

**Case 107
R (Lipman)**

v

**The Director of
Legal Aid Casework**

[2020] Costs LR 1937

*Neutral Citation Number: [2020] EWHC 2668 (Admin)
High Court of Justice, Queen's Bench Division,
Administrative Court
12 October 2020*

Before:

**HHJ Keyser QC, sitting as a
judge of the High Court**

Keywords:

Criminal Legal Aid

Headnote

The claimant sought judicial review of the Director of Legal Aid Casework's ("the Director") calculation of his capital such as to require a capital contribution to his criminal legal aid. The claimant had been in receipt of legal aid in proceedings resulting in his conviction, and at the conclusion of the proceedings, the costs of his representation were assessed at £120,082. The Director determined that the claimant had capital well in excess of that sum, and he was therefore required to make a capital contribution to the full extent of the costs of his representation. At the time of the determination, the claimant's home had available equity of between £134,000 and £193,000, and the claimant had a little over £7,000 in

the bank. He also owned sixteen residential investment properties, the value of which was said to exceed £1,000,000, but which were charged with the repayment of debts of nearly £2,000,000, as a result of which they were said to be in “negative equity”. In making an assessment of the claimant’s capital, the Director determined that the “negative equity” on the investment properties was not to be offset against the capital in the claimant’s home, which the claimant disputed.

Held:

The case turned on the correct construction of reg 28(4)(b), and the approach contended for by the claimant came very close to being unarguable. In order to calculate the amount or value of an individual’s specified capital, the Director was required to aggregate the value of the claimant’s individual resources. Regulation 28(4) made clear that those resources were to be individually valued. There was no justification in the Regulations for netting a supposedly negative value on one resource against the positive value of another; liabilities were only relevant in so far as they reduced the value of an interest in real property on which they were secured by mortgage or charge. Regulation 28 did not provide for a general balance sheet approach, but rather for the valuation of a particular “interest” in real property on the basis of the amount for which “that interest” could be sold less the amount of any debt secured on “the property”. This scheme of construction made good sense and accorded with the obvious purpose of the Regulations, whereas the claimant’s construction would have anomalous and arbitrary results. The claimant’s construction traded on a misapprehension, perhaps encouraged by the expression “negative equity”, that the value of an interest in property could be reduced below zero by virtue of the inadequacy of that interest as security for a debt; if debt secured on a property exceeded its value, its net value was zero, not a negative value. At least for the purpose of reg 28, it was in any event incorrect

to view the entire debt as secured; a debt was not secured on property to an extent greater than the value of the property.

Cases Cited

ESS Production Ltd v Sully [2005] EWCA Civ 554
R (The Good Law Project) v Electoral Commission [2018]
EWHC 2414 (Admin)

Judgment

HHJ KEYSER QC:

Introduction and Facts

1. In this claim for judicial review, brought with permission given on 26 June 2020 by Upper Tribunal Judge Grubb sitting as a judge of the High Court, Mr Paul Lipman challenges the decision dated 10 December 2019 of the Director of Legal Aid Casework (“the Director”) calculating the amount of his capital for the purposes of requiring a capital contribution to criminal legal aid. The claim raises a single issue of statutory construction concerning how capital is calculated for the purposes of such a contribution pursuant to reg 28 of the Criminal Legal Aid (Contribution Orders) Regulations 2013, SI 2013/483 (“the Regulations”). There are no material issues of fact, and for the purposes of this judgment I shall reduce the facts to their essentials and shall not set out in detail the procedural history.

2. In 2015 Mr Lipman was the defendant in proceedings that resulted in his conviction at the Crown Court at Cardiff and the imposition of a suspended sentence of imprisonment. For the purpose of those proceedings he was in receipt of criminal legal aid. At the conclusion of the proceedings, the Director assessed the costs of Mr Lipman’s representation as being £120,082; there is no challenge to that assessment. Mr Lipman was not required to make any contribution from income to the costs of his representation but, after some delay, the Director proceeded to calculate Mr Lipman’s capital for the purpose of obtaining a capital contribution to those costs. By the decision under review, the Director determined that at the relevant

date for the calculation, namely May 2015, Mr Lipman had disposable capital of a value well in excess of £120,082 and must therefore make a capital contribution to the full extent of the costs of his representation.

