The Queen (on the application of Minton Morrill Solicitors) v The Lord Chancellor

Case No: CO/2313/2016

High Court of Justice Queen's Bench Division Administrative Court in Leeds

24 March 2017

[2017] EWHC 612 (Admin)

2017 WL 01084435

Before: Mr Justice Kerr

Date: 24/03/2017

Hearing date: 26 January 2017

Representation

Mr Alex Offer (instructed by Minton Morrill Solicitors) for the Claimant.

Mr David Lowe (instructed by Government Legal Department) for the Defendant.

Judgment Approved

Mr Justice Kerr:

Introduction

1 In this case I have to decide whether the Legal Aid Agency was right to refuse to allow payments claimed by the claimant solicitors for work done on certain applications to the European Court of Human Rights (ECtHR). That depends on whether the applicable legislation excluded funding for work done on such applications. The claimant submitted claims for work done on two such applications. Both were turned down.

2 The claims were refused in late 2015 and early 2016. An appeal in the first case failed in early 2016. An appeal in the second case is still outstanding. The claimant seeks orders quashing those decisions and a declaration that legal aid for applications to the ECtHR at Strasbourg is available under the Access to Justice Act 1999 (the 1999 Act) and its successor, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

3 The defendant, the Lord Chancellor, submits that the two statutes do not permit legal aid funding for work done on applications to the ECtHR because the work is a service "relating to… law other than that of England and Wales…"; and because the law applicable to claims in the ECtHR is not "relevant for determining any issue relating to the law of England and Wales". Those words are taken from section 19(1) of the 1999 Act, and are almost the same as the relevant words appearing in section 32 of LASPO, which (it is agreed) bear the same meaning.

4 I therefore have to decide whether preparing claims brought in the ECtHR is a service "relating to" the law of England and Wales; and if not, whether the law applicable to such claims is "relevant for determining" an issue of English or Welsh law. If I refer below to the law of England, I do so purely for brevity, without any disrespect and without thereby excluding the law of Wales.

5 The claimant used to be called Lester Morrill Solicitors. Now it is called Minton Morrill Solicitors. A consent order was made in this case permitting the change of name.

The Facts

6 The first claim relates to "JL", as I shall call her following an anonymity order made in domestic proceedings before she applied to the ECtHR. She made a claim in the High Court in 2009, challenging possession proceedings against her. When it failed, she appealed unsuccessfully to the Court of Appeal, which refused permission on the papers in September 2009 and at a hearing in January 2010.

7 JL was granted "legal help" in October 2010 in the matter. The applicable statute was then the 1999 Act. LASPO had not yet been enacted, nor entered into force. Aided by the claimant, she filed an application to the ECtHR in November 2010. She asserted that the possession proceedings against her and the grant of a possession order made against her, violated her rights under articles 8 and 14 of, and article 1 of the first protocol to, the European Convention on Human Rights and Fundamental Freedoms (the Convention, or the European Convention).

8 In September 2014, the application was declared inadmissible. No order in respect of costs was (or could be) made by the ECtHR. The claimant claimed a little over £3,000 (including disbursements and VAT) for the work it had done on the application. The Legal Aid Agency (the Agency), acting on behalf of the Lord Chancellor, had by then taken over from the Legal Services Commission (from 1 April 2013, pursuant to section 38 of LASPO).

9 The Agency refused the claim on the ground that the funding had been sought only to apply to the ECtHR and the law applied there was not part of the law of England and Wales and not within the scope of section 19 of the 1999 Act. The claimant unsuccessfully appealed; first in October 2015 to an internal reviewer and then in January 2016 to an independent assessor, who upheld the refusal in a letter of 5 February 2016.

10 The second claim relates to a Ms Kathleen Slattery. She brought County Court proceedings in 2011, challenging a decision of a local authority that certain accommodation was "suitable" to meet her housing needs. The County Court dismissed her claim in December 2012. In July 2013, she was given permission to appeal on some but not all her grounds. Her appeal was heard in December 2013 and was dismissed.

11 Ms Slattery unsuccessfully applied to the Court of Appeal for permission to appeal to the Supreme Court. She did not have funding to apply to the Supreme Court for permission. She was granted legal help in January 2014, after section 32 of LASPO had entered into force, replacing section 19 of the 1999 Act.

