Lecture Night Transcript
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LIPs, LASPO and the State of Family Justice

By Joanna Miles, Senior Lecturer and Fellow at the University of Cambridge

LJ Moore-Bick: Good evening, ladies and gentlemen.

It is a pleasure to welcome you to the third in this series of Reader's Lectures, and a pleasure for me to introduce, as our lecturer tonight, Joanna Miles.

Joanna is Senior Lecturer in Law at Cambridge, and she is a Fellow and Director of Studies in Law at Trinity College. She was also appointed an Academic Fellow of this Inn in 2011.

The principal focus of Joanna's work is Family Law, especially the legal regulation of adult relationships, family property law, and financial remedies on relationship breakdown and death.

She is co-author with Sonia Harris-Short of *Family Law: Text, Cases, and Materials*, which has gone into its second edition.

She is an Assistant Editor of the *Child and Family Law Quarterly*, and a member of the Executive Council of the International Society of Family Law.

Before taking up her post in Cambridge, Joanna was a college lecturer at Christ Church and also at Lincoln College, Oxford. She took a two-year secondment as a Team Lawyer to the Law Commission for England and Wales in 2005 to work on the 'Cohabitation Project'.

We are very grateful to her for coming to give the lecture this evening, the title of which is "LIPs, LASPO and the State of Family Justice'.

Joanna? (Applause).

Joanna Miles: Master Reader, thank you for invitation to speak this evening.

My topic is the current state of Family Justice, but I shall confine my remarks to the Private Law sphere, with apologies to any Public Trials in the room.

There is a lot going on in Family Justice at the moment, not least with the imminent arrival of the new single Family Court in April, and significant changes in the culture and management of public law cases, with its eye-catching 26-week timetable for the disposal of care proceedings.

With all this going on, as Lord Justice McFarlane recently observed at the Family Justice Council Conference, Private Family Justice has had something of a Cinderella status and has been rather overlooked, perhaps.

I think that Private Law cases may turn out to be the somewhat disruptive element in the brave new world of the single Family Court, particularly its ambitions for robust case management.

My starting point must be the legal aid reforms effected in April of last year.

As Sir Humphrey once advised Bernard, “One should always get rid of the difficult part in the title, and so, implicitly, not feel inhibited by it in the substance of what follows.”

Bernard was grappling with the frightening implications of Freedom of Information. The Legal Aid, Sentencing and Punishment of Offenders Act 2012, ‘LASPO’, might be said to do the same with legal aid, since its principal function might more aptly be described as the ‘abolition of legal aid’, certainly for the bulk of Private Family Law cases.

The withdrawal of legal aid for these cases was immensely controversial, and this is now perhaps water under the bridge, but I think that it is worth pausing to reflect, for a moment, on the rationale for the reforms.

The radical reduction in the range of legal matters covered by legal aid was driven by concern that the scheme had expanded far beyond its creators' intentions.

Now, that cannot be said of the scheme's means testing. The scheme was originally intended to cover not just the very poorest, but also those of "small and moderate means", and so to reach 80% of the population.

Subsequent restrictions on means testing left the scheme within reach of only just about a third of the population; so, even before LASPO, this limited provision of legal services had become something of a poor relation of the universal free healthcare and education provided by the state.

In terms of subject matter, the scheme had expanded considerably. It gradually came to cover more categories of case, corresponding with increasing awareness of and legal responses to particular social problems, including debt, housing, education, adult social care, welfare benefits, immigration, and so on.

Private Family cases had been funded from the outset. Divorce cases were one of the major drivers for the introduction of the legal aid system in 1949. They cannot be regarded as having been part of this unintended expansion.

Undoubtedly, the amount of work under that heading burgeoned way beyond what the scheme's original architects could have foreseen, and so family cases, in raw terms, doubtless came to

cost the legal aid scheme way more than could originally have been anticipated.

The commonplace nature of family breakdown today does not make its consequences for the individuals involved or for wider society any less serious or less deserving of assistance through legal aid.

In articulating its criteria for deciding whether a matter should remain within the scope of legal aid post-reform, the government stated that it had considered “the extent to which the individual’s personal choices have played a part in the issue arising and the extent to which they might be expected to resolve it themselves”.

“Disputes arising from the litigant’s own personal choices are less likely to be considered,” they said, “as concerning issues of the highest importance.”

Now, whatever might said about the validity of those criteria in relation to the example given at that point of the consultation paper, of a migrant’s decision to live, work or study in the UK, it is deeply questionable whether they can be applied to Private Family Law schemes.

Where the interests of children are at stake, those children, whose welfare is the court’s paramount consideration, cannot be said to have exercised any relevant choice.

Neither may the adult parties. We may have chosen to marry and have children together, but I may not have chosen your decision to end our relationship, your refusal to fulfil your financial obligations towards me, or your unreasonable refusal of contact between me and our child.

As matters going to the heart of individuals’ private and family lives, and given concerns about the wider social impacts to

family breakdown, one might have thought that these cases had a strong claim to regarded as matters of high importance.

Consistently with other current policies, particularly relating to child support, the government also highlighted what it saw as the need for parties to family disputes to take greater personal responsibility for their problems by not litigating them, but instead, reaching settlement through mediation.

This brings us to the most mysterious aspect of the legal aid reforms: the abolition of funding for legal advice and assistance out of court, save, importantly, where it used as an adjunct to mediation.

