Neutral Citation Number: [2015] EWCA Civ 819

Case No: C1/2014/0953

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
DIVISIONAL COURT
RAFFERTY LJ; CRANSTON J
CO/16747/2013 & CO/17916/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2015

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
LORD JUSTICE TOMLINSON
and
LADY JUSTICE SHARP

- -

Between :

THE QUEEN **on the application of** **THE HOWARD LEAGUE FOR PENAL REFORM** **and** **PRISONERS' ADVICE SERVICE**	**Appellants**
- and -	
THE LORD CHANCELLOR	**Respondent**

- -
- -

Phillippa Kaufmann Q.C., Alex Gask and Martha Spurrier
(instructed by **Bhatt Murphy**, London)for the **Appellants**
James Eadie Q.C. and Richard O'Brien
(instructed by**Treasury Solicitor**) for the **Respondent**

Hearing date : 7 July 2015

- -

Approved Judgment

Sir Brian Leveson P :

1. On 17 March 2014, in a detailed, reserved judgment, the Divisional Court (Rafferty LJ and Cranston J) dismissed applications for judicial review of the legality of the changes introduced to criminal legal aid for prison law by the Criminal Legal Aid (General) (Amendment) Regulations 2013, SI 2013 No 2790 ("the Regulations") whereby funding for certain issues likely to arise between prisoners and the authorities was taken out of scope. The claims were brought by the Howard League for Penal Reform ("the Howard League") and the Prisoners' Advice Service ("PAS") both of whom are pre-eminent in this field and have the very highest reputations. It could not be suggested that this litigation was brought other than with a keen eye to issues that are at the forefront of the public interest. With leave (and with the benefit of protected costs orders), both organisations now appeal against that decision.

2. At the centre of the dispute is an argument about the proper balance to be struck by the judiciary, in its consideration of decision making about the priorities and deployment of public finances between decisions of the executive endorsed by Parliament, on the one hand, and what is contended to be consequential systemic and inherent unfairness on the other. Our concern is whether the grounds advanced by Ms Phillippa Kaufmann Q.C. on behalf of the Howard League and PAS are arguable: we do so with the benefit of the decision of the Divisional Court (which itself followed a contested hearing) and detailed written and oral argument both from her and from Mr James Eadie Q.C. on behalf of the Lord Chancellor.

3. In one sense, the very fact that there has been such argument makes the point that leave should be granted and we are aware that both sides indicated that, if that was to be the position, further evidence would be filed. If the case is to depend on evidence, of course, that step would be necessary. If, however, it is appropriate to proceed on the premise of the facts as advanced by the Howard League and PAS and, in addition, the legal analysis is clear so that no ground exists which has a realistic prospect of success or which merits fuller investigation at a further hearing, there is little point in prolonging the case for that purpose: see 54.4.2 of the White Book 2015 and the observations of Lord Diplock in *Inland Revenue Commissions v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 (at 643) to the effect that one of the purposes of the need for leave is:

> "to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."

Background

4. The background to the decision which is the subject of challenge, including the process of consultation, was set out in detail in the judgment of Cranston J in the Divisional Court, which I very gratefully adopt:

> "5. Part of the Coalition's programme for Government in 2010 was an undertaking to carry out a fundamental review of legal aid to make it work, it was said, more efficiently. In November

2010 there was a consultation paper entitled "Proposals for the reform of legal aid in England and Wales". In June 2011 the Government published its response to the consultation and set out its proposals for change. These were implemented in the main in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Major changes brought about by the Act included the creation of the Legal Aid Agency and changes to the scope of and eligibility for civil legal aid.

(a) The April 2013 consultation

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

7. Chapter 3 of the consultation document reiterated the need to improve public confidence in the legal aid system, to remove anomalies and, in a time of financial austerity, to target public resources at cases which really required legal aid to ensure that the public could have confidence in the system. Limited public funds should not be spent if matters could be better resolved by other means. As had been made clear in the 2010 consultation, public funding should be reserved for serious issues which had sufficient priority to justify its use, subject to people's means and the merits of the case.