12 Aided by the claimant, she made two applications to the ECtHR in May 2014, to preserve time limits. She is an Irish traveller and claimed that an offer of "bricks and mortar" accommodation, the decision that it was "suitable" and the lack of a remedy in the domestic courts, violated her rights under articles 8 , 13 and 14 of the Convention.

13 Both her applications were declared inadmissible in November 2014. Again represented by the claimant, she made a further application in February 2015, which has yet to be determined. The claimant claimed payment of nearly £6,800, plus disbursements of £134.40. By a letter of 21 January 2016, the Agency refused the claim for the same reasons as in the case of JL.

14 An internal appeal against that decision to another part of the Agency was, according to the claimant, brought in February 2016. The Agency has not found any record of the appeal and is looking for it. In any case, the outcome of the appeal may be influenced by the outcome of this application for judicial review. Meanwhile, after the usual pre-action correspondence, the present claim was issued on 4 May 2016.

15 It was brought on three grounds. Andrews J granted permission on two of them, which are before me for decision. The issues raised are of statutory construction, as already explained. She found unarguable a challenge founded on alleged incompatibility between the statutory regime and the obligations of the United Kingdom under the Convention. At an oral hearing, Blake J agreed.

The Statutory Provisions

16 Under the Legal Aid Act 1988 (the 1988 Act), a decade before the enactment of the Human Rights Act 1998 (the HRA), legal aid was available for "advice" and "assistance". Advice had to be "on the application of English law …". Assistance had to be for "steps a person might take, including steps with respect to proceedings, having regard to the application of English law to any particular circumstances …" (section 2(2) and (3)). Civil legal aid could be available for "such proceedings before courts or tribunals or at statutory enquiries in England and Wales" as specified elsewhere (section 14(1)).

17 There was no provision in the 1988 Act for legal aid to be available for an application to the ECtHR, though such applications were regularly made. An opinion on an issue of foreign law relevant in legally aided English domestic proceedings, like any expert opinion, could be obtained if allowed as a disbursement under section 10(3) , which made provision in respect of disbursements including counsel's fees.

18 I interpose here that the ECtHR, it is agreed, runs its own legal aid scheme. It includes means testing and does not allow financial support to be provided to an applicant unless and until her or his application has been declared admissible. It was therefore not available to either JL or Ms Slattery. If granted, it does not retrospectively cover pre-application work. Its existence contributed substantially to the refusal of permission to rely on the third proposed ground of challenge.

19 The 1999 Act replaced the 1988 Act from 1 April 2000, until the advent of LASPO from 1 April 2013. Under the 1999 Act, the Legal Services Commission (the Commission) administered legal aid of various kinds and could determine which cases to fund, subject to exceptions. Certain forms of domestic proceedings were excluded from the scope of legal aid, unless the Lord Chancellor authorised it in a particular case. Funding could normally be provided only to individuals who qualified on the basis of limited means.

20 Section 19 of the 1999 Act bore the heading "Foreign law", and provided (from 2006 until 31 March 2013):

> (1) The Commission may not fund as part of the Community Legal Service or Criminal Defence Service services relating to any law other than that of England and Wales, unless any such law is relevant for determining any issue relating to the law of England and Wales.
>
> (2) But the Lord Chancellor may, if it appears to him necessary to do so for the purpose of fulfilling any obligation imposed on the United Kingdom by any international agreement, by order specify that there may be funded as part of the Community Legal Service or Criminal Defence Service (or both) services relating to the application of such other law as may be specified in the order.

21 From 1 April 2013, the provisions in the 1999 Act were replaced by those in Part 1 of LASPO. Mr Lowe, for the Lord Chancellor, described the new scheme as "prescriptive rather than permissive". Civil legal services of particular types could be funded, conditioned by means and merits tests, and subject to exceptional funding being necessary or appropriate to avoid a breach or risk of breach of a person's Convention rights or enforceable rights under EU law.

22 As regards law other than that of England and Wales, section 32 of LASPO, again headed "Foreign law", provides:

> (1) The civil legal services described in Part 1 of Schedule 1 do not include services relating to any law other than the law of England and Wales, except—
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> (a) where express provision to the contrary is made by or under Part 1 of Schedule 1 ;
>
> (b) where such law is relevant for determining any issue relating to the law of

England and Wales;

(c) in other circumstances specified by the Lord Chancellor by order.