Now, this measure is deeply curious. It entirely neglected the fact, amply substantiated by professional experience and academic research, that the choice is not one between mediation and litigation, but rather between out-of-court settlement and litigation. Of course, out-of-court settlement is very commonly achieved through lawyer negotiation.

Family solicitors spend far more of their time managing client expectations and keeping cases out of court by reaching negotiated settlements than they do by litigating.

Indeed, even if contested proceedings are initiated, settlement remains the more common outcome, as court statistics show. For example, in financial cases on divorce, the adjudicated outcome is a relatively rare phenomenon.

I conducted a recent study with colleagues at Bristol and Cardiff looking at financial settlements on disputes, and that suggested that solicitor negotiation was a far more common mechanism for settling these cases out of court than mediation was before LASPO.

The pre-LASPO legal aid system recognised this key function of solicitors. They were able to provide publicly-funded clients with what is called ‘Legal Help’ for all pre-proceedings activity, including negotiating settlements and drafting consent order applications.

Only if a contested application was being considered did the solicitor have to refer the client to a mediation assessment meeting.

LASPO has pulled the plug on the funding for this highly effective and commonly used out-of-court dispute resolution mechanism.

I think it is impossible to say why they did this, as the consultation documents provide no obvious reason for doing so, save that they appear quite inexplicably to equate lawyer involvement exclusively and inevitably with litigation.

We are where we are: no routine legal aid for lawyers’ services in or out of court for the typical Private Family Law issues that arise on relationship breakdown, whether concerned with the arrangements for children or financial matters.

This is not to say that no funding is available. There are various routes back in.

I am going to talk about three: ‘Funding for Mediation’, ‘Funding for Cases involving Domestic Violence’, and ‘Exceptional Funding’.

First of all, legal aid remains available for mediation of family disputes, together with lawyers’ support of that process. That is funded as ‘Help with Mediation’. That can involve the provision of advice to parties as they are mediating and the drafting of a consent order application for any mediated settlement to be formalised.

The government clearly intended to move cases out of the courts and into mediation. Their impact assessment for LASPO projected an increase in mediation numbers, but that simply has not happened.

As had been widely reported through figures obtained via FOI requests, there has been a very substantial fall in the number of mediation starts, which is not wholly surprising because mediators warned the government that this might happen, they having, hitherto, relied on legal aid solicitors to refer clients to them.

Now that solicitors cannot act for legal aid clients in their own right, it seems that there is no referral mechanism. Solicitors are not funded to conduct an initial advice meeting and referral on to mediation.

It seems that the client needs to be referred to the solicitor from the mediator before any work by the solicitor in support of that process can be funded. It seems that clients just are not getting to mediators to begin with.

Even more extraordinarily, claims for lawyers' help with mediation seem to have been very thin on the ground.

Data released under another recent FOI request indicates, for example...

If we take the figures for November 2013, in November 2013, apparently, there were 665 publicly-funded mediation cases that started. There were six claims for Help with Mediation in that month.

Indeed, from April to December 2013, there appear to have been considerably fewer than 50 such claims for Help with Mediation

in total, despite thousands of clients going to publicly-funded mediation.

Now, explanations for this apparent collapse in the provision of lawyers' services and support of publicly-funded mediations are unclear. It may be that the paltry fee of, I think, £105 for undertaking such work simply does not make it economically feasible for firms to provide this service, preferring to reserve whatever family legal aid matter starts they have for urgent trial matters and domestic violence cases.

The apparent lack of legal advice for publicly-funded mediation clients is deeply concerning. Mediators cannot give legal advice to their clients, so these figures suggest that the vast majority of clients may be mediating in the dark, oblivious of the legal rights and duties that ought to frame their discussions.

Now, these clients may, of course, have picked up on some more or less accurate early generic legal information, particularly from websites, but that is no substitute for legal advice tailored to the circumstances of the particular case.

The second route back into legal aid for Private Family cases is provided in Schedule 1 of LASPO. You can get funding for all legal services to deal with all manner of otherwise excluded Private Family Law matters where the applicant can demonstrate that he or she has been a victim of domestic violence perpetrated by another party to the case. Indeed, there is similar provision in Private Law cases involving allegations of child abuse.

Now, during the passage of the Bill, the government made important concessions, expanding the range of evidence whereby an applicant for legal aid might demonstrate that he or

she is a victim of domestic violence. The qualifying categories of evidence are now set out in secondary legislation.

One method is to obtain a non-molestation order under the Family Law Act 1996, and it may not be unrelated, therefore, that the latest court statistics report an increase in the number of such applications being brought as people need to get that order as a passport into legal aid for everything else.

It is welcome, in this regard, that the government has proposed removing the court fee for applications for 1996 Act orders. I am not aware of any published figures on the take-up of legal aid under this heading since 2013, but if anybody has them, I would be grateful to know.

Finally, my particular area of interest is 'Exceptional Funding' under Section 10 of LASPO.

The availability of what is called 'Exceptional Funding' is essential to ensure our compliance with the European Convention on Human Rights and with EU Law.

In terms of the ECHR, which will be my exclusive focus, funding must be provided when not to do so would breach or would risk breaching the applicant's rights under Article 6.

The government's impact assessment of the LASPO Bill projected that there would be between 5,000 and 7,000 applications for Exceptional Funding in the first year of the Act. It forecast that 5% of non-violent Private Family Law cases previously eligible for legal aid would remain eligible via Exceptional Funding.

