJEU is not in my view as clear as Mr Chamberlain submits and there is a difficult question to be determined on the facts of the claimant's case. Those and his attitudes must be carefully assessed.
>
> 95. There is an Article 8 claim based on his fatherhood of a child. He has split up from his partner. There can be no doubt that that claim is extremely weak and I do not think it is such as to justify legal aid."

129. In para 96 he dealt with the Director's reasons for refusing ECF for the appeal to the First-tier Tribunal as follows:

> "The reasons for refusing legal aid include the assertions that the claimant had had legal representation at his previous hearings and it was 'speculative to think that previous errors will be repeated'. In addition, it is said that proceedings before the First Tier Tribunal 'are not complex either in law or procedure'. That observation I find remarkable and it suggests that the author has never had experience of observing appeals before the First Tier Tribunal. The reality is, having regard both to the possibility of difficulties in dealing with contentious factual matters and, in immigration law which is taking up a substantial part of the Court of Appeal's caseload, there can be considerable complexity."

130. Collins J concluded in para 97 that in the case of Mr Reis:

> "The refusal was based on an application of the Guidance which set too high a threshold. This will on any view be a difficult appeal and I am entirely satisfied that without legal assistance there is a real prospect of the claimant not receiving justice. It follows that I quash the refusal and I propose to direct in this case that legal aid be granted for the hearing before the First Tier Tribunal."

131. Following the decision of Collins J, Mr. Reis was granted legal aid for his appeal against the Secretary of State's decision on 20 May 2013 to make a deportation order. His appeal was heard on 12 September 2014 and the tribunal's determination allowing the appeal was promulgated on 1 October 2014.

132. Mr. Chamberlain submitted that, looking at the circumstances as they existed at the hearing of the appeal from the decision of Collins J, the principal legal issue, whether or not it was ever complex, had been resolved by the CJEU's decision in *MG* and the decision of the Upper Tribunal in *MG* when the hearing was completed following the CJEU's judgment: *Secretary of State for the Home Department v MG* [2014] UKUT 392 (IAC). The tribunal hearing Mr Reis's appeal would have had the benefit of the written submissions that had already been put forward by those acting on his behalf at earlier stages in the proceedings. Those submissions would have identified and explained the points of law in issue, and the fact that there were several legal points was far from unusual in a case before the First-tier Tribunal. The kind of points raised in Mr Reis's appeal were, he submitted "very much the bread and butter of many First-tier Tribunal hearings".

133. Mr. Drabble submitted that the decision to deport was of immense significance to Mr Reis. The effect of the decision would have been to separate him from his wife, from his wife's daughter, and from his own son, all of them British citizens who could not be expected to relocate to Portugal. There were two main reasons why Mr Reis required legal representation in his appeal. Firstly, following the decision of the CJEU in *MG* there was considerable uncertainty regarding the applicability of the "imperative grounds" test for the deportation of EU citizens. In para 42 of its determination in *MG* the Upper Tribunal had identified:

> "a possible tension in the text of the answers given by the Court and an apparent contradiction between:-
>
> i. its seemingly categorical statement in the first part of paragraph 33 that 'periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in Article 28(3((a) …' and
>
> ii. its seemingly defeasible statement in the second half of the same sentence (reinforced in paragraphs 35-36) that 'in principle, such periods interrupt the continuity of the period of residence for the purposes of that provision'."

134. Secondly, Mr Reis needed assistance with the preparation of evidence, in particular with an expert report concerning his risk of reoffending if he remained in the UK

(where he had the support of his family) compared with the risk if he was returned to Portugal. The determination of the tribunal allowing the appeal demonstrated that the Director's assessment that the merits of Mr Reis's claim were poor rather than borderline was irrational. Moreover, it was to be noted that the tribunal had said in para 53 of its determination that:

> "This has been a case involving complex legal submissions and I wish to note that I have been greatly assisted by the appellant being represented by counsel under the legal aid scheme."

135. Our conclusions in relation to Mr Reis are as follows. The decision to deport him was of immense significance to him, and to his family, all of whom are British citizens. We accept Mr. Chamberlain's submission that the fact that there were several legal points in issue in Mr Reis's appeal was far from unusual in a case before the Tribunal. However, the litigation culminating in the decision of the CJEU in *MG* demonstrates that the key question in Mr Reis's case – whether an individual in his position is entitled to the enhanced protection afforded to EU citizens who have resided in the UK for a continuous period of ten years – is a particularly complex legal issue. Mr Chamberlain founded the appeal in Mr Reis's case upon the proposition that such complexity as there was had now been resolved by the CJEU's decision in *MG* and the subsequent decision of the Upper Tribunal in that case. We do not accept that submission. The Upper Tribunal in *MG* identified an area of uncertainty that remained following the CJEU's decision. Moreover, we now have the inestimable benefit of hindsight. We know that the Tribunal when determining Mr Reis's appeal said that it had involved "complex legal submissions" and expressly noted that it had been "greatly assisted" by Mr Reis being represented by Counsel. Had the appeal not involved complex legal submissions Mr Reis might well have been able to effectively represent himself, but given the complexity of the key legal issue he was not able to do so.

