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 periods of dissolution, prorogation or adjournment for more than four days.

STATUTORY INSTRUMENTS

2016 No. 781

LEGAL AID AND ADVICE, ENGLAND AND WALES

The Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016

Made - - - -	*20th July 2016*
Laid before Parliament	*21st July 2016*
Coming into force - -	*22nd July 2016*

The Lord Chancellor makes the following Regulations in exercise of the powers conferred by sections 11(1)(b), 41(1)(a) and (b) and (3)(c) of, and paragraph 3(2) of Schedule 3 to, the Legal Aid, Sentencing and Punishment of Offenders Act 2012(**a**) ("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 the 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 2016, which accompanies these Regulations.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016 and come into force on 22nd July 2016.

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

(2) In these Regulations, "the Merits Criteria Regulations" means the Civil Legal Aid (Merits Criteria) Regulations 2013(**a**).

Amendments to the Merits Criteria Regulations

2.—(1) The Merits Criteria Regulations are amended as follows.

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

(a) in paragraph (1)(d)(ii)—

(i) before "poor" insert "marginal or", and

(ii) omit "or very poor";

(b) after paragraph (1)(d), insert—

"(da) "marginal", which means a 45% or more chance, but less than a 50% chance, of obtaining a successful outcome;";

(c) for paragraph (1)(e), substitute—

"(e) "poor", which means less than a 45% chance of obtaining a successful outcome; or ";

(d) omit paragraph (1)(ea), and

(e) in paragraph (2), for "(ea)" substitute "(e)".

(3) In regulation 42(2)(c) (cost benefit criteria for determinations for full representation)(**c**), omit ", borderline or poor".

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

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

(a) very good, good or moderate; or

(b) borderline or marginal, and the case is—

(i) of significant wider public interest; or

(ii) a case with overwhelming importance to the individual.".

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

"(3) The Director must be satisfied that the prospects of successfully obtaining the substantive order sought in the proceedings are—

(a) very good, good or moderate; or

(b) borderline or marginal, 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.".

(6) In regulation 58 (criteria for determinations for full representation in relation to claims against public authorities)(**f**)—

(a) in paragraph (1)(a), omit "and regulation 43 (prospects of success criterion for determinations for full representation)";

(**a**) S.I. 2013/104.
(**b**) Amended by S.I. 2015/1571.
(**c**) Amended by S.I. 2015/1571.
(**d**) The relevant amending instrument is S.I. 2015/1571.
(**e**) The relevant amending instrument is S.I. 2015/1571.
(**f**) Amended by S.I. 2014/131.

(b) in paragraph (1)(b), for "and regulation 42 (cost benefit criteria) do not apply;" substitute ", regulation 42 (cost benefit criteria) and regulation 43 (prospects of success criterion) do not apply;";

(c) for paragraph (1)(c), substitute—

"(c) paragraphs (2) and (3) apply.";

(d) in paragraph (2)—

(i) in sub-paragraph (a), after "met" insert "; and", and

(ii) after sub-paragraph (a), insert—

"(b) the criterion in paragraph (3) is met.", and

(e) after paragraph (2), insert—

"(3) The Director must be satisfied that the prospects of success are—

(a) very good, good or moderate; or

(b) borderline or marginal, 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 60(3) (criteria for determinations for full representation in relation to immigration)(**a**), substitute—

"(3) The Director must be satisfied that the prospects of success are—

(a) very good, good or moderate; or

(b) borderline, marginal or 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.".

(8) In regulation 61 (criteria for determinations for full representation in relation to court orders for possession)(**b**)—

(a) in paragraph (1)(a), omit "and regulation 43 (prospects of success criterion for determinations for full representation)";

(b) in paragraph (1)(b), for "41, 42 and 44" substitute "41 to 44";

(c) in paragraph (2)(a), omit "and", and

(d) after paragraph (2)(a), insert—

"(b) the prospects of success are very good, good, moderate, borderline or marginal; and".

(9) For regulation 66(4) (criteria for determinations for full representation in relation to public law children cases)(**c**), substitute—

"(4) If the individual is making or supporting an appeal or application, the prospects of success of that appeal or application are very good, good, moderate, borderline or marginal. ".