Now, the basis on which this 5% figure was reached is not clear. There is reason to think that it may underestimate the

prevalence of Private Family Law cases exhibiting what we might very loosely, for initial purposes call ‘exceptional characteristics’.

Mental health problems are one obvious characteristic that might seriously impede an individual’s ability to represent himself or herself and so require funding under Article 6. I will come on to the more particular test in a minute, but we are in the ballpark with mental health problems.

There is a thing called the ‘GHQ’, the ‘General Health Questionnaire’, which is a standard screening device for the detection of common mental illnesses in the community and non-clinical settings.

With colleagues at the Legal Services Research Centre, we analysed data from the Civil and Social Justice Survey relating to individuals within that survey who said that they had a Family Law problem and who would have been eligible for legal aid for a family problem that now falls outside the scope of legal aid, and who had mental health problems on the GHQ scale.

Over 36% of that group had GHQ scores at a level strongly indicative of probable mental health diagnosis. That is people with Family Law problems who now out of scope. They would previously have been eligible for funding. Thirty-six percent look like they might have a mental health problem.

Now, of course, not all of these would definitely have a diagnosable mental health problem and not all would take any sort of legal action regarding their Family Law problem, but other data in the survey indicates that individuals with Family Law problems are more likely to approach solicitors than people with other types of legal problems.

Those with mental health difficulties were more likely still to seek solicitors' help in dealing with the legal problems.

While we might not expect the full 36% to seek Exceptional Funding, we might well expect rather more than the 5% projection.

Various other studies of parents involved in Family Law cases have found high prevalence of mental health difficulties. Indeed, using the same GHQ measure, Professor Trinder and colleagues found that over three quarters of parents in their study of in-court conciliation of contact and residence disputes scored above the GHQ threshold.

This makes it all the more surprising that the numbers of Exceptional Funding applications received so far by the Legal Aid Agency have been very low, and the numbers of grants of Exceptional Funding have been almost invisible.

Figures released last week for the first three quarters following April of last year recall that there have been 1,151 applications for Exceptional Funding across all areas of law. That covers 909 individual cases; so, 242 of the 1,151 are requests for reviews. Basically, there are 909 cases.

I am going to say "of these", but I am not clear from the reported data whether it is of the 1,151 or of the 909. Anyway, 617 were Family Law cases. In total, 35 grants of Exceptional Funding have been made, of which eight were in Family Law.

This falls a very long way short of the projected 5,000 to 7,000 applications for the full year and a 5% acceptance rate of people who previously would have had legal aid.

Why have there been so few applications and why such a derisory number of grants?

There are a number of possible explanations.

The Public Law Project has extensive experience of the Exceptional Funding regime. Thanks to a charitable grant, they are handling these applications pro bono, and by September last year, they had made over 50 applications for Exceptional Funding, which, by September, were probably a fairly significant proportion of all the applications that had been made.

They identified in evidence to the Joint Committee on Human Rights a number of systemic problems in the operation of the regime, which are likely to be contributing factors to the low application numbers.

First of all, applications are made 'at risk'. The legal adviser preparing the multipage application gets no funding for doing so. The PLP estimates that it can take up to 7,500 hours to complete an application.

With grants of Exceptional Funding being so rare, very few practitioners will be prepared to take the risk of applying. Even if successful, the funding will be paid at a lower rate than cases that remain ordinarily in scope, hardly, therefore, an attractive prospect; even less so, perhaps, that providing Help with Mediation.

The second systemic problem: no procedure for urgent cases.

The Agency, in its guidance, says that it aims to deal with all cases within 20 working days from the date that the application is received, but as the PLP says, "Life just is not like that."

On the current timetables, an applicant who has a hearing date in less than seven weeks has no guarantee that a funding

decision will be made in time, and so no guarantee that their Article 6 rights will be safeguarded.

It is worth noting here, however, that the recent data release records that the average duration of case processing is in fact 6.7 days from receipt by the Legal Aid Agency; so, well below the target of 20 days.

Now, we might say, “Well, that is not surprising since their caseload is so substantially less than they were expecting.” I should hope that they could deal with them more quickly.

Even so, urgent cases and emergency cases would surely benefit from having a dedicated fast-track procedure.

The PLP’s final systemic concern relates to the lack of any exemptions for children or those who lack capacity. Whether you lack capacity on grounds of youth or ill health, you are surely, by definition, eligible for Exceptional Funding in the sense that you cannot represent yourself at all. Yet, an application must be made.

Self-evidently, these individuals cannot make the application themselves because they lack capacity. They cannot even invoke the basic preliminary review application process that is permitted by those who are acting in person.

These individuals have got to find a solicitor who is willing to undertake the application for them, as to which, see above: ‘at risk’. There are very limited prospects of them being paid for doing it.

One such individual was lucky enough to have the PLP act for them. They report that he is registered blind and has a cognitive impairment that means that he functions at the level of a dementia sufferer. His application was refused.

At the time of their written evidence to the Joint Committee, the PLP had sent a pre-action letter to challenge the refusal.

Now, of course, we have to be careful here. It remains the case that such applications do need to be reviewed on the merits and are subject to means testing. Funding is not guaranteed simply because one has exceptional characteristics, making litigation difficult without representation, but the numbers are still extraordinary low and there should be some means of at least abbreviating the process, surely, for those whose income self-evidently makes them unable to represent themselves.