GROUND 8: THE CASE OF B

136. The factual background to B's case is summarised in paras 98-100 of Collins J's judgment:

> "98. B is an Iranian national who arrived in the UK in March 2013. She claimed asylum fearing persecution for her political activities on behalf of Kurds. She was granted refugee status on 15 April 2013 and given five years leave to remain. Following her departure from Iran, her husband and son, who was born on 2 June 1997, were arrested and interrogated. They were beaten and threatened and ordered on release to give the authorities information about the claimant.
>
> 99. The claimant was understandably very anxious about her husband and son. She spoke no English and was dependent on assistance from the Iranian and Kurdish Women's Rights Organisation (IKWRO). They advised her that she might be able to apply for family reunion so that her husband and son could join her in the UK. IKWRO were unable to assist her in making an application since it was not licensed to do so and,

> following advice from IKWRO, she met with her present solicitor. Her solicitor recognised that there might be difficulties in that her son had no passport and there were no facilities available in Iran to enable a visa to allow entry to the UK to be obtained there. The claimant was extremely upset and worried and her inability to communicate in English made things even more difficult for her. Her solicitor was aware from the Legal Aid casework web site that family reunion was said not to be in scope for the purpose of grant of legal aid. Nevertheless, the view was taken that that might be wrong and that in any event the claimant needed legal assistance to enable her to have any real prospect of achieving family reunion.
>
> 100. If her son approached the Iranian authorities to obtain a passport, the claimant was afraid, not without good reason, that he would be arrested and ill-treated. Thus the only way he could apply for the necessary documentation to enable him to achieve entry to the UK was to go unlawfully to Turkey and apply there. This he did with his father and applications for entry clearance were made in Ankara. The applications were prepared by the claimant's solicitor on instructions from the claimant. Since the claimant's son was in Turkey unlawfully, he was afraid to leave the friend's address where he was staying and was extremely distressed. The applications for entry clearance were made in August 2013 but a decision was not made until 15 December 2013 when the claimant's husband was granted an entry clearance but their son was refused. Apart from the inexcusable delay in dealing with the application having regard to the circumstances in which the applicants were living in Turkey, the decision was extraordinary and an appeal was lodged. Islington Law Centre assisted in this. Fortunately, before an appeal was heard, on 13 February 2014 the claimant's son was granted the necessary entry clearance. Notwithstanding that, he has not been granted the necessary exit permits by the Turkish authorities. However, there is little that the UK authorities can do about that."

137. Islington Law Centre originally applied for legal aid on the basis that an application for family reunion was in scope pursuant to para 30(1)(a) of Part 1 of Schedule 1 to LASPO. It subsequently applied in the alternative for ECF, primarily by reference to article 8. Both applications were refused.

138. Collins J held that (i) an application for family reunion was in scope and legal aid should therefore have been granted to cover advice and assistance in respect of the applications on behalf of B's husband and son, and (ii) if an application for family reunion was not in scope, legal aid should nevertheless have been granted by way of ECF. The appellants contend that the judge was wrong on both points. An alternative basis on which legal aid was sought, by reference to Directive 2004/83/EC ("the Qualification Directive"), was rejected by the judge and, although raised by a respondent's notice, has not been pursued before us.

Is an application for family reunion in scope for legal aid?

139. By section 9(1) of LASPO, immigration cases falling within para 30 of Part 1 of Schedule 1 are within scope for legal aid. Para 30 reads:

> "**30. Immigration: rights to enter and remain**
>
> (1) Civil legal services provided in relation to rights to enter, and to remain in, the United Kingdom arising from -
>
> (a) the Refugee Convention;
>
> (b) Article 2 or 3 of the Human Rights Convention;
>
> (c) the Temporary Protection Directive;
>
> (d) the Qualification Directive …"

140. The present issue is whether rights to family reunion are rights "arising from" the Refugee Convention.

141. The written submissions on behalf of the intervener, the British Red Cross Society, contain a detailed analysis of the right of a refugee to family reunion. They point out that a right to family unity is entrenched in international human rights and humanitarian law and that there is strong support for the view that it is also customary international law. Whilst the body of the Refugee Convention contains no explicit reference to family unity or family reunion, the Final Act of the Conference which adopted the Convention included a Recommendation B referring to the unity of the family as "an essential right of the refugee" and recommending governments "to take the necessary measures for the protection of the refugee's family especially with a view to (1) ensuring that the unity of the refugee's family is maintained …". The argument advanced is that the refugee's right to family reunion arises directly from his or her recognition as a refugee under the Convention and reflects his or her special status: "the right to family reunion is inherently linked to status – it is a right which arises from the Convention and which, in its practical form, would not exist but for recognition of status".

142. Similarly, Mr Bowen argues on behalf of B that a refugee's right to family reunion "arises from" the Refugee Convention because (i) it follows from recognition of refugee status under the Refugee Convention, (ii) it would not exist but for the Refugee Convention, and (iii) it is given effect domestically through the Immigration Rules, the relevant provisions of which were introduced expressly to give effect to the policy agreed at the Conference which adopted the Refugee Convention. He submits that "arising from" is plainly wider than terms such as "contained in", "conferred by" or "under". For example, section 82 of the Immigration and Asylum Act 1999 defines "claim for asylum" as a claim that it would be contrary to the UK's obligations "under" the Refugee Convention for the claimant to be removed from, or required to leave, the UK: had Parliament intended para 30 of Part 1 of Schedule 1 to LASPO to be limited in the same way, a similar term would have been used. Thus, rights "arising from" the Refugee Convention, within the meaning of para 30, include not

only those that are contained in the Refugee Convention but also those that are contingent on the recognition of refugee status under the Refugee Convention.