(2) A determination by the Director or a court under section 13 , 15 or 16 that an individual qualifies for advice, assistance or representation under this Part does not impose a duty on the Lord Chancellor to secure that services relating to any law other than the law of England and Wales are made available, except—

(a) where such law is relevant for determining any issue relating to the law of England and Wales;

(b) in other circumstances specified by the Lord Chancellor by order.

(3) The Lord Chancellor may not make an order under subsection (1) or (2) unless the Lord Chancellor considers—

(a) that it is necessary to make the order because failure to do so would result in a breach of—

(i) an individual's Convention rights (within the meaning of the Human Rights Act 1998), or

(ii) any rights of an individual to the provision of legal services that are enforceable EU rights, or

(b) that it is appropriate to make the order having regard to any risk that failure to do so would result in such a breach.

Ground 1: "services relating to… law other than that of England and Wales…"

23 Mr Offer, for the claimant, submitted that work done on applications to the ECtHR constitutes services relating to the law of England and Wales, and not services relating to other law than that of England and Wales. In support of his position, he made the following main arguments:

(1) The Convention articles relied on by JL and Ms Slattery in the domestic proceedings and in their applications to the ECtHR had all (except article 13 in the case of Ms Slattery) been incorporated into English law by the HRA (section 1 and schedule 1). Members of the House of Lords and Supreme Court had consistently described the rights they confer as "incorporated" into English law and "part of" English law. Those statements were not *obiter* or, if they were, should be followed.

(2) The Convention rights referred to in the HRA section 1(1)-(3) are "directly enforceable in this country as part of its domestic law" and are now "part of the domestic law of this country" (*Wilson v. First County Trust Ltd (No 2) [2004] 1 AC 816* , per Lord Nicholls at paragraph 10; see also Lord Hope at paragraph 90, Lord Hobhouse at paragraph 126 and Lord Rodger at paragraph 218; and *R (Keyu) v. Secretary of State for Foreign and Commonwealth Affairs [2016] AC 1355* , per Lord Neuberger PSC at paragraphs 64, 92, 98 and 120; and Lord Mance JSC at paragraph 152).

(3) The Inner House of the Court of Session had also recognised that the Convention rights referred to in the HRA were not merely "unincorporated treaty and convention provisions", but were "incorporated" into Scots law; (albeit that preparing an application to the ECtHR was not giving advice and assistance about "the application of Scots law"): see *Donaldson v. Scottish Legal Aid Board [2014] CSIH 31* , in the opinion of the court at paragraphs 22-23, 32–37, and 53; see also Lord Kerr JSC's analysis of the "dualist" conception of the

effect of international treaties in domestic law, in *R (SG) v. Secretary of State for Work and Pensions [2015] 1 WLR 1449* , at paragraphs 235-8.

(4) There is an exceptional power in section 10 of LASPO to fund civil legal services other than those normally eligible for support, where the Director of Legal Aid Casework determines that funding is necessary because failure to provide it would be a breach of a person's Convention rights or enforceable EU law rights, or that funding is appropriate because of the risk that failure to provide it would be such a breach. That means an application to the ECtHR must be capable of engaging an individual's Convention rights.

(5) In *Re McKerr [2004] 1 WLR 807* , Lord Nicholls (at paragraph 25) and Lord Hoffmann (at paragraphs 62-65) were wrong to say that the Convention rights created by the Convention, and existing as international law rights before the HRA was enacted, do not form part of English law and are distinct from the Convention rights created in domestic law by the HRA . That analysis should be regarded as overtaken by the Supreme Court's reconsideration of *Re McKerr* in *Re McCaughey [2012] 1 AC 725* (see Lord Dyson JSC's remarks at paragraphs 135-6), and by Lord Neuberger PSC's observations in *Keyu* (in which *Re McKerr* and *Re McCaughey* were considered) at paragraphs 64 and 92-98.