8. The first of five proposals in chapter 3 addressed the subject matter of these challenges, restricting the scope of criminal legal aid for prison law. (The document defined the term "prison law" as matters relating to treatment in prison, sentencing issues, disciplinary matters and Parole Board reviews.) It was said that prison law legal aid should be available for cases involving "the determination of a criminal charge, or which affects the individual's ongoing detention and where liberty was at stake, or which meet the criteria set out in case law (see para 3.14)": para 3.4. There was then a review of current practice. Criminal legal aid was available to prisoners seeking advice and assistance, including advocacy assistance, for matters relating to treatment, sentencing, disciplinary matters and Parole Board reviews (with a reference to Annex B): para 3.6. Paragraph 3.[9] dealt with the change made in the 2010 Standard Crime Contract for legal aid, that matters concerning the treatment of prisoners (e.g. regime conditions)

were not covered, when they could be suitably resolved through the internal prisoner complaint system, unless the legal provider could demonstrate that it would be practically impossible for the applicant to use the system (for example, prisoners with learning difficulties or mental health issues). There was also discussion of both the internal prison complaint mechanism and the work of the Prisons and Probation Ombudsman. A table set out how legal aid spent on prison law had risen from £1 million in 2001/02 to £25 million in 2009/10 (£26 million in 2010/11, £23 million in 2011/12).

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

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

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

10. The document turned to specific prison law issues. Treatment matters were likely to be removed from criminal legal aid: para 3.17. With sentencing matters it was anticipated that issues relating to sentence planning or minimum term review applications would continue to be funded, subject to means and merits, since they related to the review of ongoing detention. However, those relating to "categorisation, segregation, close supervision centre and dangerous severe personality disorder referrals and assessments, resettlement issues and planning and licence conditions would not be funded as they do not engage any of the proposed scope criteria": para

> 3.18. With disciplinary matters, criminal legal aid and advice would remain available where the charge was so serious that an award of additional days might be imposed or where for some other reason the case was referred to an independent adjudicator: para 3.19. Regarding Parole Board review matters, the document said:
>
> > "3.20 Criminal legal aid advice and assistance would remain available for Parole Board review matters as these cases concern decisions about ongoing detention."
>
> At the end of this section the document posed this consultation question: Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria?
>
> 11. Annex B set out the then current position with criminal legal aid for prison law. For Parole Board cases it covered "advice and advocacy assistance for eligible persons subject to proceedings before the Parole Board or who require advice and assistance regarding representations in relation to a mandatory life sentence or other parole review".”

5. After outlining some of the main stakeholder responses to the consultation, Cranston J went on to consider the response from the Ministry of Justice to the April consultation and final proposals:

> “(b) "*Next steps*" and the Regulations
>
> 15. On 5 September 2013 the Government published its response to the April consultation and set out its proposals in "Transforming Legal Aid: Next Steps" ("Next Steps"). In the Ministerial foreword the Lord Chancellor reiterated the value of legal aid and the need to maintain public confidence in it and to put it on a sustainable footing. The Ministry of Justice needed to reduce its budget by one third between 2010 and 2016, and no area of spending could be immune from scrutiny. He noted that detailed negotiations had been undertaken, in particular with the Law Society, and that there would be a panel of criminal lawyers to look at the efficiency of the legal process. He had decided to proceed with most of the measures proposed in April to bear down on the cost of legal aid and to ensure public confidence. There would be further consultation concerning a modified model of procurement for criminal legal aid.
>
> 16. As regards prison law Next Steps noted that the Government had amended its proposals to ensure that criminal legal aid remained available for all proceedings before the Parole Board where it had a power to direct release, as opposed simply to cases engaging article 5.4 of the ECHR. The

Government also intended to retain sentence calculation cases within scope where the date of release was disputed. It agreed with those respondents who had stressed the importance of ensuring that there was a robust prisoner complaint system in place.

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

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

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

18. Annex B then turned to criminal legal aid advice and assistance for Parole Board proceedings: it would continue to be available where the board had the power to direct release. The document recognised that categorisation might be an important element of risk assessment. However, it was not necessarily or directly determinative of release for those

determinate sentence prisoners eligible for consideration by the Parole Board for release prior to their automatic release date or for indeterminate sentence prisoners. It was a relevant factor, but not the sole consideration, and a small number of category A prisoners had been released by the Parole Board without being recategorised to B or below. Civil legal aid for judicial review might be available in this area. Some Parole Board hearings did not engage article 5.4 of ECHR, in particular those for certain determinate sentence prisoners, but the Government considered that criminal legal aid should remain available for advice and assistance in relation to all proceedings before the Parole Board where it had the power to direct release. That included cases where the Parole Board had the power to direct release but decided not to do so, instead making a recommendation regarding categorisation.