143. Collins J accepted that line of argument, holding that as a matter of ordinary English, the refugee's right to family reunion "arises from the Convention since the Convention enabled that person to achieve the status of refugee" (para 105). He referred to *Union of India v E.B. Aaby's Rederi A/S* [1975] AC 797 as confirming the width of the words "arising out of" (which he considered to be no different in meaning). That was a charter party case in which the House of Lords held that a dispute concerning a claim for general average was a dispute "arising out of" the charter party.

144. For the appellants, Mr Chamberlain submits that the meaning of "arising from" depends on context and that the decision in the *Union of India* case therefore provides no real assistance. As Lord Brandon of Oakbrook said in *Samick Lines Co Ltd v Owners of the Antonis P Lemos* [1985] 1 AC 711, at 727C, in relation to the words "arising out of":

> "… I would readily accept that in certain contexts the expression 'arising out of' may, on the ordinary and natural meaning of the words used, be the equivalent of the expression 'arising under', and not that of the wider expression 'connected with'. In my view, however, the expression 'arising out of' is, on the ordinary and natural meaning of the words used, capable, in other contexts, of being the equivalent of the wider expression 'connected with'. Whether the expression 'arising out of' has the narrower or the wider meaning in any particular case must depend on the context in which it is used."

145. Mr Chamberlain submits that in the present context the expression "arising from" clearly has a narrow meaning. A right "arises from" an instrument referred to in para 30 if and only if it is contained in that instrument, not by reason of some looser connection. The expression "arising from" (rather than, for example, "under") has been used simply because each of the instruments in question has to be implemented in domestic law – the Refugee Convention by means of the Immigration Rules, the Human Rights Convention by means of the Human Rights Act 1998, and the Temporary Protection Directive and the Qualification Directive by means of regulations and other measures. The use of "arising from" makes sense in that context. The fact that LASPO lays down a set of carefully defined and restrictive conditions as to the matters in scope for legal aid also tells in favour of a narrow interpretation.

146. On that basis it is submitted that a refugee's right of family reunion is not a right "arising from" the Refugee Convention. The right is not contained in the Refugee Convention. The Refugee Convention makes no reference whatsoever to it. It is not enough that the right is recognised in international law and is referred to in the Final Act of the Conference which adopted the Refugee Convention.

147. In our judgment, the interpretation of "arising from" for which the appellants contend is the correct one. The expression is evidently capable of having a narrower or a wider meaning but in the present context, for the reasons given by Mr Chamberlain,

we think that Parliament must have intended the narrower meaning, with the consequence that the right of family reunion is excluded from the matters in scope. On this issue, therefore, we reach the opposite conclusion from that reached by Collins J.

148. Mr Chamberlain has sought to rely in addition on various Parliamentary materials as demonstrating the correctness of the appellants' position on the issue. Collins J took the view that there was no ambiguity in the expression "arising from" and that the materials in question were therefore not admissible on the principles in *Pepper v Hart* [1993] AC 593, but that even if they were admissible they were insufficient to show that Parliament intended to exclude the right of family reunion from scope under para 30. As it seems to us, however, the best that might be said in B's favour is that the expression is ambiguous, opening the door to consideration of the Parliamentary materials; and if those materials are taken into consideration, they point strongly to the conclusion, which we would reach in any event, that the legislative intention was to exclude the right of family reunion from scope. The materials in question are as follows.

149. In the House of Commons debate on 31 October 2011, at the Report stage of the LASPO Bill, consideration was given to an amendment tabled by Mr Simon Hughes MP seeking to bring some refugee family reunion cases into scope for legal aid. The premise of the proposed amendment and of the debate on it was that such cases were not at present in scope under the Bill. Mr Jonathan Djanogly MP, at that time Parliamentary Under-Secretary of State for Justice, resisted the amendment but, in response to a request by Mr Hughes, promised to look again at the point and to come back to him. He said that he would write to Mr Hughes about that and other immigration matters raised in the debate.

150. We have not seen any subsequent letter to Mr Hughes from Mr Djanogly. On 1 December 2011, however, Mr Hughes had a meeting with Lord McNally, Minister of State and Deputy Leader of the House of Lords, to raise concerns about the LASPO Bill, including the issue of appeals in immigration cases and complex family reunion cases. In a subsequent letter to him, dated 14 December 2011, Lord McNally referred to the difficult choices the Government had had to make about legal aid and stated that the reforms to the scope of the scheme were designed to refocus civil legal aid on the most serious cases in which legal advice and representation was justified; this meant making sure that legal aid remained for asylum matters, which might be a matter of life and death, but "fundamentally, we do not think that most immigration matters justify legal aid". The letter amounted in our view to a refusal on behalf of the Government to countenance bringing family reunion cases into scope.