(6) In oral argument, Mr Offer added that the decision of the Supreme Court in *R (Miller) v. Secretary of State for Exiting the European Union [2017] 2 WLR 583* (in which judgment was given two days before the hearing before me) supported the view that Lord Hoffmann's analysis was incorrect. Mr Offer drew my attention to the treatment of EU law rights in domestic law by Lord Neuberger PSC, at paragraph 65:

> "In our view, then, although the 1972 Act [the European Communities Act 1972] gives effect to EU law, it is not itself the originating source of that law. It is, as was said on behalf of the Secretary of State echoing the illuminating analysis of Professor Finnis, the 'conduit pipe' by which EU law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute EU law an independent and overriding source of domestic law."

(7) Mr Offer invited me to conclude that the HRA similarly provided a "conduit pipe" through which the law of the Convention applied by the ECtHR had been transposed into the domestic law of England and Wales.

24 Mr Lowe, for the Lord Chancellor, submitted that solicitors who prepare applications to the ECtHR are not providing services relating to the law of England and Wales, but relating to the autonomous law of the Convention applied by the ECtHR. He made the following main points in support of the Lord Chancellor's position:

(1) The correct analysis is that of Lord Clyde in *R. v. Lambert [2002] 2 AC 545* , at paragraph 135 ("[i]n approaching the problem of the retrospectivity of the 1998 Act it is to be remembered …. that the Act did not incorporate the rights set out in the Convention into the domestic laws of the United Kingdom"); and of Lord Hoffmann, first in *R. v. Lyons [2003] 1 AC 976* , at paragraph 27, and repeated with increased emphasis in *Re McKerr* at paragraph 63.

(2) To speak of the HRA as having "incorporated" the Convention rights is (in Lord Hoffmann's phrase) a "misleading metaphor"; the HRA had not altered the principle that international treaties are not self-executing in our domestic law:

> "[w]hat the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights.

Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state" (*Re McKerr* , per Lord Hoffmann at paragraph 63).

(3) That analysis is unaffected by what Lord Neuberger PSC said in *Keyu* ; and it demonstrates that the various *obiter* uses of the word "incorporated" found in the judgments relied on by the claimant are no more than a loose and inaccurate way of expressing the manner in which the HRA functions, as correctly described by Lord Hoffmann and Lord Clyde.

(4) But even if it were linguistically accurate to describe the HRA as having "incorporated" into domestic law the Convention rights referred to in it, it would not follow that the law applied in the ECtHR is that of England and Wales. The ECtHR applies the law of the Convention, not that of England and Wales. The two legal systems are separate.

(5) Thus, the Convention regime in domestic law is only available to the extent provided for in the HRA , against public authorities, as defined, in the performance of functions that engage Convention rights. The domestic courts are not bound by decisions of the ECtHR, though they must take them into account. Domestic courts must apply domestic legislation even if it is incompatible with the obligations of the United Kingdom under the Convention (when it cannot be read down under section 3 to prevent the incompatibility).

(6) The ECtHR, by contrast, adjudicates on claims against contracting states including the United Kingdom. The decisions of the ECtHR affect our domestic law only indirectly; the Strasbourg court does not in any real sense apply or interpret the law of England and Wales. It does not sit as a court of appeal against domestic judgments in cases founded on the Convention rights in the HRA . The law of the Convention which it applies existed long before the HRA and the latter Act did not alter that body of law.

(7) As to the supposed analogy with EU law rights in domestic law, and the claimant's reliance on the decision of the Supreme Court in the *Miller* case, Mr Lowe said the difficulty with the analogy is that in the case of the HRA there is "nothing coming down the conduit pipe". Whereas the European Communities Act 1972 uniquely creates a source of law enacted outside this country but forming part of our domestic law without the need for further domestic legislation, the same cannot be said of the HRA , which merely replicated in domestic law the language of certain articles of the European Convention .

(8) Although the point is not relevant to where the boundary lies between domestic and international law, the Lord Chancellor does not accept that the regime in section 10 of LASPO would ever require funding of an application to the ECtHR to avoid breach of (or the risk of breach of) a Convention right. She accepts only that if, contrary to her position, funding of an application to the ECtHR were necessary to avoid such a breach, or appropriate so as to avoid the risk of such a breach, the power in section 10 of LASPO is there and would allow such funding.