These practical difficulties highlighted by the PLP aside, there may be another reason why the number of Exceptional Funding grants has been so vanishingly small so far.

That is the government's understanding of the extent of the obligation imposed by Article 6.

The Lord Chancellor's guidance sets out a wide range of factors to be taken into account in deciding these applications, factors which properly reflect the Strasbourg jurisprudence on the matter, but it states at paragraph 18, "The overarching question to consider when deciding whether funding is required under Article 6 is whether the withholding of legal aid would make the assertion of the claim practically impossible or lead to an obvious unfairness in the proceedings."

Now, that language may, at first sight, not seem objectionable. It is not new. It is the language used under the Legal Services Commission's pre-LASPO Exceptional Funding Scheme, which was a much smaller than this one should be, and it was adopted following the *Jarrett* case in 2001.

The problem with that language is that it has rather undistinguished origins. It comes from a lowly and decidedly cursory admissibility decision that, in 1994, called various *A* or *X v the United Kingdom*, in which, at paragraph 3 of its two-page decision, the European Commission on Human Rights purported to summarise the effect of the leading decision on Article 6, *Airey v Ireland*.

It did not actually quote any passages from it or discuss it any length. They summarise it by saying, “Only in exceptional circumstances, namely, where the withholding of legal aid would make the assertion of a civil claim practically impossible or where it would lead to an obvious unfairness in the proceedings can such a right be invoked by virtue of Article 6(1) of the Convention.

There was commendably pithy language adopted in *Jarrett* and then in our Exceptional Funding guidance. The problem seems to me to be, though, that that pithy summary finds a most limited textual basis in the language used by the court in *Airey* and later decisions.

While the Strasbourg court was clear that Article 6 confers no absolute right to legal aid in civil cases, the *Airey* judgement does not use the words ‘exceptional’ or any of its synonyms, ‘special’ or ‘unusual’. Nor does ‘practically impossible’ or anything like it appear.

Article 6 was interpreted in *Airey v Ireland* to require the provision of legal aid to those unable to afford private legal representation, where the applicant would not be able to represent herself “properly and satisfactory”, thereby depriving her of “practical and effective enjoyment of her right of access to court”.

Whether that is so is a matter for judgement on the particular facts of each case, depending on a holistic appraisal of various factors, including the importance of what is at stake for the individual, the complexity of the relevant law and procedure, and, in light of that, we might say the applicant's capacity to represent himself or herself effectively.

The court found that it was improbable that Mrs Airey would be able, effectively, to present her case. She is described as a lady of humble origins. She had been to school. There was nothing particularly wrong with her, but it was improbable that she could effectively present her case.

It held that the state may be under a duty to provide the assistance of a lawyer "when such assistance proved indispensable for effective access to court, either because legal representation is rendered compulsory, as it sometimes done by the domestic law of certain contracting states for various types of litigation or by reason of the complexity of the procedure or of the case".

Now, I emphasise the word "effective", since its admission would render the test rather more restrictive in the way that the purported summary of *A v the UK* perhaps reflects.

It is not necessary to show that the applicant would otherwise have no access to court, rather that she would thereby be deprived of effective access.

In the course of considering Mrs Airey's case, the European Court has also noted the importance of the issues at stake in family cases. It has said that the emotional involvement of many parties to family disputes is "scarcely compatible with the degree of objectivity required by advocacy in court".

The language of *Airey*, itself, and subsequent cases of the court is somewhat more open than the practically impossible test of *A v the UK*.

The test of “obvious unfairness” is perhaps closer to the mark, but I find its combination with the foregoing “practically impossible” to be rather restrictive in its implications, and I think that it fails to reflect the nature of the tests deployed by the court.

I found *A v the UK* cited in no other Strasbourg decision, whether reported in English or in French; nor has its formulation of the test, so far as I can find, been adopted or even referred to in any subsequent case of the Court.

Now, given the Court’s tendency to do the whole ‘cut and paste’ thing, replicating turns of phrase from one judgement to the next, its failure to recycle the *A v the UK* formula is perhaps not insignificant.

From the Strasbourg perspective, the passage in *A v the UK* may be regarded as a rather isolated dictum of only limited persuasive value, which makes it rather curious that this is the formulation that assumes such prominence, domestically, latched onto by the English court in *Jarrett*, which quoted no material from *Airey*, and adopted in the Legal Services Commission and now the Lord Chancellor’s Exceptional Funding guidance.

This formulation was adopted in several pre-LASPO domestic cases, but without any critical consideration of whether it accurately reflected *Airey*, and sometimes, I am afraid to say, accompanied by a rather crucial error.

In the case of *R (on the application of Viggers) v Tribunal for War Pensions and Armed Forces Commission*, the court there wrongly reported that the Irish High Court action that Mrs Airey

wished to bring required the presence of a lawyer as a matter of law.

Not so. Mrs Airey's need for a lawyer was a functional, not a formal, one, necessary not to give her access to the court at all, but rather to give her effective access in circumstances where she could not properly and satisfactorily represent herself.

Now, there must be many parties to cases before the Family Court of whom that could be said. We know that a substantial proportion of Family Court litigants have mental health, substance abuse and other problems associated with chaotic lifestyles that are likely, significantly, to impair their ability to engage with what will very often be an emotionally stressful process in any meaningful or constructive way.