151. The matter was pursued in the House of Lords. On 18 January 2012, at the Committee stage, Lord Thomas of Gresford moved a specific amendment to the LASPO Bill to bring family reunion cases into scope. Whilst resisting the amendment on behalf of the Government, Lord Wallace of Tankerness undertook to look again at the issue of complex cases. It is evident, however, that the Government's position did not change. On 12 March 2012 an amendment was moved by Lord Thomas the effect of which would have been to enlarge the criteria for ECF by the addition of a general "interests of justice" criterion. Family reunion cases were cited as an example of complex immigration cases where such a provision was needed. The amendment was resisted by Lord Wallace and was withdrawn.

152. In our view it is plain from those materials, looked at as a whole, that Parliament intended the expression “arising from” in para 30 of Part 1 of Schedule 1 to LASPO to have the narrower meaning for which the appellants contend. The amendments to which we have referred were moved on the basis that the rights “arising from” the Refugee Convention did not include the right of family reunion. The debates on them proceeded on that basis. There was no suggestion that the amendments were unnecessary because the right of family reunion fell within scope on the present wording of the Bill. There was no material change to the wording. This was not just the *executive* expressing a view about the meaning of the legislation. It was *Parliament's* understanding of that meaning.

153. After the hearing of the appeal, Mr Chamberlain drew our attention to the judgment of Lord Carnwath JSC in *R (ZH and CN) v London Borough of Newham and London Borough of Lewisham* [2014] UKSC 62, rejecting an attempt by the Secretary of State to rely on ministerial statements made in response to a proposed amendment to a Bill before Parliament. Lord Carnwath stated:

> “86. … The special exception allowed by *Pepper v Hart* is directed at Ministerial statements in support of legislation, and then the circumstances in which reference is permissible are closely defined. It provides no support for reference to such a statement in relation to proposed legislation which was not in the event adopted.”

154. That observation must be read in context. The case concerned the construction of a 1977 statute which was the subject of long standing Court of Appeal authority. The Secretary of State sought to rely on the fact that in the course of a debate on a Bill in 2008 an amendment reversing the effect of that authority was proposed but was defeated. That is plainly a very different situation from the present, where the proposed amendments were to the Bill that became the very statute the construction of which is in issue, and where the ministerial statements in question were made in response to those proposed amendments. We do not read Lord Carnwath's observation as precluding reliance on the Parliamentary materials to which we have referred in this case.

The application of article 8 to B's case

155. Our conclusion that the right of family reunion is not in scope for legal aid makes it necessary to consider the alternative basis on which Collins J found in B's favour, by reference to the application for ECF pursuant to article 8.

156. The letter of 2 August 2013 from Islington Law Centre requesting ECF is an impressive document. It explained that the Centre was assisting B and her husband and son to prepare and submit applications to the visa application centre in Turkey. It set out the factual background. It stated that without legal advice B had no idea how to secure her family's entry into the United Kingdom. She did not speak English but was receiving some practical and emotional assistance from IKWRO, which had been able to assist her through interpreting for her and helping her to complete a benefits claim but had referred her for specialist legal advice on the basis that it did not have the required expertise to advise and assist in family reunion applications.

157. In relation to the importance of the issues at stake, the letter said that the consequence of the family reunion applications being refused, or being unable to proceed due to a lack of legal advice and assistance, would be the loss of any possibility of meaningful contact between the three family members concerned. It listed various factors in the history of the case and the personal circumstances of members of the family as highlighting the importance and gravity of the issues at stake.

158. On the question of complexity, the letter referred to the legal provisions governing family reunion and described the procedure for making entry clearance applications as "a complex and time-consuming process involving multipart evidential preparation without which family reunion applicants can be readily refused". In the ordinary course the applicants and sponsor would be expected to provide proof of marriage, proof of parentage, proof of a *de facto* pre-flight family relationship which was still subsisting, and proof of the sponsor's UK refugee status. From the Centre's experience the most common cause of refusals in family reunion applications was a failure to provide adequate evidence to the overseas visa post, particularly as regards subsisting family life. Because of the particular factual matrix in B's case, it was envisaged that there could be grounds for refusal if additional evidence was not provided along with legal submissions by a specialist legal adviser. The issues identified were that (a) the family did not have access to all documentation required to satisfy the requirements of the rules, on account of their separation and dispersal, (b) the son was a 16 year old now living separately from his parents and it could be contended that he was living an independent life, so that assistance was required with preparing a witness statement to set out what had happened, and submissions were required on the point of continued dependency; and (c) evidence was needed on the psychological/psychiatric impact of separation on members of the family. In addition, the family would need legal advice and assistance in order to make a concurrent application to expedite the family reunion applications, on the basis of factors including the best interests of the son.

159. The letter submitted that B and her family were not in a situation where they could act for themselves and engage meaningfully in the required proceedings. The husband was at that time hiding in Iran and it was not clear when he would be able to go to Turkey. The son was traumatised and suffering from mental health problems in Turkey where he was also in hiding. They had no financial resources. B did not speak English, had no experience of UK immigration law and was herself in poor psychological health and without financial or practical resources. Without legal advice and assistance she and her family would either (i) submit applications that were likely to be refused or (ii) not submit applications at all. Either consequence would occasion a breach of article 8.