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

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

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

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

> effect on 2 December. The Regulations were subject to the negative resolution procedure.

Consultation

6. I turn first to consider the ground of appeal which alleges that the Lord Chancellor failed adequately to consult upon the nature and extent of the changes that he proposed in relation to hearings before the Parole Board. It is argued that a decision fundamentally different from that which was consulted upon is contrary to the duty of fair consultation established by authorities such as *R v North & East Devon Health Authority ex parte Coughlan* [2001] QB 213 and *R (Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin).

7. The challenge concerns criminal legal aid funding for Parole Board hearings for pre-tariff reviews (where prisoners have been referred to the Parole Board by the respondent for advice on a move to open conditions prior to the expiry of their minimum term) and return to open conditions cases (where prisoners have been removed from open conditions). Ms Kaufmann argues that it was "clear to everyone" from the consultation, *Transforming Legal Aid*, in April 2013, that the proposed changes to criminal legal aid would not affect the existing funding of these two types of case. Consequently, the appellants did not make representations on this issue, and nor, they submit, did any other consultee give the issue any detailed consideration.

8. In the Ministry's *Next Steps* document, however, it became apparent (Ms Kaufmann argues for the first time) that the Lord Chancellor intended to remove these cases from scope. She drew our attention to paragraph 2.5 of *Next Steps* which, as I have identified, acknowledges an adjustment to the original proposal and underlines that funding is retained not just for proceedings before the Parole Board that engage Article 5.4 of the Convention but also where the Parole Board has the power to direct release. She drew support for the argument that this constituted a change from the terms of paragraph 3.20 of *Transforming Legal Aid*, which stated that "Criminal legal aid advice and assistance would remain available for Parole Board Review matters…". Reference is then made to Annex B which defines Parole Board cases in line with definitions currently used by the Legal Aid Agency. The submission, however, fails to address the fact that this paragraph 3.20 was completed with the following words:

> "… as these cases concern decisions about ongoing detention".

9. That the main objective of the proposal was to restrict funding to cases which involve the individual's ongoing detention or where Article 5.4 of the Convention was engaged was evident from paragraphs 3.4 and 3.14 (set out above). It is common ground that Article 5.4 is not engaged in pre-tariff reviews because prior to the expiry of the tariff, prisoners remain lawfully detained. Paragraph 3.20 plainly mirrored this objective when it said in terms that that Parole Board reviews would remain in scope "as these cases concern decisions about ongoing detention". There is nothing to support the appellants' contention that "Parole Board reviews" included all Parole Board hearings. In my judgment, paragraph 3.20 does not (and cannot have been intended) to broaden the application of the proposal in paragraph 3.14.

10. I am not suggesting that the language used in paragraph 3.20 could not have been clearer, but the submission that it was widely understood as retaining these cases within scope is undermined by the responses of other consultees. The human rights organisation, Liberty (which is also pre-eminent in this field), responded to the consultation in this way:

> "The consultation proposes significantly restricting the availability of legal aid to prisoners. Legal aid would only be available for prison law cases which involve determination of a criminal charge for the purposes of the Article 6, right to a fair trial, as protected by the Human Rights Act; which affect the individual's on going detention and where liberty is at stake, thus engaging Article 5(4) protections; or which meet the criteria in *R v Home Secretary ex p Tarrant*. This would exclude from scope several categories of case involving treatment in prison, sentencing, disciplinary hearings, and Parole Board Review. "

11. In those circumstances, I agree with the conclusion expressed by the Divisional Court that in the April consultation, the respondent was clearly giving notice that it proposed that these two types of case would no longer be in scope. In any event, even if I am wrong about that and putting to one side the extent to which any change (had there been one) was fundamental, it is highly unlikely that a clearer enunciation of this change would have made any difference to the outcome. The Lord Chancellor had received and considered representations in relation to the decision to exclude categorisation cases from scope, and the complaints raised were equally applicable to pre-tariff reviews and return to open condition cases. In Annex B, paragraph 6 of *Next Steps*, the response makes it clear:

> "Respondents suggested that the removal of categorisation and licence conditions matters from the scope of criminal legal aid for prison law would not be in line with the policy intention of providing legal aid where an individual's liberty is at stake, and that in relation to licence conditions prisoners' rehabilitation may be affected. A number specifically argued that re-categorisation from Category A is essential if prisoners on indeterminate sentences for Public Protection (IPPs) are to be released. In addition, the possibility of prisoners being housed in more secure conditions than necessary as a result of not being re-categorised, and the resulting cost implications, was also raised. Specifically, respondents suggested that the difference in cost of holding a prisoner in Category A as opposed to Category B, C or D conditions is significant and removing prisoners' access to criminal legal aid for categorisation cases may result in more prisoners being held in more secure, and therefore more expensive, conditions for longer than necessary."