As to the issue of emotional stress, the Lord Chancellor's guidance on family cases specifically asks whether the proceedings are likely to be unusually emotive for the applicant, noting that all Private Law proceedings are likely to be emotive to some degree, but that this factor alone will "very rarely be sufficient to demonstrate that legal aid is required to avoid a breach of Article 6".

The Strasbourg court has not looked for unusual levels of emotional involvement, remarking simply that marital disputes often do entail emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court.

I think that the compatibility of the Lord Chancellor's guidance with Article 6, properly understood, must, at the very least, be open to question, and is something that we should perhaps look at more closely than we have hitherto.

That guidance also properly asks, "What support, other than legal representation, is the applicant likely to receive?" noting

that Family judges, in particular, are used to dealing with unrepresented parties in Family proceedings, and that that court, itself, may be supported by a Cafcass officer in reaching its decision.

This brings us, then, to another alternative for the party who is ineligible for legal aid, yet unable to reach a settlement in mediation, quite possibly because the other party just will not engage in that process. That is to act in person.

Litigants in Person, or 'LIPs' as we tend to call them, are not new in Private Family Law cases, but it was widely forecast that numbers would go up after LASPO.

It is probably too soon to be able clearly to identify the impact of LIPs in MoJ data, as this, I think, tends to record parties' representation statuses at the point of the disposal of the case, and there are still pre-LASPO cases in the system.

In any event, recording representation status at only one point of the case, the point of disposal, does not give the full picture.

Our court file survey of many cases shows that parties can move in and out of legal representation over the lifetime of a case. It is perhaps not sensible to classify cases being a LIP case or not by just going from any single point in the lifetime of that case.

I do not think that we can rely on MoJ data yet; not least because of the pre-LASPO cases in the system.

More useful as an early measure of LASPO's impact is the Cafcass data, which looks at the parties' representation statuses at the point of the application.

Here, if I get data today, I know that this is a post-LASPO case because it is at the point of application. Prior to LASPO, Cafcass data indicated that in 20% of children's cases, both parties were

represented at the point of the application, but that figure has now apparently dropped to 4%. The proportion of cases in which neither party is represented at the point of application has leapt from 19% to 42%.

Those are early signs for the children's cases from Cafcass. Of course, some of those parties might acquire representation along the way, but the very fact that there is such a change at the point of application surely indicates that there is some impact of LASPO.

I am not sure about the money cases, and our recent court file survey of pre-LASPO financial cases on divorce found that in about a third of cases, at least one party acted without representation for at least part of the case. We tried desperately to have a slightly more nuanced test of whether that was a LIP case or not. That was not easy.

I am not aware of any reliable post-LASPO figures for money cases yet. There is no Cafcass equivalent, but it may be expected, I think, that, there too, the number of LIPs has been increased.

Now, post-LASPO, it may, I think, be reasonably supposed that the constituency of new LIPs are generally more vulnerable than those who were acting as LIPs pre-LASPO. It is more likely, given their previous eligibility for legal aid to be young, of low income, obviously, of low education, and for whom English was not their first language.

Indeed, as our Civil and Social Justice Survey data indicates, mental health problems may also be quite prevalent in this group.

As such, they may encounter particular problems and pose special difficulties for any legal representatives who are involved in the case and for the court staff and judges.

As one solicitor interviewee in our recent study of financial cases on divorce put it, and he or she was talking about pre-LASPO cases, he or she said, “Trying to negotiate on a finance FDR is just impossible. I am trying to think if I can recall one where we have negotiated a settlement, and I can’t think of one because LIPs just don’t get it. They don’t understand the settlement-oriented nature of that particular court appointment.”

Pre-LASPO studies, including our financial cases on divorce have found that cases involving parties who have been LIPs at any stage are less likely to settle, and if they do settle, may settle at a later stage in the proceedings than cases involving parties who have been represented throughout.

In the brave new world of the single Family Court, robust case management is key, but that can be very difficult to achieve with LIPs who cannot engage effectively with the process.

Mr Justice Holman recently described the difficulties that can ensue. In *Tufail v Riaz*, he was confronted with a contested petition for divorce, which was a bit of a rarity in itself, made by a wife who resided in Pakistan and who was unable to come to the UK for the hearing. She could no longer afford the cost of legal representation and legal aid was not available to her.

The husband, who was contesting the petition on the basis that they were already validly divorced in Pakistan, appeared in person.

As Mr Justice Holman put it: “In the presence case, until recently, I would have expected to have had the assistance of experienced lawyers on each side, and almost certainly, expert

evidence, in relation to the proceedings in Pakistan. As it is, I have no legal representation and no expert evidence of any kind. I do not even have the basic materials and an orderly bundle of relevant documents: a chronology, case summaries and, still less, any kind of skeleton argument.

“Instead, I have had to rummage through the admittedly slim court files, supplemented by various documents handed up to me by the respondent husband today, and materials sent by the petitioner wife in Pakistan.

“I recall that I began this case at 10:30 this morning and am now concluding it around 3:30 in the afternoon. It has, accordingly, effectively occupied the whole of the court day. By sheer good fortune, the other case which had been listed for hearing by me today was vacated yesterday. If that case had not been vacated, I and the litigants in that case would have been faced with very considerable difficulties and a severe shortage of court time, and probably also additional expenditure to the parties in that case, who, as likely as not, would have had to return on another day.”