160. A separate letter from IKWRO, dated 30 August 2013, confirms that B could not manage the family reunion application herself: "She did not have the first clue". IKWRO was registered with OISC at Level 1 (see para 116 above for an explanation of OISC requirements) and to have given her legal advice would have been beyond its competence. That is supported by the witness statement of Mr James of OISC, which makes clear that a person must be accredited at Level 2 in order to provide legal advice and assistance in relation to refugee family reunion.

161. The application for ECF was refused. The refusal was then the subject of a review decision, dated 13 September 2013, by the Head of the Exceptional Cases Team. The

decision letter stated that regard had been had to the Guidance. It expressed the opinion that B would not be incapable of submitting an application form without the assistance of a lawyer. As to the statement that she was precluded from participation in the process because she did not speak English, the letter noted that she was able to provide Islington Law Centre with her instructions and that the cousin with whom she was staying had provided a well written letter which illustrated that the cousin understood the English language; the Centre did not appear to have considered or addressed why the cousin could not assist B to submit the application. As to the assertion of procedural and evidential complexities, it was evident that the evidence had been straightforward to collate "as you have been able to attain and analyse 'certified translations' of your client's husband passport and marriage certificate". The decision-maker was satisfied that withholding legal aid would not make the assertion of her claim practically impossible or lead to an obvious unfairness, and that therefore there would be no breach or risk of a breach of B's article 8 rights.

162. By this time Islington Law Centre had already submitted to the entry clearance officer in Turkey, on 12 August 2013, applications on behalf of B's husband and son for leave to enter the UK on the basis of refugee family reunion with B. The applications consisted of a covering letter explaining the background and making submissions about missing information and documents; completed online standard forms of application for entry clearance, including an appendix relating specifically to refugee family reunion; a supporting statement by B; and copies of available documents.

163. Decisions on the applications were not made until 5 December 2013, when the husband's application succeeded but the son's application was refused. The reasons for refusal were:

> "You have not fully completed your Annex 4 of your application form, but according to your claimed father's application form you last saw your sponsor in February 2013. You claim to have lived with your parents from birth in the same place until your sponsor left. You have provided a birth certificate, however apart from this, you have not provided any evidence that you were or are in a relationship with your sponsor. You have provided no photographs of the two of you together or any evidence of any contact at all between the two of you. I acknowledge that you have provided your sponsor's Screening interview, but this does not mention you by name. If you had been in a relationship since you were born I would expect there to be overwhelming evidence of this. I am therefore not satisfied that you have been part of a family unit of your father at the time he left his country of his habitual residence in order to seek asylum."

164. We have already quoted the passage in Collins J's judgment where he observed that the delay in dealing with the applications was "inexcusable" and that the decision in respect of B's son was "extraordinary" (para 100 of his judgment). Islington Law Centre lodged an appeal to the First-tier Tribunal on the son's behalf, with grounds of appeal and supporting documents. It also put in a request for fee remission and a request for an expedited appeal hearing. In addition, however, it sought urgent reconsideration of the entry clearance officer's decision. That resulted in a change of

mind and the grant of entry clearance without the need to pursue the appeal before the tribunal.

165. That, in summary, is the factual material that led Collins J to the view that ECF should have been granted if the correct approach had been applied.

166. In challenging that conclusion, Mr Chamberlain stresses that the procedural requirements of article 8 are focused on involvement in the decision-making process and that in this case ECF was sought in relation to the making of *applications* for family reunion. In essence, the application process involves (a) checking online what the procedure is for the particular country in question (for most countries, it is to fill in an online application for a visa), (b) submitting the online application and getting a reference number, and (c) making an appointment to attend in person at a visa application centre. No more than a limited amount of internet searching is necessary to find the right forms. The forms themselves ask specific and directed questions in plain English and seek factual information. The appendix dealing specifically with refugee family reunion applications refers at the outset to guidance on the Home Office website about supporting documents (i.e. what evidence one should submit with the application) and includes guidance notes at the end in relation to the individual questions. There is no need to address submissions on points of law. As to the point that B herself does not speak English, the evidence does not establish that there is nobody to whom B can turn for assistance in relation to the English forms. Mr Chamberlain also points to the existence of third-sector organisations capable of helping with tasks such as translating from the website, booking appointments with visa application centres and collating documents. He suggests that even if B needed more than practical assistance, there are over 100 organisations registered to provide not for profit immigration advice at Level 2 and above, and he points out that B was assisted in the event by Islington Law Centre (though he does not dispute the Centre's evidence that it is a charity of limited resources and needs ordinarily to be funded if it is to provide such advice and assistance).

167. So far as concerns the appeal against, and request for reconsideration of, the refusal of entry clearance for B's son, Mr Chamberlain makes the point that the decision on ECF was made in relation to the application for entry clearance, not in relation to the steps to be taken following a refusal of entry clearance. In any event, however, he submits that if an application is refused, reasons are given, there is a right of appeal on the merits and the applicant knows what points it is necessary to address in an appeal. For example, the refusal decision in respect of B's son explained in plain language the deficiencies in the evidence provided. There was no point of law and no need for a lawyer. Similarly, in relation to matters such as fee remission, expedition and reconsideration, the issues are administrative, not legal, and it is simply a case of asking for something in plain language and explaining why it is needed.