12. For these reasons, in my judgment, the 'lack of consultation' challenge is unarguable and I would dismiss the appeal on this ground.

Systemic Unfairness

13. Ms Kaufmann also challenges the removal of criminal legal aid funding in seven principal areas of prison law on the basis that they either impact upon the liberty of the prisoner or they engage his or her Article 8 Convention rights in a way that is systemically unfair. These areas are:

> (1) all Parole Board hearings not otherwise in scope; in particular, this affects those discussed above namely pre-tariff reviews and return to open condition cases;
>
> (2) prisoner eligibility for one of the few available places in mother and baby units;
>
> (3) prisoner segregation and placement in Close Supervision Centres
>
> (4) Category A reviews
>
> (5) Access to offending behaviour courses
>
> (6) Resettlement and licence conditions
>
> (7) Disciplinary proceedings (where no additional days may be awarded)

14. In written grounds of appeal, Ms Kaufmann asserted that the test for permission to bring judicial review was clearly met in this case and that the Divisional Court erred by holding that this challenge was unarguable. First, she argued that, quite apart from the failure to consult, the removal from scope of criminal legal aid funding from the seven types of case outlined above creates an unacceptable risk of unfair decision making. In addition, the changes give rise to an unacceptable risk of interference with prisoners' rights of access to justice and unlawful discrimination against prisoners under Articles 6 and 14 of the Convention. Finally, it was said that the scheme was irrational because it failed to meet its stated aims.

15. Before us, Ms Kauffman submitted that her primary arguments were in relation to systemic unfairness and the failure to consult. She accepted that the argument under Article 6 of the Convention had less merit, as did the Article 14 argument which was necessarily parasitic on the former. She also recognised the difficulty in the irrationality complaint, made all the more so due to the parties' reliance in this aspect of the challenge on material which is arguably protected by parliamentary privilege. The hearing therefore proceeded to consider the unacceptable risk of unfairness.

16. As to the principles, Mr Eadie argued that the claims are an attack on the Regulations, which obtained Parliamentary approval. He referred to *R (Patel) v Lord Chancellor* [2010] EWHC 2220 (Admin) which concerned a specific (rather than generic) decision about legal aid funding. The widow of one of the 7/7 bombers unsuccessfully challenged the refusal to grant her exceptional funding for the inquest. Thomas LJ (as he then was) and Silber J rejected the challenge on the grounds that, following debate, the Lord Chancellor was entitled to be afforded a substantial degree of latitude. Mr

Eadie submitted that the Lord Chancellor was entitled to "draw lines and to do so brightly" in the context of legal aid reform and that where there has been a full consultation followed by parliamentary involvement, judicial restraint is all the more appropriate.

17. Such decisions are usually only subject to challenge on irrationality grounds. As Mr Eadie accepted, the authorities recognise that a court may declare a government policy unlawful where it gives rise to an unacceptable risk of unlawful decision making.

18. The principle was first formulated in *R (Refugee Legal Centre) Secretary of State for the Home Department* [2005] 1 WLR 2219 where Sedley LJ considered, at [6], that "there will in our judgment be something justiciably wrong with a system which places asylum seekers at the point of entry … at unacceptable risk of being processed unfairly" and proceeded to hold that potential unfairness was susceptible to judicial intervention "to obviate in advance a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself": [7].

19. The fundamental basis for the primary case advanced by Ms Kaufmann on this aspect of the case (identical to the argument advanced in *R(Tabbakh) v Staffordshire Probation Trust* [2014] 1 WLR 4620, [2014] EWCA Civ 827), summarised at [34]) is that the policy to remove these classes of cases from the ambit of criminal legal aid:

> "… creates an unacceptable risk that the individual to whom it applies will be subject to unlawful decision making. In deciding whether the risk is unacceptable, the court must ask whether the risk inheres in the policy itself, as opposed to the ever-present risk of aberrant decisions. Unacceptability depends on the degree of risk, the consequences if the risk materialises, the extent of anything that minimises the risk and the cost of minimising the risk."