Now, this case involved particular complexities, not least given the foreign law issues involved, but the paucity of the paperwork was not atypical, I would suggest, of cases involving LIPs. You may find even the most basic requirements of effective case preparation difficult.

There is, perhaps, some evidence to suggest that Cafcass in the children cases, may be bearing some of the brunt and the costs of this, there having been a 12% increase in the number of welfare reports being requested from them by the courts in April to December 2013, compared with the previous year.

More serious still, perhaps, are the difficulties now being experienced as a result of the lack of funding for expert reports

or even DNA testing. Paternity can be a serious issue in Private Family cases. Who is going to pay for the DNA testing?

If not trying to do justice in the dock, we certainly seem to be turning the clock back several decades.

Certainly, our court processes, our court paperwork, our forms and explanatory notes can and should be adapted, to some extent, to better accommodate the needs of LIPs. We may need substantially to revise our understanding of the judicial role, pushing it far more firmly towards the inquisitorial end of the spectrum.

This may, itself, cost more to the system in terms of judicial time, and such measures can only do so much to mitigate the very real difficulties faced and posed by the large increase in Litigants in Person, not least because they may be entirely unable to access any tailored legal advice to enable them to assess the merits of their case in the first place.

They may be bringing or seeking to defend unmeritorious cases that ought never to have troubled the courts.

Last, and very importantly, we must not forget the many families that do not engage with any part of the Family Justice system, whether that be courts, lawyers or mediators.

After a rise in application numbers immediately after April 2013, probably boosted by lots of people getting their legal aid sorted out at the last minute, applications in children cases seemed to have settled back to something like the pre-LASPO situation. Yet, the mediation numbers have plummeted.

There is a gap. Where have all those people gone?

There is, of course, nothing necessarily wrong about parties resolving their family problems for themselves. In many cases,

particularly regarding arrangements for children, that may be positively desirable. If parents can communicate well and cooperate, they should be encouraged to make and adapt their own arrangements as suits them and their children. They probably were before LASPO.

The situation in money cases on divorce is a bit different because only a court order can extinguish financial claims for good, and only a court order can effect pension sharing. It is advisable, at the very least, to get a consent order, even if all it does is extinguish claims for all time. It is useful thing to do just to be on the safe side.

Yet, pre-LASPO, about 40% of divorces were accompanied by any financial order. We don't know who the 60% were, although our recent court file survey suggests that those who do get court orders may, on average, be older and married for longer than divorcing couples generally; so, maybe they have also, therefore, accumulated more assets and have got a more obvious need for a financial order.

That is not to say that all cases that ought to involve financial orders were getting them before or will be getting one now.

LASPO renews concerns that some vulnerable parties, who would formally have been able to bring financial proceedings with the assistance of legal aid, will no longer be able to do so.

Solicitor interviewees in our recent study expressed concerns about this, particularly in so far as it is likely to impact disproportionately on women. As one solicitor put it, "They may be fobbed with a 50:50 settlement or something akin to that because they cannot really afford the lawyers. In a small money case, very probably, the wife ought to be getting more than 50% because it is a case that is going to be governed by needs, not by equal-sharing."

As another remarked, “We are going to have another generation of old ladies without pensions because it just won’t occur to them that the pension is something that might be shareable. They don’t go to the solicitor, they don’t get the advice, and they don’t get the order.”

As Lord Neuberger has recently observed, “The primary duty of any civilised government is to ensure the defence of the realm from foreign threats and the rule of law at home. These duties rank ahead of its other services in the areas of education, health and welfare. Securing the rule of law requires a high-quality and independent judiciary, an accessible and effective court system, and an accessible, high-quality, independent legal profession.”

Given the LASPO reforms, one may perhaps be forgiven for wondering whether the government shares this view of the importance of the legal system, broadly understood as a vital public service.

Lord Neuberger also observed in a lecture in 2010: “While mediation has its part to play, it is complementary to justice, not a substitute for it. Yet, the government’s promotion of mediation to the neglect of lawyers’ various out-of-court services risks being pursued for its own sake. We must guard against placing such emphasis on the process of mediation and that we neglect the substantive justice of the settlements, if any, reached.”

One does not take responsibility, to use the government’s language, simply by caving in to what may be the legally unreasonable demands of the other party, who may simply refuse to mediate any settlement at all.

We live in a society governed by law. That includes laws which govern family relationships, in particular the consequences of

their breakdown. Parties with Family Law problems have a legitimate need for legal advice, whether they are pursuing mediation or some other means of achieving a satisfactory resolution, if necessary through court proceedings.

As matters stand, it appears that those publicly-funded clients mediating their cases are not accessing the legal advice that they should and are, in principle, entitled to receive in order to be confident of the fairness of any agreement being reached. Those who should be eligible for Exceptional Funding are not accessing that vital facility, and many of those that cannot mediate and are otherwise illegible for legal aid are struggling to deal with their problems by themselves, some through the courts, and others, perhaps a growing group, entirely off-radar.

All of these cases give serious cause for concern about the presence state of Private Family Justice. We must do all that we can within inevitable funding constraints, but without false economies, to ensure that we have a Family Court and Family Judiciary equipped to deal with the new challenges of the post-LASPO world, able to handle both the public and the Private Law cases that come before them, and that we still have a profession of Family lawyers available to assist those vulnerable clients who need their services." (Applause).

LJ Moore-Bick: Well, Joanna has said that she will take questions from the floor, so it is open to you.

Who has got a question that they would like to ask?