168. A further submission by Mr Chamberlain, generating a sub-issue of its own, is that Collins J fell into error in considering that B's son, who was living at the material time with family friends in Turkey, enjoyed rights as against the UK under article 8: the son was outside the jurisdiction of the UK for ECHR purposes. The decision of the Strasbourg court in *Tuquabo-Tekle v Netherlands* [2006] 1 FLR 798 does not stand as authority to the contrary because the Netherlands government was estopped on procedural grounds from raising the question of jurisdiction. The decision in *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 confirms that, save for certain defined

and established exceptional categories, it is only individuals within the territorial jurisdiction of a contracting state who are within that state's jurisdiction for the purposes of the Convention. B's son was not within the territory of the UK and did not fall within any of the exceptional bases, including in particular that relating to acts of diplomatic and consular agents, the narrow scope of which was recently confirmed by the Supreme Court in *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [2014] 1 WLR 2697.

169. On behalf of B, Mr Bowen submits by reference to the decision of the Strasbourg court in *Senigo Longue v France* (cited at para 69 above) that a decision whether to permit family reunion engages B's substantive article 8 rights – a point that is not in dispute. As to the relevance of the article 8 rights of B's son, he submits that there are many cases in which the courts have reached decisions on article 8 grounds where the people concerned are outside the jurisdiction. He cites the decision of the Supreme Court in *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 as a recent example and submits that this court is bound to follow the reasoning in that case.

170. He makes the undisputed point that legal aid may in principle be required at the application stage, as illustrated by the fact that the appellants have conceded IS's appeal (see paras 78-80 above). He submits that if legal advice is necessary to ensure effective participation in the decision-making process, the right to receive free legal advice can arise at the outset of the process, before any application is made: there can be no participation at all if the individual cannot identify the correct application form and fee, the procedure for making the application and the evidence required to support it. It is self-evident that a need for immigration legal advice may arise in practice prior to the making of an application. The law and policy are extremely complex. The provision of legal advice in this area is regulated by statute, with criminal sanctions for those who provide it without authorisation. It is incoherent to suggest that an ordinary individual can always navigate a process without the benefit of advice that would, if given, be subject to that statutory regulation. The only question, therefore, is whether such advice is necessary on the particular facts, having regard to what is at stake, the complexity of the particular procedure and the individual's ability to navigate the process without advice. That is a merits question which Collins J decided in B's favour. For this court to interfere with the judge's assessment, the appellants would need to show that the judge's decision was so unreasonable as to have "exceeded the generous ambit within which a reasonable disagreement is possible" (*Tanfern Ltd v Cameron MacDonald* [2000] 1 WLR 1311, para 32), a threshold that the appellants do not even begin to cross.

171. Mr Bowen goes on to address the detail of the appellants' arguments on the merits, without prejudice to his primary case that this court should not interfere with the judge's assessment. He submits that on the material set out in the application for ECF, B clearly needed legal advice and assistance. The process is far from being so simple that all that was required was a little help with English and an internet connection. Identifying the correct application form and the correct appendix to it is not straightforward. Neither the guidance on the Home Office website nor the questions and guidance in the form itself tell an applicant about the substantive and evidential requirements for a family reunion application. The experience of the Islington Law Centre was that the most common cause of refusals is a failure to

provide evidence to the overseas visa post, which was indeed the reason why entry clearance was refused in the case of B's son. The lack of a passport added complexity to the son's case. The refusal of entry clearance meant that an appeal was necessary. The fact that the grounds of appeal were very strong did not remove the need for legal advice and assistance, which was also required in relation to the applications to the Tribunal for fee remission and expedition and the making of representations to the entry clearance officer to reconsider the refusal decision. If legal advice is needed, it must be given by a person accredited to OISC Level 2, and there is no evidence that third-sector organisations have the competence and capacity to give such advice on a widespread basis without legal aid. The fact that Islington Law Centre provided legal advice and assistance to B at risk, pending clarification of whether family reunion applications are within scope for legal aid and/or whether ECF should be granted, takes the appellants nowhere. For all those reasons Collins J was correct to find that, if family reunion applications are not in scope, ECF was necessary in order to avoid a breach of B's rights under article 8.

172. Our conclusions in relation to B's case are as follows. We accept that family reunion is generally a matter of vital importance for refugees and that it was so for B herself. The particular circumstances of B, her husband and her son gave rise to issues of particular complexity. It is striking that even though the application on behalf of the son was prepared with legal advice and assistance, it was refused at first on the ground of failure to satisfy the entry clearance officer that the son was part of the family unit – one of the areas of potential difficulty identified in the application for ECF. The resulting appeal and request for reconsideration added to the overall procedural complexity of the exercise. In relation to all of this, B was wholly unable to represent herself or her other family members. It was not simply that she was unable to speak English but that "[s]he did not have the first clue", as it was graphically put by IKWRO. Without legal advice and assistance it was impossible for her to have any effective involvement in the decision-making process. The Director ought therefore to have concluded that failure to provide legal aid would amount to a breach of her Convention rights. This alternative basis for Collins J's order directing the grant of legal aid was correct.