3. Mr Lipman's challenge concerns the method of the assessment of his disposable capital. There is some dispute as to the precise figures, but it is not relevant to the grounds of challenge. Mr Lipman had the following assets:

- 1) His own home: The Director says that in May 2015 the property had a value of about £458,000 and the available equity after deduction of the moneys charged on the property was about £193,000. Mr Lipman says that the correct figures are of the order of £400,000 and £134,000 respectively.
- 2) Sixteen residential investment properties that he let out on a commercial basis. The total value of these properties in May 2015 exceeded £1,000,000. However, they were charged with the repayment of debts of nearly £2,000,000. Therefore, to use a common but not entirely felicitous expression, they were in very substantial "negative equity".
- 3) A little over £7,000 in the bank.

Therefore Mr Lipman had two assets (his home and his bank balance) with a combined value significantly in excess of the costs of his representation: according to the Director about £80,000 in excess of those costs, and according to Mr Lipman about £21,000 in excess of those costs. However, when the sixteen investment properties were taken into account, together with the debts with which they were charged, his balance sheet showed a substantial deficit. So the question is whether the "negative equity" in the investment properties offsets the capital in Mr Lipman's home. The Director says it does not, and Mr Lipman says it does. The answer to the question turns on the correct construction of reg 28(4)(b) of the Regulations.

The Regulations

4. The Regulations were made pursuant to powers conferred on the Lord Chancellor by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the Act"). It is unnecessary to examine the provisions of the Act in detail here. Part 1 of the Act makes provision for, among other things, the provision of legal aid in criminal

proceedings. Section 23 provides that an individual shall not be required to pay for services provided under Part 1 of the Act except as provided by regulations and, by subsection (8), that regulations may include provision for payments out of income or out of capital. Section 24 provides in part:

- “(1) Regulations may make provision about the enforcement of an obligation to make a payment imposed under section 23. ...
- (3) Regulations under this section may, in particular –
- (a) provide that overdue amounts are recoverable summarily as a civil debt;
 - (b) provide that overdue amounts are recoverable as if they were payable under an order of the High Court or the county court, if the court in question so orders on the application of the person to whom the amounts are due.”

5. Part 2 of the Regulations deals with Crown Court trials. Regulation 16 and a number of associated regulations make provision for an “income contribution order”, requiring an individual to make contributions from his income to the costs of his representation. Mr Lipman’s circumstances were such that he was not required to make any contribution out of income.

6. Regulation 25, so far as material to Mr Lipman, provides:

“Where –

- (a) an individual is sentenced or otherwise dealt with for any offence following conviction in the Crown Court; ...

the Director must calculate the cost of representation of the individual in the proceedings in the Crown Court.”

7. Regulations 27 and 28 provide:

“27. Where –

- (a) the recoverable costs of representation exceed the amount of any payment already made by an individual under an income contribution order; or

- (b) an individual was not liable to make a payment out of income,

the Director must assess the individual’s capital in accordance with reg 28.

28.—

- (1) The Director must calculate an individual's disposable specified capital by –
 - (a) calculating the amount or value of an individual's specified capital on the date on which the application for a determination under section 16 of the Act is made; and
 - (b) except where para (2) applies, deducting £30,000 from the total amount or value.
- (2) Where –
 - (a) an individual fails, without reasonable excuse, to comply with a request for documentary evidence in relation to specified capital under reg 7(3); and
 - (b) the Director has reasonable grounds to believe that the individual has specified capital of an amount or value equal to, or in excess of, £30,000,the Director must not make the deduction in para (1)(b).
- (3) The amount or value of an individual's specified capital is the amount or value of all specified capital belonging to the individual on the date on which the application for a determination under section 16 of the Act is made, except where –
 - (a) it would be impractical or unreasonable for the Director to include the specified capital; or
 - (b) the individual is restrained by order of the High Court or Crown Court from dealing with the specified capital.
- (4) In calculating the amount or value of an individual's specified capital –
 - (a) in so far as the specified capital does not consist of money, its value is –
 - (i) the amount which that resource would realise if sold; or
 - (ii) the value of that resource assessed in such other manner as appears to the Director to be equitable;
 - (b) the value of any interest in real property is the amount for which

that interest could be sold less the amount of any debt secured by a mortgage or charge on the property; and

- (c) where an individual owns an interest in specified capital jointly or in common with any other person (other than the individual's partner), the Director must treat that resource as being owned in equal shares or, where there is evidence that the resource is not so owned, in such proportion as appears to the Director to be equitable in the light of that evidence."