25 In my judgment, the Lord Chancellor's submissions on this issue are correct. I am in no doubt about the correctness of the statement of Lord Clyde at paragraph 135 in *R. v. Lambert* , and the more detailed explanation of the position in Lord Hoffmann's speech in *R. v. Lyons* , reiterated the following year in *Re McKerr* .

26 None of the other distinguished judges of the House of Lords and the Supreme Court who made use of the verb "incorporate" to describe the operation of the HRA , said that Lords Clyde and Hoffmann's views were wrong. That linguistic usage does not provide a foundation for any suggestion that the HRA directly gives the force of law in England and Wales to the autonomous

law of the European Convention , nor that the HRA has altered the principle that treaties are not self-executing under our domestic law.

27 The judges who have spoken of the HRA *incorporating* into our domestic law the Convention rights referred to in it, used that language, in my judgment, as no more than a convenient shorthand to describe the enactment in domestic law of rights expressed in words that mirror those of the articles of the European Convention that are referred to in section 1 of the HRA and reproduced in schedule 1 to that Act.

28 The fact that the domestic law Convention rights are expressed in the same words as those that appear in the articles of the Convention which are reproduced in schedule 1 , does not mean that the content of the domestic Convention rights enacted by the HRA is necessarily identical to the content of the rights expressed in the same words as applied by the ECtHR.

29 Thus, to adapt Mr Offer's phrase used during oral argument, article 8 does not necessarily mean the same thing in Leeds as it means in Strasbourg. Indeed, the line of cases culminating in *Manchester City Council v. Pinnock [2011] 2 AC 104* (of which more below) demonstrates that for a time, article 8 had very different meanings in Leeds and Strasbourg, in the context of possession proceedings.

30 Domestic courts here may decide not to follow decisions of the Strasbourg court, though they will of course not lightly depart from them. They may even be required not to follow a decision of the ECtHR because of a higher domestic authority binding on the court, be it statute, i.e. domestic legislation equal in standing to the HRA (and incapable of being read down to achieve conformity with the content of a relevant Convention right under the law applied by the ECtHR), or a binding decision of a higher domestic court which is not consistent with the jurisprudence emanating from Strasbourg.

31 In my judgment, the analogy with EU law and the comments on its nature made by Lord Neuberger in *Miller* , do not take the present debate any further. The nature of EU law rights in our domestic law is completely different from that of Convention rights in the domestic law of England and Wales. The former are part of domestic law because of a statutory cession of sovereignty to a source of law outside the United Kingdom. The HRA , by contrast, is a domestic statute that does not cede any ground to an external legislature.

32 Thus, future changes to the articles of the European Convention would not, without fresh legislation, be replicated in domestic law. But future changes to EU law rights (if directly effective, and until the repeal of the 1972 Act) would without more become part of English domestic law.

33 For those reasons, which (though expressed in different words) are essentially the same as those advanced by Mr Lowe, I conclude without difficulty that solicitors who prepare applications to the ECtHR do not thereby provide services relating to the law of England and Wales; rather, they provide services relating to the autonomous law of the Convention applied by the ECtHR.

Ground 2: "… unless any such law is relevant for determining any issue relating to the law of England and Wales"

34 It follows that the second issue also arises: whether the law administered and applied by the ECtHR is relevant for determining any issue relating to the law of England and Wales. On that issue, Mr Offer submitted as follows for the claimant:

> (1) He submitted that there is an "air of unreality" about the Lord Chancellor's submissions. It is obvious that the law of the ECtHR is relevant to courts in England and Wales deciding human rights cases, applying domestic law. The contrary suggestion from the Lord Chancellor defies common sense, he suggested.
>
> (2) Thus, Mr Offer pointed out, in an article 8 case in this country, the issue is the same as it would be in a claim brought before the Strasbourg court alleging a violation of article 8 as against the United Kingdom. In both cases, the issue is whether article 8 has been violated. To decide that issue in domestic proceedings, a domestic court must equip itself with the ECtHR jurisprudence which is, therefore, relevant for determining the domestic article 8 issue.