173. We have reached that conclusion without needing to decide the jurisdictional issue concerning the article 8 rights of B's son. It can make no practical difference in the present case whether one looks at the position simply from the perspective of B's article 8 rights or whether one adds in the son's article 8 rights: the ECF decision does not turn on it. In any event, however, we share the view expressed by Collins J at para 113 of his judgment as to the artificiality of excluding the interests of a child outside the jurisdiction when considering a refugee reunion case under article 8.

GROUND 9: THE CASE OF MS EDGEHILL

174. The factual background to the case of Ms Edgehill is set out in paras 115-120 of the judgment of Collins J:

> "115. The claimant, a Jamaican national, was admitted to the UK on 14 September 1998 as a visitor. She was granted leave to remain as a student until 31 January 2001. In March 2007 she applied for leave to remain on the ground of UK ancestry, asserting that she had been born in the UK but sent to Jamaica

where she was brought up by a couple whom she believed to be her parents. The application was refused and the claimant thereupon became an overstayer. She did not leave the UK. She said she was joined by various children, one of them had a son born here in May 2008 who is a British citizen.

116. She kept in touch with the Home Office and she applied for a certificate under s.10 of the Nationality, Immigration and Asylum Act 2002 that she was entitled to remain here. This was refused on 7 March 2012. She appealed. In her notice of appeal which she filled out without legal assistance, she said, under the heading in the form asking her to state if the Home Office had suggested she could live safely in another part of her country of origin, that she disagreed. She said:-

> ‘I have no home in another country all my family are here and I have nowhere to go. Also my parents brought me to Jamaica and left me there and this is my home.’

117. That box in the form had no application since the Home Office had not suggested she could live safely in another part of her native country. However, the First-tier judge, who dismissed her appeal, did spot that it ‘alluded to her Article 8 rights’. He said he would in any event have considered them, but, because no evidence had been produced and there was no attendance before him, he dismissed her appeal on 4 June 2012. She was granted leave to appeal to the Upper Tier, but her appeal was dismissed on 7 February 2013.

118. In answering her Article 8 claim, the UTIAC considered her length of residence (which exceeded 14 years) and had regard to Paragraph 276 ADE of the Immigration Rules which came into force on 9 July 2012 and required that an applicant had lived continuously in the UK for at least 20 years in order to establish an Article 8 claim based on private life. It said:-”

> ‘… Article 8 appeals are decided on the facts as at the date of the hearing and, whilst this was a decision made before the new Rules came into effect and therefore have no direct application and not retrospective, we consider it appropriate to give weight to the new Rules as being an expression of the legislature's views as to where the public interest lies.’

119. Leave to appeal to the Court of Appeal was sought following refusal of leave by an UTIAC judge. Ground 2 raised the 14 year point, but somewhat indirectly. Beatson LJ noted that the case raised a question of principle warranting a decision by the Court of Appeal. There was another case with which it was to be joined which raised a similar point. In due course, the claimant's appeal was allowed and the other appellant's dismissed since it did not on the facts cover the

> same ground. The claimant is due to have a fresh appeal before the Tribunal.
>
> 120. Following Beatson LJ's grant of leave, an application for ECF was made on 19 September 2013. This was refused on 14 October 2013. First, it was said that Article 8 was not engaged since leave had not been granted on the grounds specifically relating to Article 8. However, that is to misunderstand the position since the correct approach to 14 years residence would impact on the Article 8 claim. There was also refusal on the merits since, it was said, the other case raised the same point. A review was sought, but on 30 October 2013 the refusal was upheld. The author accepted that the merits test was met save in one respect, namely that the Court of Appeal would not be considering grounds relating directly to Article 8. That maintains the same error as in the previous decision. But the author asserts that Beatson LJ stated that the appeal raised a question of principle not a point of law and that therefore there was no legal complexity. That is an extraordinary assertion since the point of principle obviously turns on the correct approach in law."

175. In para 121 Collins J explained why he had concluded that the Director's reasons for refusing ECF were flawed:

> "I am clearly of the view that if the Court of Appeal gives leave to appeal, it will (provided the case is one which can attract ECF) prima facie be a case in which legal aid should be granted. The point at issue was not entirely straightforward and would affect other cases. In this case I am entirely satisfied that it should have been granted and that the reasons for refusal are flawed."

In para 122 he rightly rejected a submission, pursued without much enthusiasm by Mr Underwood QC on behalf of Ms Edgehill in this appeal, that article 6 applied to her case.

176. Ms Edgehill had been represented before the Court of Appeal by Mr Tear without the benefit of legal aid. Her appeal was successful, and the Court remitted her appeal to the Upper Tribunal for re-determination: [2014] EWCA Civ 402.

177. Mr Chamberlain submitted that, Beatson LJ having identified the point of law in his grant of permission, the Court of Appeal was well able to deal with it. While the point of law would have been over the head of Ms Edgehill, it was a relatively simple one, as evidenced by the brevity of the Court's judgment and the fact that it was able to dispose of the Secretary of State's submissions in a couple of paragraphs. Ms Edgehill's appeal had been listed to be heard with another appeal (HB (Mauritius)) which raised the same point, and in which the appellant was represented. It was apparent from the Court of Appeal's judgment that the points taken by the other appellant's representative were the same as those taken on behalf of Ms Edgehill.

