

First hurdle

Shabina Begum highlights a recent challenge to the gateway requirements for legal aid in domestic abuse cases



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As from 1 April 2013 civil legal aid is primarily governed by Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA 2012). Civil legal services have been preserved for some family matters such as non-molestation orders, occupation orders, forced marriage protection orders and child abduction cases. A key change introduced by LASPOA 2012 was that survivors or potential victims of domestic violence no longer automatically qualify for legal aid in family matters in relation to children: they must provide specific evidence in relation to the domestic violence or child protection issue.

Sch 1, para 12, LASPOA 2012, entitled 'Victims of domestic violence and family matters', makes provision for:

- (1) Civil legal services provided to an adult ('A') in relation to a matter arising out of a family relationship between A and another individual ('B') where –
 - (a) there has been, or is a risk of, domestic violence between A and B, and
 - (b) A was, or is at risk of being, the victim of that domestic violence.

Domestic violence is defined in Sch 1, para 12(9), LASPOA 2012 as (emphasis added):

... any incident, or pattern of incidents, of controlling, coercive or threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other.

This definition was amended to add the words in italics to bring it into line with the UK cross-governmental definition of domestic violence, adopted following a programme of action against violence against women by the Home Secretary and in the light of the judgment of Lady Hale (with whom Lord Hope and Lord Walker agreed) in *Yemshaw v London Borough of Hounslow* [2011] (at para 36). The revised definition is consistent with the approach adopted under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), as ratified by the UK and applied by the European Court of Human Rights (see *Opuz v Turkey* [2009]).

Evidence requirements

Regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012 (CLA(P)R 2012), which came into force on 1 April 2013, sets out a list of the evidence required. This list was reviewed and an amended list came into force on 22 April 2014.

A potential client must produce at least one piece of evidence on the list in order to satisfy the domestic violence gateway criteria. On doing so the client will be eligible for legal aid for private family matters; without this evidence they will be outside the scope of legal aid. See box on p23 for a list of the different types of evidence that may satisfy the criteria.

The 24-month barrier

In March 2015 the Justice Select Committee found that more than a third of victims of domestic violence cannot provide the evidence required to obtain legal aid. It appears that a regulation intended to provide refined

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Evidence required for an application for legal aid in domestic abuse cases

CLA(P)R 2012 specifies the following as acceptable evidence:

- a relevant unspent conviction for a domestic violence offence;
- a relevant police caution for a domestic violence offence;
- evidence of relevant criminal proceedings for a domestic violence offence that have not concluded;
- a relevant protective injunction which is in force or was granted within the 24-month period immediately preceding the date of the application;
- an undertaking given in England and Wales under ss46 or 63E of the Family Law Act 1996 (or given in Scotland or Northern Ireland in place of a protective injunction);
- evidence that the alleged perpetrator is on relevant police bail for a domestic violence offence;
- a letter from any person who is a member of a multi-agency risk assessment conference confirming that the victim was referred to the conference as a victim of domestic violence;
- a copy of a finding of fact, made in proceedings in the UK, confirming that there has been domestic violence by the alleged perpetrator, giving rise to a risk of harm to the victim;
- a letter or report from a health professional who has access to the medical records of the victim, confirming that a health professional has examined the victim and was satisfied following that examination that the victim had injuries or a condition consistent with that of a victim of domestic violence;
- a letter from social services confirming that the victim was assessed as being, or being at risk of becoming, a victim of domestic violence by the perpetrator (or a copy of that assessment);
- a letter or report from a domestic violence support organisation in the UK confirming that the victim was either in a refuge or has been admitted into a refuge due to either being a victim or being at risk of becoming a victim of domestic violence by the alleged perpetrator;
- a letter or report from a domestic violence support organisation in the UK confirming that the victim was refused entry to a refuge;
- a letter or report from a health professional confirming that the victim was referred to a person who provides specialist support or assistance for victims of, or those at risk of, domestic violence; or
- a relevant domestic violence protection notice (within the meaning of s24, Crime and Security Act 2010 (CSA 2010)) or a relevant domestic violence protection order (within the meaning of s27, CSA 2010) granted against the perpetrator.

Notably, save in relation to a relevant unspent conviction for a domestic violence offence or ongoing criminal proceedings, all gateway evidence must relate to the 24-month period immediately preceding the date of the application for civil legal services.

evidential gateways to survivors or potential victims of domestic violence has in fact turned into a barrier to justice, where family lawyers are unwittingly the gatekeepers.

In *R (on the application of Rights of Women) v The Lord Chancellor And Secretary of State for Justice* [2015] Lang J described the situation as follows (at para 38):

Typically, victims are excluded in circumstances where serious domestic violence led to a complete breakdown of the relationship, and then, more than 24 months later, there is an application by the perpetrator of the violence for

contact with a child of the family, or ongoing contact arrangements break down. By the date of application for legal aid, their evidence of domestic violence is older than 24 months, but they remain fearful of their former partner.