Yes?

Female 1: Do you think the changes in the Children and Families Act will have any influence on services, good or bad?

Joanna Miles: Are you talking about the MIAMs Protocol?

Female 1: Yes.

Joanna Miles: Until now or whenever the new Act comes into force, parties who want to bring an application for a contested family law order, whether in children or money matters, in theory, have been supposed to go to a thing called a 'Mediation, Information and Assessment Meeting'.

The applicant has had to go. Of course, the problem is that the respondent won't go, and so, probably, very few of these cases actually are ever converted into mediation.

The bigger problem was with a widely reported postcode lottery with lots of courts, apparently, not being too fussed about whether you had been to a MIAM or filled in the form explaining why you hadn't gone to your MIAM, because there were exceptions, not least in domestic violence cases and that sort of thing, where one could just say, "No, I am not going to a MIAM because…"

That requirement, it seemed, was not being policed as tightly as one might have wished. The Bill, now the Act, makes it a statutory requirement that you go to a MIAM before you can start your contested proceedings, with the same sorts of listed exceptions that exist in other protocols. The hope is that the courts really will police that now because the requirement is there.

Perhaps more people will now go to MIAMs. Whether that results in conversions of people into mediation rather than litigation, I think that is a wholly separate question, not least because the applicant goes to a MIAM but the respondent does, and I can't mediate if you won't.

The ability of the MIAM or indeed any other process, because the court could adjourn and direct the respondent to go for a MIAM as well… The respondent may not be interested, and so the mediation will presumably judge the case to be unsuitable for mediation.

When we ask whether it will be effective, I think that we have to ask: "In doing what?"

"In getting people to MIAMs?"

Maybe.

"In getting people actually to mediate and conclude their disputes through mediation?"

Yes, we will have to wait and see. I would be doubtful of that.

LJ Moore-Bick: Thank you.

Yes, another question?

Well, I shall ask a question.

No, even better. Yes, James?

James: Is legal aid still available, as far as you understand it, to bring judicial review proceedings for refusal and exceptional circumstances?

Joanna Miles: That is a really good question.

The provisions in Schedule 1 to do with when I can bring judicial review proceedings are not wholly clear. I am hoping that somebody can save me from this question because I am not confident of the answer, but I am hoping that somebody very soon will bring a judicial review application, probably on a pro bono basis, against a refusal.

I don't know whether the Public Law Project is planning on doing that. They would certainly, I would imagine, have the resource to do that.

James: It is surprising that no-one has so far.

Joanna Miles: Yes, but then there have been so few applications so far, and it would depend on the reasons being given for the refusal. Since the reasons relate to the 'Means or Merits Test', then, perhaps there is not an obvious case to seek review of, but where you have clearly got a reason that looks like it is a very narrow construction of what Article 6 requires, that is the reason why it has been pushed back, I would hope that somebody would bring a judicial review application, whether or not legal aid is available for that.

LJ Moore-Bick: Yes?

Female 2: ___ [0:51:06-0:51:11].

Joanna Miles: Sorry, I am afraid I can't hear you. Can you perhaps stand and…?

LJ Moore-Bick: There is a roving mike somewhere. Would you like to try that?

Female 2: Hi.

It seems to me that the Litigants in Person are costing the Bar and the judicial system as a whole an awful lot of money, which is probably not what the government wanted in the first place.

Would a better situation maybe be to almost compel people to mediation, make a free service of mediation and put a lot of money into that, and then, for the people that perhaps don't come out the other side, we give them some funding for litigation if it does not work?

Joanna Miles: No mediator in this country would sign up for compulsory mediation.

'Compulsion' and 'Mediation' are completely anathema to each other. Mediation rests on voluntarism as a basic precept.

No, I don't think we can compel people to mediate. How would you compel people to mediate? You can make them sit in the room, but you can't get them to reach a satisfactory settlement of the case.

Certainly, an awful lot needs to be done to get people to mediation because there has clearly been a big drop-off in the number of people going to mediators in the first place. It seems to me perfectly clear that the reason for that is the removal of solicitors from the system, because they were very clearly the principal conduit for getting clients to mediators. That has just gone, and overnight, numbers have just gone through the floor.

I think that some very careful thought has to be put to this.

There was a web chat with Simon Hughes last Monday that I tentatively, as an academic, participated in because it was officially for mediators. I put in a few comments.

The thrust of that was all very much in terms of “How can we better publicise mediation and get people aware of the service?” I think there is a massive public education issue here just to make people aware of what mediation is. I think that there is a huge lack of familiarity with the word and what it means, and there is still confusion that mediation means ‘reconciliation’: “I don’t want to get back together with my ex-spouse.”

That is a very big mountain to climb, and will require a lot of funding. Presumably, there is an awful lot of funding there because they said that there was an unlimited budget for mediation and Family Law cases. Great. Okay, so you have got an unlimited budget for publicising family mediation as an option.

I think that is important.

To my mind, though, the most obvious solution to several of the current problems is to reintroduce Legal Help for out-of-court solicitor work. Let’s not talk about the litigation side.

If you reintroduce Legal Help, you would get your conduit straight back to mediation at a stroke. Job done.

You would potentially prevent a lot of the LIPs who are currently turning up from appearing at all, because you would manage their expectations and you say to them, “No, you don’t have a good case,” or if you do think that they have got a good case, you would give them some advice and guidance about how to prepare the case that they would then, if all we have got is Legal Help, take forward by themselves to the court.