(3) This is demonstrated beyond doubt by, in particular, *Manchester City Council v. Pinnock* (cited above), in which the Supreme Court adjusted its approach to the effect of article 8 on claims to recover possession of rented property, departing from House of Lords decisions in three previous cases (*Harrow LBC v. Qazi [2004] 1 AC 983* , *Kay v. Lambeth LBC [2006] 2 AC 465* and Doherty v. Birmingham City Council [2009] AC 367) in the light of supervening jurisprudence emanating from the ECtHR.

(4) The relevance of the law of the ECtHR for determining issues of English law is also, Mr Offer submitted, established by the obligation on a domestic court in English law to "take into account", though not necessarily to follow, any decision of the ECtHR; see section 2(1) of the HRA and the explanation of the court's section 2(1) obligation given by Lord Neuberger in *Pinnock* at paragraphs 48-9.

(5) The differences in the process followed in domestic human rights cases and applications to the ECtHR, do not undermine or negate the relevance of the law applied, in the latter cases, to the determination of issues arising in the former cases. The law of the ECtHR, applied and developed in that court, is undeniably relevant not just to the case in which an application is made to the ECtHR, but also more broadly to the future development of domestic human rights law in this country.

(6) The explanatory notes accompanying the 1999 Act and subsequently LASPO, relied on by the Lord Chancellor, do not assist her; they merely restate the provisions without elucidating their meaning further, or altering what is obviously their plain meaning.

(7) The Hansard materials also relied upon by the Lord Chancellor, do not assist her either, for they do not meet the Pepper v. Hart requirements. Mr Offer reminded me of the need for court to exercise caution before being willing to travel outside the four corners of the statute itself and look at extraneous materials for the purpose of interpreting it (as explained in *R. v. Secretary of State for the Environment, Transport and the Regions ex p. Spath Holme Ltd [2001] 2 AC 349* , per Lord Bingham at 391–2, and Lord Nicholls at 397–9).

(8) He submitted that in the present case, there is no sufficient ambiguity or absurdity arising from the claimant's construction of the statutory provisions; even if there were, the statements of the Lord Chancellor in the House of Lords relied upon do not resolve the issue of construction; they address a different point altogether – that of foreign law as a question of fact relevant in English law proceedings – and not the present issue concerning proceedings before the Strasbourg court.

35 Mr Lowe's answer to those submissions was essentially as follows:

(1) He relied on the use of the present tense of the verb "is" in the phrase "unless any such law *is* relevant for determining any issue relating to the law of England and Wales". As pointed out during the oral hearing, an application to the ECtHR cannot be made until domestic remedies have been exhausted. A solicitor therefore cannot provide services preparing an application to the ECtHR until the domestic case is over.

(2) Until domestic remedies have been exhausted, argued Mr Lowe, any law the ECtHR might apply in a subsequent application against the United Kingdom is not relevant to the case during its passage through the domestic courts. Similarly, once the domestic case is over and remedies in this country exhausted, the law of the ECtHR as applied to a subsequent claim against the United Kingdom, is incapable of affecting the outcome of the concluded domestic proceedings.

(3) At the most, therefore, an application to the ECtHR after the conclusion of domestic

proceedings which have been decided adversely to the applicant, may influence the future direction of travel of domestic human rights law, which is what happened in the cases leading up to the Supreme Court's decision in *Pinnock* (and as also shown by the reconsideration of *Re McKerr* in *Re McCaughey*). That is not enough to make ECtHR proceedings relevant for determining the issues in the (already finished) case for which legal aid funding is sought.

(4) In the present case, the explanatory notes accompanying both the 1999 Act and LASPO point clearly to the statutory purpose: that of limiting advice and assistance to "services only in relation to the law of England and Wales (except where foreign law is relevant to proceedings in England and Wales) …"; see the explanatory notes accompanying section 19 of the 1999 Act, paragraph 121. The equivalent note (paragraph 224) dealing with section 32 of LASPO states that civil legal services are restricted to "the law of England and Wales only, except where the Act specifies otherwise, where foreign law is relevant to proceedings in England and Wales …. ".

(5) Passages from Hansard during the passage of the Access to Justice Bill show that the correct construction of section 19 of the 1999 Act is the Lord Chancellor's and not the claimant's. The Pepper v. Hart criteria are satisfied. The claimant's construction is not clear and unambiguous. The statements in the House of Lords relied upon, emanated from the Lord Chancellor himself; and they resolve the ambiguity in favour of the Lord Chancellor's construction.