Regulation 2 contains the following definitions that are relevant to the interpretation of regs 27 and 28:

"In these Regulations – ...

'disposable specified capital' means the disposable specified capital of an individual calculated in accordance with reg 28 (calculation of disposable specified capital); ...

'specified capital' means –

- (a) any interest in real property;
- (b) money in a bank or building society account;
- (c) money in a National Savings Bank account;
- (d) national savings certificates;
- (e) Premium Savings Bonds;
- (f) property in an account to which the Individual Savings Account Regulations 1998(1) apply;
- (g) property in a personal equity plan;
- (h) property in a unit trust scheme;
- (i) any other lump sum investment; and
- (j) shares and stock."

8. In the present case, reg 28(2) and the exceptions to reg 28(3) did not apply. Therefore the assessment of Mr Lipman's capital in accordance with reg 28 required the Director, first, to calculate "the amount or value of [Mr Lipman's] specified capital" at the relevant date and, second, to deduct £30,000 from the total amount or value. The resulting figure was Mr Lipman's "disposable specified capital". The issue, accordingly, concerns the correct method of calculating an

individual's specified capital; it concerns in particular the proper construction of reg 28(4)(b).

9. Before turning to the specific issue before me, I might conveniently refer briefly to a few of the other provisions of the Regulations. Regulation 29 provides that, where the Director calculates that an individual has disposable specified capital, she must make a determination that the individual is liable to make a payment in respect of the costs of representation and she must issue a capital contribution order recording the determination. (The Regulations make provision for reassessment and review of determinations.) Regulation 46(1) provides:

“Any overdue sums are recoverable –

- (a) summarily as a civil debt; and
- (b) if the High Court or a county court so orders on the application of the Lord Chancellor, as if they were payable under an order of the court in question.”

I note that on 15 January 2020, by way of enforcement of the capital contributions order against Mr Lipman, the County Court at Cardiff made a final charging order in favour of the Director in respect of Mr Lipman's home. No action has been taken to enforce the charging order by seeking sale of the property, pending the outcome of these proceedings.

The Arguments

10. Mr Armstrong submitted that the calculation of the amount or value of an individual's specified capital necessarily required setting off negative equity in one asset against positive equity in another. The natural meaning of “the value of any interest in real property” was one, total value, not a reference to each of the several interests that an individual might have: reg 28(4)(b) could have referred to “each interest” but did not do so. This interpretation gained support from other provisions in reg 28. It was consistent with the reference in reg 28(3) to “*all* specified capital”. It also cohered with the requirement in reg 28(4)(b) to deduct “the amount of any debt secured by a mortgage or charge on the property”. The debt secured by the charge on the investment properties was accordingly to be deducted in its entirety, resulting in a negative figure to be brought into the calculation. When

interpreted in that manner, reg 28 was both simple to apply and consistent with the purpose of the provisions, namely the ascertainment of the money that is available. “Money that is owed and secured (if, as it happens, under-secured) is not available money. Nor is it disposable” (skeleton argument, para 27). The most that could be said for the Director’s case was that reg 28 was ambiguous, and in those circumstances the court should apply the principle recently affirmed by the Divisional Court in *R (The Good Law Project) v Electoral Commission* [2018] EWHC 2414 (Admin) at [34]:

“It is also generally reasonable to assume that Parliament intended to observe what *Bennion on Statutory Interpretation* (7th edn, 2017) in section 27.1 calls the ‘principle against doubtful penalisation’. This is the principle that a person should not be subjected to a penalty – particularly a criminal penalty – except on the basis of clear law.”