It is astonishing what is, to my mind, the false economy of having removed Legal Help, completely unjustified, it seems to me, by any materials in the consultation documents preceding LASPO.

Probably, it is pointless proposing that, in a sense, because I sense that the government is sufficiently committed to what it has just done that it is unlikely do what would be regarded as such a major attraction.

I think that, at the very least, they have got to give serious thought to funding solicitors to do an initial advice and referral to mediation to get people using Help with Mediation.

When I saw the numbers, and they were reported on the *Family Law Week* website, so maybe a number of you did see them, it said something like 12,000 publicly-funded mediation starts in the relevant period with then 26 Help with Mediation…

I thought, “Twenty-six out of 12,000? That really can’t be right,” but I have now seen the numbers for myself from the FOI request and it is true. It is just astonishing.

No mediator should be happy about that situation. Their code of practice precludes them from giving legal advice, so getting some way of getting more people involved doing Help with Mediation is really important.

It may be that the economics of that are just unrealistic. If the fee for Help with Mediation is so low compared to the amount of time that you would properly want to spend in order to discharge the professional service, with no risk of negligence action, to be properly supporting somebody through mediation, probably for £100 or whatever it is, that is just not feasible.

Firms will have already adapted over the last, nearly now, 12 months. We are a whole year on. It may be very difficult, at this stage, to reintroduce that with any instant effect to correspond with the very immediate effect that it seems that the withdrawal of legal aid had in the first place.

On paper, they look like obvious solutions, but whether the economics of either the government or the solicitors' practices would actually make it feasible is another question entirely.

LJ Moore-Bick: Yes?

Female 3: I am impressed but not surprised by what has been said, but during the passage of the Children and Families Bill through the Lords, the Minister, Lord Nash, was promising that there would be very full guidance, both online and also in hard copy available all over the place.

Have you come across much and is it any good?

Joanna Miles: In December of last year, the 'Sorting Out Separation' app was launched with manifold legal errors. It was just embarrassingly bad.

Quietly, I just emailed all my chums and said, “Can we all go onto the aptly-named SOS website and find as many legal errors as we can?” We sent a schedule to MoJ with all the errors that we found, and they rectified those errors.

It is still a very perfunctory website, with very generic information, certainly on the money side. It is hopelessly general. It does not begin to function as legal advice. How could it? Legal advice has to be properly tailored to the individual’s situation.

Now, I think that this is something that they are very aware that they need to sharpen up. There is an incredibly important bit of public education that needs to be done on the Children and Families Bill, not least to make sure that the very hard won amendments to the Bill make it absolutely clear that this is not a ‘Shared Time’ presumption. That has got to be communicated in 20-foot high letters and flashing lights, every day of the week.

I am very concerned. I am just waiting for the media coverage of the Act. I am scared about legal headlines that might begin to allude to the possibility that this is anything to do with Shared Time, because it is that sort of misapprehension of what the legal entitlements of the parties are that is so concerning when you put that into a non-supported mediation context, although one would hope that the mediation within his or her professional parameters could do something to steer the conversation in more or less the right direction.

Certainly, with the people who are completely off-radar, that is what I worry most about: the sources of information that those people are getting.

The other thing to say about online information is that people have looked at this. Somebody did a study with their own

undergraduate students, giving them a pretend Family Law problem and saying, “Alright. Go and find out what your rights are.” The number who came back with an Australian website not having noticed that they had an Australian website rather than a UK website…

Whoops. Let’s get the jurisdiction right, to start with.

I think as well that there is a big problem, online, with having confidence about the authoritativeness or authorship of any material that you are accessing. I think that one of the problems with the Sorting Out Separation app, certainly initially and I am not sure if they have rectified this now, was that it was not completely clear that this was actually government information, which, in theory, therefore, ought to have been reliable so that one could safely rely on it.

You will get a very different message, potentially, depending on which NGO website you go to, where you might get a very different spin. Quite possibly, Mum is going to one type of website and Dad is going to another type of website. Quite potentially, we have two quite conflicting views of what the situation might be, which, again, is not going to make for particularly easy negotiations, however those negotiations are conducted.

Sorry, it is still depressing. I find it difficult to say anything hopeful on this topic. (Laughter).

LJ Moore-Bick: Well, depressed or not, and for those who are very depressed, there will be some refreshments in a moment behind the hall. (Laughter).

Before we go through to the refreshments, I would like to thank Joanna very much, on your behalf, for an interesting and sobering lecture.

I must say that the insight into how the reforms are working at the moment in practice does not fill one with any degree of confidence, but it is very important that our attention be drawn to aspects of really very great concern.

It makes me wonder how things are going to develop over the next few years and when somebody is going to realise that paying lawyers, particular at the early stages of disputes, really does pay. It is good value for money. Unfortunately, that message seems not to have got through.

I have to say, listening to Joanna's account of Mr Justice Holman's case involving two Litigants in Person, only one of whom was before him, debating about marital issues in Pakistan, makes me wonder whether our courts are well equipped and, should I say, well-enough supported, to undertake any significant inquisitorial role. I certainly would not feel confident, but then, it has not been my particular area of practice.

Still, it is very valuable to have these things drawn to our attention, and I would like to thank Joanna very much, on behalf of all of us, for coming to give her lecture.

Thank you very much. (Applause).

END AUDIO