(6) Thus, after the Access to Justice Bill had been introduced in the House of Lords, the Lord Chancellor at committee stage on 26 January 1999 responded to a query from Lord Ackner about what was then clause 18 (which subsequently became section 19). Lord Ackner asked for clarification about how clause 18 operates. It then read:

"The Commission may not fund …. services relating to any law other than that of England and Wales".

(7) Lord Ackner cited the example of an extradition case and asked (with other Lords then chiming in with various other examples) whether there would not be cases "where it may well be necessary for foreign law to be gone into and be the subject matter of expert evidence?" The Lord Chancellor responded that it was:

"quite obvious that it was not intended to exclude from legal aid, whether civil or criminal, services in order to deal with foreign law when it is a fact in issue in English proceedings necessary to be determined in order to arise [sic] at a just outcome".

He undertook to look again at the clause to make sure it would be effective to achieve that end.

(8) Having done so, at report stage on 16 February 1999, he moved an amendment to the then clause 18, so as to add to the end of it the qualifying words which became the concluding words of section 19(1) : "unless any such law is relevant for determining any issue relating to the law of England and Wales".

(9) He went on to explain that the amendment was "designed to ensure that the wording of Clause 18 does not prevent the legal services commission from providing help … where there are factual issues of foreign law which arise in proceedings in England and Wales". He referred back to the litany of examples that had been given, and commented that he believed the amendment "provides for those and similar situations, where we would wish to provide help".

36 I come to my reasoning and conclusions on this second issue. If the language of the provision alone is considered, without reference to the context in which it falls to be construed, I would find that the claimant's interpretation of the words of the provision are a more natural reading of the words used than the construction advocated by the Lord Chancellor. The words of the provision are wide.

37 Thus, one may begin by asking the question in the abstract: is the law applied by the ECtHR relevant for determining any issue relating to the law of England and Wales? In a domestic human rights case the answer, in a purely linguistic sense, would be yes. The law of the European Convention is obviously relevant for determining the content of the domestic Convention rights created by the HRA .

38 This is so for all the reasons Mr Offer gave: domestic human rights law is inspired, shaped and influenced by the decisions of the Strasbourg court. Those decisions must be taken into account in domestic human rights cases. An argument that ECtHR decisions are not relevant to judges deciding domestic cases about the scope of the same articles of the Convention would be unsustainable.

39 The explanatory notes accompanying the two provisions in issue in this case do not, in my judgment, assist in displacing that preliminary and provisional view. Mr Offer is right, in my opinion, to submit that they do no more than restate and paraphrase the provisions themselves. They refer to legal help being limited to "services … in relation to the law of England and Wales", except where "foreign law" is relevant to proceedings in England and Wales.

40 The explanatory notes are admissible only to help elucidate the purpose of the enactment, not to determine its meaning. The notes clarify the statutory purpose but not how far the provisions extend in giving effect to that purpose. The statutory purpose is clearly to make eligible for legal help the giving of advice and assistance about foreign law where that foreign law is relevant to an issue in domestic proceedings. That much is not controversial.

41 The notes do not say whether the law of the Convention is to be regarded as "foreign law". I would have thought that it is "foreign law": it is not the same as the law of England and Wales, though it is not the law of any other nation state. But the notes do not throw light on how far the purpose extends when one is considering whether the particular foreign law in issue (here, that of the Convention) is, or is not, "relevant" to proceedings in this country.

42 The explanatory notes, therefore, do not help. That brings me to the next question: whether recourse to Hansard is permissible and provides the answer. I have to ask myself first whether the provision is ambiguous or whether, literally construed, it leads to an absurdity. There is no question of absurdity here: it is not absurd for legal aid to be available to fund applications to the ECtHR; nor is it absurd for legal aid not to be available for that purpose.

43 I ask myself whether the provision clearly and obviously, without ambiguity, bears the meaning contended for by the claimant. I do not think it does. I come back to Mr Lowe's temporal argument and to the use of the present tense of the verb *is* , in the phrase: "…unless any such law is relevant for determining any issue relating to the law of England and Wales".