20. Referring to *Refugee Legal Centre*, Ms Kaufmann identified the test (at [20]) as whether the system "considered in the round and at the point of entry [carried] an unacceptable risk of unfairness to asylum seekers". This approach was followed in *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1925 (Admin) (later approved and adopted by this court: [2011] EWCA Civ 1710) in which Silber J articulated the test in terms that the provisions of a policy should be declared unlawful "if there is an unacceptable risk or a 'serious possibility' that the right of access to justice of those subject to them will be or is curtailed" ([36]). In *Tabbakh*, Richards LJ, after reviewing the authorities, posed the essential question as "whether the system established by the policy under challenge was inherently unfair" [38].

21. In all of these cases, the risk of an unlawful decision arose from impediments, inherent in the system, to the individuals' ability to effectively participate in the decision making process that affected them. In *Refugee Legal Centre* this was a system which compressed decision making on asylum applications into three days while in *Tabbakh*, individuals were precluded from attending meetings in which decisions were made concerning the imposition of additional licence conditions.

22. Ms Kaufmann's primary contention is that removing the seven categories of case outlined above entirely from the scope of criminal legal aid renders the system inherently unfair because, in some circumstances, the prisoners affected by these types of decisions will only be able to effectively participate in the decision making process if they are legally represented. This is said to be the combined consequence of the nature of the prison population, which includes some of the most vulnerable members of society and where those with mental health and learning difficulties are significantly over-represented, and the fact that prisoners live in a closed world which significantly inhibits their ability to access outside sources of free advice.

23. Furthermore, Ms Kaufmann submitted that the system does not have the required flexibility to accommodate those cases in which fairness demands legal representation. This is, first, because the system established under the Regulations removes these categories of case from scope in their entirety and there is no equivalent provision to that found in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which, in the context of civil legal aid, provides (in s. 10) for exceptional grants of legal aid where failure to do so would be in breach of an individual's Convention rights. Secondly, it is submitted that the internal review processes which exist, and on which the Lord Chancellor relies in justifying the removal of legal aid in these areas, namely the prisoner complaints system and the Prisons and Probation Ombudsman ("PPO"), cannot remedy the unfairness. It is said that the review procedures are hampered by the same unfairness and if a prisoner cannot effectively put his case before the original decision maker without legal assistance, he will no more be able to do so on review.

24. Mr Eadie on the other hand argued that the system does have sufficient flexibility so as to ensure fairness in the run of cases. Flexibility does not require exceptional legal aid funding and, in relation to the Parole Board, the inquisitorial nature of the hearing means that the Board itself plays an integral role in ensuring fairness and a proper investigation of all relevant issues. In short, therefore, there is no inherent unfairness: it is not enough to be able to say there is a risk of individual cases going wrong. In any event, the existing mechanisms are sufficient to ensure that the system is capable of delivering a fair outcome in every case.

25. On the face of it, based on the present material, I am prepared to accept that there could be a significant number of individuals subject to these types of decisions for whom it may be very difficult to participate effectively without support from someone. It is arguable, therefore, that without the potential for access to appropriate assistance, the system could carry an unacceptable risk of unfair, and therefore unlawful, decision making. The question of inherent unfairness concerns not simply the structure of the system which may be capable of operating fairly, but whether there are mechanisms in place to accommodate the arguably higher risk of unfair decisions for those with mental health, learning or other difficulties which effectively deprive them of the ability effectively to participate in, at least, some of the decisions to which Ms Kaufmann refers. Such mechanisms may not necessarily include access to a lawyer (or legal aid), but the question will necessarily require a more detailed examination of the support that will be available in practice. No doubt for that reason, both sides have indicated that should leave be granted, they intend to file further evidence.

26. In light of the importance of the issues at stake and the evaluative nature of the question of inherent unfairness, for my part, I do not agree that this point is unarguable although I have deliberately set out what I perceive to be the parameters of the potential debate at some length in order to contain the argument that is yet to take place. For these reasons, I would grant leave to apply for judicial review on this ground, limited as I have described.

27. Having regard to the circumstances, pursuant to CPR Part 52.15(4), I consider that the most convenient and cost effective course would be to retain the hearing of the application and to determine it in the Court of Appeal: whether this constitution can be retained to determine the substantive application is a matter that can be considered. Subject to the views of the other members of the court, the parties should agree appropriate directions; in any event, I am prepared to retain case management decisions should difficulties arise.

Lord Justice Tomlinson :

28. I agree.

Lady Justice Sharp :

29. I also agree.