178. Mr Underwood submitted that Ms Edgehill could have had no concept of the point that was in issue in the Court of Appeal. She would have been in no position to put forward any argument in support of her appeal. If she had been unrepresented that would have been tantamount to her not being in court at all while her appeal was being heard. What was at stake for Ms Edgehill in this court was the lawfulness of a decision in respect of her article 8 rights and the application of immigration rules. In the context of family life comprising four children and a grandchild, and against the backdrop of a stay of over 15 years, that was highly significant to her. The bases for the decisions to refuse exceptional funding were woefully flawed. The Director's contention that, looking at the decision-making process as a whole, Ms Edgehill was involved to the extent necessary to protect her interest disregarded the fact that, until her case reached the Court of Appeal, she had wrongly lost her appeal against the Secretary of State's decision at each stage of the appellate process. Only this court was able to put that right, and her previous involvement in the appellate process was immaterial to the protection of her interests.

179. Mr Underwood submitted that the issue in Ms Edgehill's appeal was far from straightforward. In his judgment Jackson LJ had said that the interpretation of the Immigration Rules which had been advanced by Counsel on behalf of the Secretary of State was "one of subtlety", which had not occurred to him when he was reading the transitional provisions (para 25), and Jackson LJ had admired "the dexterity of the argument" advanced on behalf of the Secretary of State (para 31). The issues in the appeal of HB (Mauritius) were not the same, HB did not have 14 years' residence and her appeal, unlike Ms Edgehill's, was dismissed. Listing the two appeals together was good case management but it did not obviate the need for Ms Edgehill to be represented in her appeal to the Court of Appeal.

180. Our conclusion is as follows. Ms Edgehill's appeal was of vital importance for her and her children. If her appeal to the Court of Appeal had not been listed with HB (Mauritius) it is clear that without legal aid she would not have been able to have any meaningful involvement in the critical stage of the decision making process in her case: the appeal to the Court of Appeal (her appeal having been wrongly rejected at the earlier stages of the process). Although the Court of Appeal was able to dispose of the Secretary of State's submissions in a couple of paragraphs, it praised "the dexterity of the argument" advanced on behalf of the Secretary of State, and said that the interpretation of the rules advanced on her behalf was "one of subtlety". Mr Chamberlain realistically accepted that the point of law which had been identified by Beatson LJ would have been over the head of Ms Edgehill. However, we do accept Mr Chamberlain's submission that the point of law on which Ms Edgehill's appeal succeeded was being raised by HB, who was going to be legally represented before the Court of Appeal. While the circumstances of the two appeals were not identical (HB's appeal was dismissed), the issue on which Ms Edgehill's appeal succeeded was to be raised on behalf of HB. For this reason, while separate legal representation for Ms Edgheill was no doubt desirable, a failure to provide her with legal aid would not have been a breach of her Article 8 rights.

SUMMARY OF CONCLUSIONS

181. For the reasons we have given at paras 41 to 59 above in relation to ground 2, the Guidance is not compatible with article 6(1) of the Convention and article 47 of the Charter. It impermissibly sends a clear signal to caseworkers and the Director that the

refusal of legal aid will amount to a breach only in rare and extreme cases. For the reasons we have given at paras 64 to 77 above in relation to ground 3, the Guidance is not compatible with article 8 of the Convention in immigration cases. As is now conceded by the Lord Chancellor, para 60 of the Guidance wrongly states that there is nothing in the current case law that would put the UK under a legal obligation to provide legal aid in immigration proceedings in order to meet its procedural obligations under article 8.

182. To this extent, therefore, we agree with the general conclusions reached by Collins J. For the reasons given at paras 29 to 32 above, however, we do not agree with his statement that ECF is required under section 10(3)(a) of LASPO only when the applicant can establish "to a high degree of probability" that without it there would be a breach of his procedural rights under the Convention or EU law. Nor do we agree with his statement that the "risk" of a breach referred to in section 10(3)(b) is a "substantial risk that there will be a breach of the procedural requirements of" the Convention or EU law.

183. Accordingly, we have considered the five live appeals afresh for ourselves applying Convention and EU law principles to the facts of each case.

184. For the reasons stated in paras 90-91, the appeal in the case of Ms Gudanaviciene is dismissed. For the reasons stated in paras 123-124, the appeal in the case of LS is allowed. For the reasons stated in para 135, the appeal in the case of Mr Reis is dismissed. For the reasons stated in paras 172-173, the appeal in the case of B is dismissed. For the reasons stated in para 180, the appeal in the case of Ms Edgehill is allowed.

185. Finally, we note that an important strand of the submissions of Mr Chamberlain is that, to some extent at least, courts (and in particular specialist tribunals) are able to adopt an inquisitorial approach and in that way ensure that litigants in person enjoy effective access to justice. We accept that this will be possible in many cases. But these appeals show that there are cases where this is not possible. We would point out that, in some circumstances, legal advice to the litigant in person may be more important than legal representation at the hearing for ensuring effective access to justice. We suggest that consideration be given to whether, in an appropriate case, ECF be provided for early legal advice even where it is not considered to be necessary for representation at the hearing.