11. Mr McLoughlin submitted that the construction advanced on behalf of Mr Lipman was contrary both to the plain meaning of reg 28(4) and to the obvious purpose of the Regulations. Regulation 28 required that the total amount or value of the individual’s specified capital be calculated and, in para (4), provided how certain particular resources were to be valued. Regulation 28(4)(b) did not provide for the valuation of interests in real property on an aggregate basis but on its plain terms provided for the valuation of specific interests, having regard in each case to the debt secured on “the property”. Thus it did not direct the valuation of “all interests”, it did not refer to the amounts for which “those interests” could be sold, and it did not direct the deduction of any debt secured on “the properties” or “those interests”. When interpreted according to its natural meaning, reg 28(4) accorded perfectly with the purpose of the relevant provisions of the Regulations and the Act, namely to enable the Director to identify the capital resources that are available to an individual and from which he can make a contribution to the costs of his representation in criminal proceedings. The contrary construction would mean that otherwise available capital resources would be ignored because of debts that were not secured on those resources. As for the “principle against doubtful penalisation”, Mr McLoughlin was content to accept that reg 28 could for present purposes be regarded as penal, but he submitted that the principle had no application because the regulation was not ambiguous.

Discussion

12. At the conclusion of the argument, I stated my conclusion that the construction advanced on behalf of the Director was correct but reserved my reasons to this written judgment. Out of deference to the grant of permission and to the quality of Mr Armstrong's submissions, I refrain from saying that I consider the case advanced for judicial review as being unarguable. But I think it comes very close to being so. The fact that counsel had been unable to find any authority on the point of construction under consideration does not occasion me any surprise.

13. The relevant exercise is the calculation of "the amount or value of all specified capital belonging to the individual" on the relevant date. "Specified capital" means the things identified within the definition in reg 2; in the terminology of reg 28(4), those various things are "resources". Those resources include both money and non-monetary resources. The method of valuing a non-monetary resource is set out in reg 28(4)(a) and (b); the method of valuing a resource, whether money or non-monetary, that the individual owns jointly or in common with another person is set out in reg 28(4)(c).

14. The "amount or value of an individual's specified capital" is a single figure representing the aggregate of the amounts or values of the individual resources. The individual resources are to be individually valued, as reg 28(4) makes clear.

15. There is no justification in the Regulations for the netting of a supposedly negative value on one resource against a positive value on another resource.

16. First, reg 28 does not provide for a general balance sheet in respect of the individual, setting total assets against total liabilities. Instead it provides for an aggregate valuation of capital resources on a specific basis, as mentioned above. In particular, liabilities are only relevant in so far as they reduce the value of an interest in real property on which they are secured by mortgage or charge. Yet the proposed construction would have the effect of equipping the unencumbered interest in Mr Lipman's home to an encumbered interest to which reg 28(4)(b) applied, at least in so far as the residential properties were insufficient security for the repayment of the debt charged on them.

17. Second, despite Mr Armstrong's valiant attempt to argue the contrary, reg 28(4)(b) does not provide for a single valuation of *all* interests in real property or the deduction of the amount of any debts

secured on *any* interests in real property. Rather, it provides for the valuation of a particular “interest” in real property on the basis of the amount for which “that interest” could be sold less the amount of any debt secured on “the property”. This indicates that a debt is relevant only to the ascertainment of the value of the property on which it is secured, and that the exercise to be carried out does not involve taking a gross total valuation of all interests in real property and deducting from that total the sum of debts secured on any of the interests in real property.

18. Third, as construed by Mr McLoughlin on behalf of the Director, the scheme of reg 28 makes perfectly good sense. Individuals commonly hold interests in real property subject to charges or mortgages to secure borrowing. The extent of the individual’s interest in the property that is in principle available to meet unsecured liabilities is only the value of that interest after the amount of the security has been taken into account. Where an individual has an unencumbered interest in real property, the full extent of that interest is in principle available to meet that individual’s unsecured liabilities.

19. Fourth, by the same token, the construction advanced on behalf of the Director accords with the obvious purpose of the Regulations, namely to identify the available capital resources from which the individual can be required to contribute to the costs of the representation received. Mr Lipman’s case illustrates the point clearly. He has a substantial capital resource, namely the equity in his home after account has been taken of the debts secured by charges on the home. No consideration of reason or of the logic of the statutory provisions requires that resource to be treated as unavailable for a capital contribution by reason of an unrelated debt.

