Witness: Giles Peaker
Party: Claimant
Statement: first
Date: 9/6/2014

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

B E T W E E N

THE QUEEN
(on the application of
1. Ben Hoare Bell Solicitors
- and –
2. Deighton Pierce Glynn Solicitors
- and –
3. Public Law Solicitors
- and –
4. Mackintosh Law
- and –
5. Shelter)

Claimants

- and –

THE LORD CHANCELLOR

Defendants

WITNESS STATEMENT OF GILES PEAKER

I, Giles Peaker, Partner, at Anthony Gold Solicitors, of 169 Walworth Road, London SE17 1RW, will say as follows:

Introduction

1. I make this statement in support of the Claimants' application for judicial review.

2. I am a partner and solicitor in the Housing and Public Law department of Anthony Gold Solicitors and the current chair of the Housing Law Practitioners Association.

3. Anthony Gold have a well-known housing law practice and have had a legal aid contract for housing for many years.

4. I am gravely concerned that the Regulations will have a serious impact on the ability of legal aid housing practices to act in judicial review claims in general, and particularly those on behalf of clients who are highly vulnerable, for example those who are affected by imminent or actual street homelessness. .

Impact of Regulations on the Firm

5. In this statement I focus on homelessness because this is the type of publicly funded judicial review work typically carried out by Anthony Gold. For example, judicial review of a Local Authority's failure to, or refusal to accept a homeless application under Part VII Housing Act 1996 ("gatekeeping"), or an unlawful refusal to exercise a discretion to provide temporary accommodation pending a section 202 review of a decision as to duty under section 184 Housing Act 1996. Other kinds of judicial review carried out by the firm have addressed failure to provide accommodation under section 17 and section 20 Children Act 1989; failure to continue to provide temporary accommodation for a reasonable period after a decision finding intentional homelessness, and failure to provide homeless applicants with a 'reasonable preference' in allocation schemes. The firm previously brought judicial reviews of the operation of allocation policy in a number of areas, but this is now out of scope for legal aid under LASPOA and problems with the practical operation of the exceptional funding scheme mean that there is no longer any reasonably accessible funding route under which we might seek to bring such challenges.

6. The most common form of judicial review work taken on by the firm is "gatekeeping" by Local Authorities, and unreasonable failure to provide temporary accommodation pending review of section 184 decision. In both such types of case, the client is facing immediate or threatened street homelessness. It is very typically the case that the clients affected by such problems are disadvantaged in more than one respect; they will often be subject to mental and/or physical ill heath in addition to and low levels of education, and poverty. In the very large majority of cases, such claims settle at a very early stage by the Local Authority accepting the client's homeless application, or agreeing to provide interim accommodation. Typically, this will occur very shortly after issue of the claim and before grant of permission. Very often, the Local Authority will propose to accept the client's application or provide accommodation on the basis that the claim is ended with no order as to costs. The interests of the client make it extremely difficult to resist such a proposal.

7. These types of case will in future be caught by the operation of the Regulations. I am therefore concerned that the type of judicial review claim most commonly brought by Anthony Gold, and I believe many other housing law legal aid firms and not for profit organisations, will face the significant risk of there being no legal aid funding for the claim post issue, regardless of the clear merits of the case.

8. It is not always practical or realistic for legal aid practitioners to insist that settlement of such cases will be on the basis that the Defendant pay costs or that the Administrative Court will determine costs, even if current caselaw suggests that the costs burden in such circumstances should very plainly rest with the Defendant. In particular,it is unlikely that the Local Authorities would agree to settle on those terms, being well aware that the Claimant's solicitors will have the client's interests as their primary concern. Local Authorities are highly unlikely to alter their position in view of the impact of the Regulations

9. There is therefore a very significant risk in such claims that many cases would not result in post issue payment of costs for the Claimant's solicitors, even in matters with very clear merits. Given the level of fixed fee for the Pre-Action stage under the Legal Help scheme, this would effectively mean such types of case would result in a loss for the firm with even a small amount of post issue work being involved. For the majority of legal aid practices, which are already operating on extremely tight margins, such losses would be unsustainable. But even where the losses could theoretically be sustained, practices are unlikely to be willing to take on matters which have a significant risk of being loss making. I and this firm will inevitably have to seriously consider whether such claims can be taken on, or at the least whether we would have to reduce the numbers of such cases taken on. The cases that will involve the highest risk will not always be those cases where there is uncertainty about merits. In a homelessness practice like ours, those claims that will involve the greatest levels of risk (ie that will require the most work to be undertaken at risk of non-payment) are likely to be those cases where an individual is particularly vulnerable (and may indeed have protected characteristics). It is a practical reality that acting for clients with mental disabilities or language barriers, for example, takes longer than acting for clients who can give clear and succinct instructions in English.

10. The availability of a discretion to pay pre permission costs by the Legal Aid Agency ("LAA") where the matter has settled with no order as to costs is not, in my view, an adequate remedy for this position. It does not address the issue of principle that providers should not be at risk where legal aid is properly justified. The requirements for submissions to request the exercise of the discretion are substantial and time consuming, accruing further costs to the firm with no certainty of outcome and no recovery of the time spent on the submissions. It is entirely possible that the unpaid time spent on preparing submissions and potentially seeking a review of the decision

(it is the general experience of practitioners that the LAA tendency is to exercise any discretion restrictively) would outweigh the potential costs payment that may be made in any event, with the additional uncertainty as to whether the discretion would be exercised. The result would still be a loss for the firm.

11. In addition, given the typical outcome of the kind of claim discussed above, there is a clear risk that the LAA will consider that the provider should have pursued a costs only claim, rather than settling. My experience of the LAA decision making in relation to applications for funding or amending funding in other matters leads me to believe that the LAA makes decisions on the theoretical possibility of costs being sought, rather than the practical position, taking into consideration both the client's immediate interests and the Administrative Court's stated wish not to see matters proceed on a costs only basis.

12. My view is that the theoretical availability of the LAA discretion will not be a significant factor in my assessment of the potential costs risk to the firm of bringing the kind of claim discussed above.

Conclusion

13. The Regulations have caused me to very seriously consider whether I and my firm can continue to take on the types of judicial review matters which formed the majority of our publicly funded judicial review claims. These are typically the most urgent and with the most vulnerable clients, but also the most likely to settle pre-permission. If we do continue to take on such matters, there will certainly be a reduction in the number of such cases we would be prepared to act in, and the types of cases in which we act. I am gravely concerned that publicly funded housing law practices will have to make similar decisions, given the extremely significant risk that such matters will be loss making, no matter how clear the merits of the claim.

Witness: Giles Peaker
Party: Claimant
Statement: first
Date: 09/06/2014

Statement of Truth

I, GILES PEAKER, believe that the facts stated in this statement are true.

Signed: .....

Dated: .....09/06/2014.....