

Regulations made by the Lord Chancellor, laid before Parliament under section 41(9) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10), for approval by resolution of each House of Parliament within 120 days beginning with the day on which the Regulations were made, subject to extension for period of dissolution, prorogation or adjournment for more than 4 days.

STATUTORY INSTRUMENTS

2015 No. 1571

**LEGAL AID AND ADVICE,
ENGLAND AND WALES**

**The Civil Legal Aid (Merits Criteria)
(Amendment) (No. 2) Regulations 2015**

<i>Made</i>	- - - -	<i>23rd July 2015</i>
<i>Laid before Parliament</i>		<i>24th July 2015</i>
<i>Coming into force</i>	- -	<i>27th July 2015</i>

The Lord Chancellor makes the following Regulations in exercise of the powers conferred by sections 11(1)(b), 41(1)(a) and (b), (3)(a) and (c) of, and paragraph 3(2) of Schedule 3 to, the Legal Aid, Sentencing and Punishment of Offenders Act 2012⁽¹⁾ (“the Act”).

In making these Regulations, in accordance with section 11(2) to (5) of the Act, the Lord Chancellor

- (a) has considered the circumstances in which it is appropriate to make civil legal services available under Part 1 of the Act and, in particular, the extent to which the criteria ought to reflect the factors in section 11(3) of the Act;
- (b) has sought to secure that, in cases in which more than one form of civil legal service could be provided for an individual, the individual qualifies under Part 1 of the Act for the form of service which in all the circumstances is most appropriate having regard to the criteria, and
- (c) is satisfied that the criteria reflect the principle that, in many disputes, mediation and other forms of dispute resolution are more appropriate than legal proceedings.

In accordance with section 41(8) of the Act, the Lord Chancellor considers that it is desirable for these Regulations to come into force without delay for the reasons given in the statement laid before Parliament on 21st July 2015, which accompanies these Regulations.

⁽¹⁾ 2012 c. 10. Section 42(1) provides that in Part 1 of that Act, “regulations” means regulations made by the Lord Chancellor.

Citation and commencement

1. These Regulations may be cited as the Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2015 and come into force on 27th July 2015.

Amendments to the Civil Legal Aid (Merits Criteria) Regulations 2013

2.—(1) The Civil Legal Aid (Merits Criteria) Regulations 2013(2) are amended as follows.

(2) In regulation 5 (prospects of success test)—

(a) in paragraph (1)(d)(ii), after “poor” insert “or very poor”;

(b) for paragraph (1)(e) substitute—

“(e) “poor”, which means a 20% or more chance, but less than a 50% chance, of obtaining a successful outcome;

(ea) “very poor”, which means a less than 20% chance of obtaining a successful outcome; or”, and

(c) in paragraph (2), for “(e)” substitute “(ea)”.

(3) In regulation 42(2)(c) (cost benefit criteria for determinations for full representation), after “moderate”, insert “, borderline or poor”.

(4) For regulation 43(3) (prospects of success criterion for determinations for full representation) substitute—

“43. The prospects of success criterion is only met if the Director is satisfied that—

(a) the prospects of success are very good, good or moderate; or

(b) the prospects of success are borderline or poor but it is—

(i) necessary for the Director to determine that the prospects of success criterion is met to prevent a breach of—

(aa) the individual’s Convention rights; or

(bb) any rights of the individual to the provision of legal services that are enforceable EU rights; or

(ii) appropriate for the Director to determine that the prospects of success criterion is met, in the particular circumstances of the case, having regard to any risk that a failure to make such a determination would be such a breach.”.

(5) For regulation 56(3)(4) (criteria for determinations for full representation in relation to public law claims) substitute—

“(3) The Director must be satisfied that—

(a) the prospects of successfully obtaining the substantive order sought in the proceedings are very good, good or moderate; or

(b) the prospects of successfully obtaining the substantive order sought in the proceedings are borderline or poor but it is—

(i) necessary for the Director to determine that the criterion in this paragraph is met to prevent a breach of—

(aa) the individual’s Convention rights; or

(2) [S.I. 2013/104](#).

(3) Amended by [S.I. 2014/131](#).

(4) Amended by [S.I. 2014/131](#).