20. Fifth, and for much the same reason, the construction advanced on behalf of Mr Lipman has anomalous and arbitrary results. It means that, if the investment properties are unsold at the relevant date, the full amount of the debt to the chargee will be deducted for the purpose of calculating the value of the specified capital. If, however, the chargee has decided to cut its losses and by the relevant date has enforced a sale of the investment properties, the balance of the debt remaining after recourse to the properties will not be deducted for the purpose of calculating the value of the specific capital. The difference between these outcomes makes no practical or logical sense; it arises only because the construction advanced does not respect the strict

limitation of the purpose for which the amount of a secured debt can be taken into account under reg 28(4)(b). More generally, if there were no investment properties and only a wholly unsecured debt of £1,000,000, the debt would be irrelevant to the calculation under reg 28, because that calculation is not concerned with a balance sheet that sets total assets against total liabilities. As the purpose of the calculation in reg 28 is to ascertain the amount of capital that is available for a contribution to the legal aid costs, the case is plainly no different where an interest in real property is charged to a person who is a creditor for a sum greater than the value of the interest.

21. Sixth, the construction advanced on behalf of Mr Lipman seems to me to trade on two confusions: first, the impermissible slide into a balance-sheet approach (see above); second, the mistaken belief – perhaps encouraged by the expression “negative equity” – that the value of an interest in property can be reduced below zero by virtue of the inadequacy of that interest as security for a debt. If the amount of the debt exceeds the value of the property, the property does not somehow magically acquire a negative net value. Its net value is zero. The deficit on the individual’s balance sheet is attributable not to a negative value in the property but to the debt. A related confusion may perhaps appear in the sentence already quoted from Mr Armstrong’s skeleton argument: “Money that is owed and secured (if, as it happens, under-secured) is not available money. Nor is it disposable.” Mr Lipman’s debt, with repayment of which the investment properties are charged, is not a resource to be valued as “specified capital”; it is relevant only in the exercise of valuation of a particular resource.

22. Seventh, and related to the previous point, the argument for Mr Lipman and its surprising results rest on the supposed logic of the need, in accordance with reg 28(4)(b), to deduct the full amount of the chargee’s debt. This logic (it is said) requires that, if a debt of £2,000,000 is secured on real property worth only £1,000,000, the amount to be brought into the final calculation is a negative figure: -£1,000,000. There are, in my view, three answers to that. (1) The logic of the approach undermines the purpose of the provisions; this alone suffices to show that the approach is inconsistent with the proper construction of reg 28. (2) The proposed method of calculation is nonsensical, because the value of an interest in real property cannot fall below zero because of its inadequacy to discharge a debt: see above. (3) At least for the purpose of the construction of reg 28 (and,

I should think, for most other purposes; but I do not have to investigate the wider point) I should regard as incorrect the premise that the entire debt was secured. A debt is not secured on property to an extent greater than the value of the property. If a property worth £1,000,000 is charged with repayment of a debt of £2,000,000, the amount of debt secured on the property is £1,000,000, not £2,000,000. That must certainly be the case where, as in the Regulations, the object of the valuation exercise is to identify available capital resources.

23. In my judgment, the meaning of reg 28(4)(b) is entirely clear. There is no ambiguity. Therefore it is unnecessary for me to consider Mr Armstrong's argument from "the principle against doubtful penalisation". It may well be, however, that Mr Armstrong was right to submit and Mr McLoughlin to concede that the principle would have applied in Mr Lipman's favour if the meaning of the provision had been genuinely ambiguous, in the sense that the other arguments were equally balanced. The calculation under reg 28 determines the amount of the contribution payable under a capital contributions order and may well determine whether any capital contributions order is made; and overdue sums under a capital contributions order are recoverable summarily as a civil debt. In *ESS Production Ltd v Sully* [2005] EWCA Civ 554, Arden LJ, with whom Chadwick and Auld LJJ agreed, said at [78] that the principle against doubtful penalisation "should be applied to the imposition of a civil liability as well as to the imposition of criminal liability".

Conclusion

24. The claim for judicial review is dismissed.

Nick Armstrong (instructed by Shanahans Solicitors) appeared for the claimant.

Simon McLoughlin (instructed by the Government Legal Department) appeared for the defendant.