44 An applicant to the ECtHR cannot make her application unless and until she has first exhausted domestic remedies. That happened in the case of JL when permission to appeal to the Court of Appeal was refused at an oral hearing. It happened in the case of Ms Slattery when the Court of Appeal, having dismissed her appeal, refused her permission to appeal to the Supreme Court (and she was unable to secure funding to apply direct to the Supreme Court).

45 That means, as Mr Lowe pointed out, that any decision of the ECtHR on a subsequent application against the United Kingdom, arising from the failure of the domestic proceedings, has no purchase on the outcome of those domestic proceedings which, by definition, have already terminated, adversely to the applicant. A favourable outcome in the ECtHR would not retrospectively alter the outcome of the domestic proceedings; at the most, it would generate or remedies (which could include compensation) against the United Kingdom.

46 Viewed in that light, it is not obvious that the law to be applied in the subsequent Strasbourg proceedings "is relevant for determining" any issue in the domestic proceedings. They have, necessarily, already been determined. The "issue relating to the law of England and Wales" to which the law applied by the ECtHR is relevant, would therefore have to be an issue arising

outside the scope of the recently terminated domestic proceedings. The ECtHR's Convention law could and probably would influence future development of English law, but not the determination of any issue in the proceedings leading to the application to the ECtHR for which funding is sought.

47 I therefore hold that the first of the Pepper v. Hart tests is satisfied: the provision is sufficiently ambiguous that recourse to Hansard is permissible for the purpose of resolving the ambiguity, subject to considering the second and third of the Pepper v. Hart requirements, to which I turn next.

48 The second requirement is straightforward. The Access to Justice Bill was introduced in the House of Lords. The responsible Minister was the Lord Chancellor. It is accepted that the statements relied upon come from the Lord Chancellor, who was responsible for promoting the Bill. The second requirement is satisfied. The question is then whether the third requirement is also satisfied.

49 Mr Offer says that the statements of the then Lord Chancellor in the House of Lords do not resolve the ambiguity, if there is one. He argues that the statements are silent on the critical issue as to whether the law of the Convention is to be regarded as relevant to an issue arising in English law proceedings that are eligible for receipt of legal advice and assistance.

50 In my judgment, the utterances of the Lord Chancellor make it clear that the words added to the end of what was then clause 18 of the Bill, following the query raised by Lord Ackner, were intended to ensure that legal help would be available to fund the obtaining of evidence on a factual issue, relevant to legally aided English law proceedings, as to the content of foreign law.

51 In my judgment it is clear from what the Lord Chancellor said that he was talking about legal aid being available for proceedings in an English or Welsh forum, not for proceedings in a forum outside England and Wales. On 2 December 1998, he referred to an issue of foreign law arising in "English proceedings". On 16 February 1999, when introducing the amendment, he referred to the amendment being designed to cover "factual issues in foreign proceedings which arise in proceedings in England and Wales".

52 I take the view that these statements are clear and that they exclude the interpretation for which the claimant contends. Proceedings before the ECtHR in Strasbourg are not proceedings in England or Wales. They arise for determination in Strasbourg, not in the course of any proceedings in England and Wales, but after those proceedings are concluded. They are separate proceedings in an international forum, which measure the outcome of the previously determined domestic proceedings against the standard set by the United Kingdom's international law obligations under the Convention.

53 That is a very far cry from what the Lord Chancellor was speaking of when introducing his amendment. I think it is plain from what he said to the House that the meaning for which the claimant contends, although that meaning fits with a literal reading of the language of the provision, is not within the scope of the provision, giving it its true and correct meaning as explained by the Lord Chancellor.

54 This, then, is one of those relatively rare cases where the statements of the minister responsible for promoting legislation in Parliament conclusively resolve an ambiguity as to its true meaning. I do not accept that the statements are inconclusive because they do not positively address, and rule out, the funding of claims before the Strasbourg court. The territory of the amendment is very clearly that of funding claims in a forum located in England and Wales.

55 For those reasons, I decide the second ground also in favour of the Lord Chancellor. The law of the European Convention administered and applied by the ECtHR is not relevant for determining any issue relating to the law of England and Wales, within the meaning of section 19 of the 1999 Act, and section 32 of LASPO.

Conclusion

56 It follows that the claim must be dismissed. The Agency was right to refuse the claims.