- (bb) any rights of the individual to the provision of legal services that are enforceable EU rights; or
 - (ii) appropriate for the Director to determine that the criterion in this paragraph is met, in the particular circumstances of the case, having regard to any risk that a failure to make such a determination would be such a breach.”.
- (6) For regulation 60(3)(5) (criteria for determinations for full representation in relation to immigration) substitute—

“(3) The Director must be satisfied that—

- (a) the prospects of success are very good, good or moderate;
- (b) the prospects of success are borderline or poor but it is—
 - (i) necessary for the Director to determine that the criterion in this paragraph is met to prevent a breach of—
 - (aa) the individual’s Convention rights; or
 - (bb) any rights of the individual to the provision of legal services that are enforceable EU rights; or
 - (ii) appropriate for the Director to determine that the criterion in this paragraph is met, in the particular circumstances of the case, having regard to any risk that a failure to make such a determination would be such a breach; or
- (c) the prospects of success are unclear, and—
 - (i) the case is of significant wider public interest;
 - (ii) the case is one with overwhelming importance to the individual; or
 - (iii) the substance of the case relates to a breach of Convention rights.”.

- (7) For regulation 66(2)(6) (criteria for determinations for full representation in relation to public law children cases) substitute—

“(2) An individual may qualify for full representation in a public law children case only if the Director is satisfied that the criterion in paragraph (3) and, where applicable, paragraph (4) are met.

(3) It is reasonable for full representation to be provided, having regard to the importance of the case to the individual.

(4) If the individual is making or supporting an appeal or application—

- (a) the prospects of success of that appeal or application are very good, good or moderate; or
- (b) the prospects of success of that appeal or application are borderline or poor but it is—
 - (i) necessary for the Director to determine that the criterion in this paragraph is met to prevent a breach of—
 - (aa) the individual’s Convention rights; or
 - (bb) any rights of the individual to the provision of legal services that are enforceable EU rights; or
 - (ii) appropriate for the Director to determine that the criterion in this paragraph is met, in the particular circumstances of the case, having regard to any risk that a failure to make such a determination would be such a breach.”.

(5) Regulation 60 was amended by S.I. 2014/131 and 2015/1414.

(6) Amended by S.I. 2014/131.

(8) In regulation 67(7) (criteria for determinations for full representation in relation to domestic violence cases)—

- (a) in paragraph (1), for “paragraph (2)” substitute “paragraphs (2) and (3)”, and
- (b) for paragraph (2) substitute—

“(2) An individual may qualify for full representation in a domestic violence case only if the Director is satisfied that—

- (a) the prospects of success are very good, good or moderate; or
- (b) the prospects of success are borderline or poor but it is—
 - (i) necessary for the Director to determine that the criterion in this paragraph is met to prevent a breach of—
 - (aa) the individual’s Convention rights; or
 - (bb) any rights of the individual to the provision of legal services that are enforceable EU rights; or
 - (ii) appropriate for the Director to determine that the criterion in this paragraph is met, in the particular circumstances of the case, having regard to any risk that a failure to make such a determination would be such a breach.

(3) An individual may qualify for full representation in a domestic violence case only if the Director is satisfied that the proportionality test is met.”.

(9) In regulation 68(8) (criteria for determinations for full representation in relation to private law children cases and certain cases relating to EU and international agreements)—

- (a) in paragraph (1), for “paragraph (2)” substitute “paragraphs (2) and (2A)”, and
- (b) for paragraph (2) substitute—

“(2) The Director is satisfied that—

- (a) the prospects of success are very good, good or moderate; or
- (b) the prospects of success are borderline or poor but it is—
 - (i) necessary for the Director to determine that the criterion in this paragraph is met to prevent a breach of—
 - (aa) the individual’s Convention rights; or
 - (bb) any rights of the individual to the provision of legal services that are enforceable EU rights; or
 - (ii) appropriate for the Director to determine that the criterion in this paragraph is met, in the particular circumstances of the case, having regard to any risk that a failure to make such a determination would be such a breach.

(2A) The Director is satisfied that the reasonable private paying individual test is met.”.

(10) For regulation 69(3)(9) (criteria for determinations for full representation in relation to other family cases to which specific merits criteria apply) substitute—

“(3) The Director must be satisfied that—

- (a) the prospects of success of the case are very good, good or moderate;

(7) Amended by [S.I. 2014/131](#).

(8) Amended by [S.I. 2014/131](#).

(9) Regulation 69(3) was amended by [S.I. 2014/131](#).