The gateway evidence requirements are prejudicial against potential clients who may be too scared to face the perpetrator during the course of legal proceedings, but are unable to pay legal fees and do not qualify for legal aid as their evidence does not meet the 24-month threshold. The other obvious blind spot is that the gateway evidence requirement overlooks those

victims who are arguably perhaps the most vulnerable, ie they will never qualify for legal aid as they do not report the violence, as their actions may be constantly monitored by the perpetrator, or they may not speak English.

Challenging the requirements

Action was taken by the Public Law Project, on behalf of the campaign group Rights of Women, to challenge the lawfulness of the government's changes to legal aid for domestic violence victims in *R (Rights of Women)*. The claim was brought on the basis that, *inter alia*:

Further reading

'A Call to End Violence against Women and Girls: Strategic Vision', Home Office, 25 November 2010.

'A Call to End Violence against Women and Girls: Action Plan', Home Office, 8 March 2011.

'Cross-Government Definition of Domestic Violence – A Consultation: Summary of Responses', Home Office, September 2012.

- Regulation 33 is *ultra vires* of s12(2), LASPOA 2012 as that section only empowers the Lord Chancellor to 'make provision for the making and withdrawing of determinations' under s9, LASPOA 2012, which sets out the criteria for eligibility (by reference to Sch 1, para 12, LASPOA 2012); and
- from the types of provision listed in s12(3), LASPOA 2012 it is apparent that the Regulations are intended to be procedural in nature; however, Reg 33 imposes inflexible evidential requirements that go beyond the eligibility criteria and have the effect of wrongly excluding applicants from the scope of legal aid.

In support of these submissions, reference was made to the following features of Reg 33:

- the time limit of 24 months is absolute without any discretion to waive this requirement;
- although it is theoretically possible for victims of emotional or psychological abuse to obtain the required evidence, in reality it is exceptionally unlikely, and financial abuse and controlling/coercive behaviour are not provided for at all in the Regulation;
- it will be virtually impossible in practice for those who are at risk of domestic violence, but have not yet suffered it, to obtain the required evidence;
- only evidence that has come to the attention of the courts or statutory agencies can be relied upon; and
- there is no residual discretion on the part of the Legal Aid Agency (LAA)

to accept evidence that does not meet the prescribed conditions.

The court concluded that:

- the Lord Chancellor's actions in seeking to ensure that the domestic violence exception was strictly confined to its intended scope and not exploited as a route to obtaining legal aid for family law proceedings (which had been taken out of scope for most people) were consistent with the statutory purpose of reducing the scope of legal aid and removing it from private family law proceedings;
- despite the justifiable criticisms of Reg 33 of the CLA(P)R 2012, the Lord Chancellor's chosen method of establishing eligibility had not been an exercise of discretion that had gone so far as to thwart or frustrate the purpose of LASPOA 2012 and had been a legitimate means of giving effect to the intention to take family law proceedings outside the scope of legal aid, while preserving legal aid for the exceptional category of victims of domestic violence in need of protection in family law proceedings; and
- an applicant who is refused legal aid is not denied access to justice, as there is no restriction on their right to obtain legal advice or participate in legal proceedings, with or without representation.

An application has been made for permission to appeal to the Court of Appeal.

Requesting evidence

Family law practitioners need to continue to assess whether potential clients have the required gateway evidence in order to be eligible for

legal aid in private family matters. The LAA has devised template letters that are useful tools when contacting the following agencies:

- the courts;
- the police;
- a multi-agency risk assessment conference;
- social services;
- a health professional, eg a doctor, nurse, midwife, psychologist or health visitor;
- a refuge manager; or
- a domestic violence support service.

See www.legalease.co.uk/sample-letters.

Conclusion

The gateway evidence requirement initially seemed to be a positive initiative on the government's part, as it was intended to be a practical way of validating the 'real' cases of domestic violence. However, in reality the gateway requirement is more of a barrier to accessing justice.

Unfortunately the requirements for gateway evidence do not take into account practical implications during proceedings, or that the current system may be used by perpetrators as a tool for further victimisation.

One of the recommendations made by the select committee is to introduce an additional 'catch-all' clause, addressing the stringent nature of the 24-month requirement and allowing for a more relaxed case-by-case approach. This would give the LAA discretion to grant legal aid to any victim of domestic violence who does not fit within the current criteria. However only time will tell whether the approach is steered towards this direction. ■

Opuz v Turkey – 33401/02
[2009] ECHR 870

R (on the application of Rights of Women) v The Lord Chancellor And Secretary of State for Justice
[2015] EWHC 35 (Admin)

Yemshaw v London Borough of Hounslow
[2011] UKSC 3