- (b) the prospects of success of the case are borderline or poor but it is—
 - (i) necessary for the Director to determine that the criterion in this paragraph is met to prevent a breach of—
 - (aa) the individual’s Convention rights; or
 - (bb) any rights of the individual to the provision of legal services that are enforceable EU rights; or
 - (ii) appropriate for the Director to determine that the criterion in this paragraph is met, in the particular circumstances of the case, having regard to any risk that a failure to make such a determination would be such a breach; or
 - (c) the prospects of success of the case are unclear, and—
 - (i) the case is of significant wider public interest;
 - (ii) the case is one with overwhelming importance to the individual; or
 - (iii) the substance of the case relates to a breach of Convention rights.”.
- (11) In regulation 75(10) (criteria for determinations for legal representation in relation to legal persons)—
- (a) in paragraph (2)(c), for “paragraph (3)(b) and (c)” substitute “paragraphs (3)(b) and (3A)”;
 - (b) in paragraph (3)(a), for “paragraph (1) are met;” substitute “paragraphs (1) and (3A) are met; and”;
 - (c) omit paragraph (3)(c) and the “and” preceding it, and
 - (d) after paragraph (3) insert—
 - “(3A) The Director must be satisfied that—
 - (a) the prospects of success of the case are very good, good or moderate; or
 - (b) the prospects of success of the case are borderline or poor but it is—
 - (i) necessary for the Director to determine that the criterion in this paragraph is met to prevent a breach of—
 - (aa) the person’s Convention rights; or
 - (bb) any rights of the person to the provision of legal services that are enforceable EU rights; or
 - (ii) appropriate for the Director to determine that the criterion in this paragraph is met, in the particular circumstances of the case, having regard to any risk that a failure to make such a determination would be such a breach.”.

Transitional provision

3.—(1) The amendments made by regulation 2 apply to matters in which a relevant determination is made on or after 27th July 2015.

(2) In this regulation—

(a) a “relevant determination” means—

- (i) a determination that civil legal services are to be available to an individual or legal person under Part 1 of, or Schedule 3 to, the Act;

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- (ii) a decision by the Director under regulation 26 (controlled work: withdrawal of determinations) or 42 (licensed work: withdrawal of determinations) of the Procedure Regulations;
 - (iii) a decision by the Director under regulation 27(2) (controlled work: review), 44(3) (licensed work: review) or 69(3) (exceptional cases: review) of the Procedure Regulations, and
 - (iv) reconsideration of a determination by virtue of a referral under regulation 46(3) or (4) (appeal: power to refer for reconsideration) of the Procedure Regulations, and
- (b) “the Procedure Regulations” mean the Civil Legal Aid (Procedure) Regulations 2012⁽¹¹⁾.

23rd July 2015

Andrew Selous
Parliamentary Under Secretary of State
Ministry of Justice

(11) [S.I. 2012/3098](#), to which there are amendments not relevant to these Regulations.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Civil Legal Aid (Merits Criteria) Regulations 2013 (S.I. 2013/104) (“the Merits Criteria Regulations”), which make provision for the criteria which the Director of Legal Aid Casework (“the Director”) must apply when determining whether an individual or legal person qualifies for civil legal services under Part 1 of, or Schedule 3 to, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10).

Regulation 2 amends the merits criteria which the Director must apply in relation to determinations for legal representation in certain cases. Regulation 2(2) amends the definition of “poor” prospects of success to mean that a case has 20% or more chance of obtaining a successful outcome, but less than a 50% chance. Regulation 2(2) also creates a “very poor” category of prospects, which is less than a 20% chance of obtaining a successful outcome.

Regulation 2(4) amends regulation 43 of the Merits Criteria Regulations to provide that the prospects of success criterion is only met if the Director is satisfied that the prospects of success are “borderline” (as defined by regulation 5(1)(d) of the Merits Criteria Regulations) or “poor”, but it necessary for the criterion to be met to prevent a breach of the individual’s Convention or enforceable EU rights, or where it would be appropriate for the criterion to be met having regard to any risk of such breach. Regulation 2(5) to (11) makes equivalent amendments to other provisions of the Merits Criteria Regulations which apply a “prospects of success” test.

Regulation 3(1) provides that the amendments made by regulation 2 apply to matters in which a relevant determination is made on or after 27th July 2015. Regulation 3(2) defines “relevant determination”.

A full impact assessment of the effect that this instrument will have on the costs of business, the voluntary sector and the public sector is available from the Ministry of Justice, 102 Petty France, London SW1H 9AJ and is published with an Explanatory Memorandum alongside the instrument on www.legislation.gov.uk.