(10) For regulation 67(2) (criteria for determinations for full representation in relation to domestic violence cases)(**d**), substitute—

(**a**) The relevant amending instrument is S.I. 2015/1571.
(**b**) Amended by S.I. 2014/131.
(**c**) Amended by S.I. 2015/1571.
(**d**) The relevant amending instrument is S.I. 2015/1571.

"(2) An individual may qualify for full representation in a domestic violence case only if the Director is satisfied that the prospects of success are very good, good, moderate, borderline or marginal.".

(11) For regulation 68(2) (criteria for determinations for full representation in relation to private law children cases and certain cases relating to EU and international agreements)(**a**), substitute—

"(2) The Director is satisfied that the prospects of success are very good, good, moderate, borderline or marginal.".

(12) For regulation 69(3) (criteria for determinations for full representation in relation to other family cases to which specific merits criteria apply)(**b**), substitute—

"(3) The Director must be satisfied that the prospects of success are—

(a) very good, good or moderate; or

(b) borderline, marginal or 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."

(13) For regulation 75(3A) (criteria for determinations for legal representation in relation to legal persons)(**c**), substitute—

"(3A) The Director must be satisfied that the prospects of success of the case are—

(a) very good, good or moderate; or

(b) borderline or marginal, and the case is of significant wider public interest.".

Transitional provision

3.—(1) The amendments made by regulation 2 do not apply to an application for civil legal services that is made before 22nd July 2016.

(2) In addition, regulation 42 of the Merits Criteria Regulations has effect in relation to civil legal services provided as a result of an application for civil legal services that is made before 22nd July 2016 as if the amendments made by regulation 2(2) and (3) had not been made.

(3) For the purpose of this regulation, an application for civil legal services is made before 22nd July 2016 if the application is—

(a) for Controlled Work and the application is signed and dated before 22nd July 2016;

(b) for Licensed Work or for civil legal services to be made available under section 10 of the Act, other than an application for emergency representation, and the application is—

(i) signed and dated before 22nd July 2016 and received by the Director by 5.00pm on 29th July 2016, or

(ii) submitted through the Client and Cost Management System before 22nd July 2016, or

(c) for emergency representation and the application—

(i) results in a determination being made by a provider before 22nd July 2016 and that determination is notified within five working days of the determination to the Director;

(ii) is emailed or faxed to, and received by, the Director before 22nd July 2016, or

(iii) is submitted through the Client and Cost Management System before 22nd July 2016.

(4) In this regulation—

(**a**) The relevant amending instrument is S.I. 2015/1571.
(**b**) The relevant amending instrument is S.I. 2015/1571.
(**c**) Inserted by S.I. 2015/1571.

"the Act" means the Legal Aid, Sentencing and Punishment of Offenders Act 2012;

"the Procedure Regulations" means the Civil Legal Aid (Procedure) Regulations 2012(**a**);

"Client and Cost Management System" means the client and cost management system used by the Director in relation to applications for civil legal services;

"Controlled Work" has the meaning given in regulation 21(2) of the Procedure Regulations;

"emergency representation" means legal representation (within the meaning of regulation 18 of the Merits Criteria Regulations)—

(a) that is not Controlled Work, and

(b) which is provided following a determination made on an urgent application;

"Licensed Work" has the meaning given in regulation 29(2) of the Procedure Regulations;

"provider" means a person who provides civil legal services under Part 1 of the Act (legal aid);

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971(**b**).

Oliver Heald
Minister of State
Ministry of Justice

20th July 2016

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) omits the category of "very poor" prospects of success and amends the definition of "poor" prospects of success to mean that a case has less than a 45% chance of obtaining a successful outcome. It also creates a "marginal" category of prospects, which is a 45% or more chance, but a less than 50% 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 "moderate", "good" or "very good" (as defined by regulation 5(1) of the Merits Criteria Regulations), or where the prospects of success are "borderline" or "marginal" and the case is of significant wider public interest or a case with overwhelming importance to the individual. Where an application for civil legal services is subject to an assessment of its prospects of success, it will no longer fulfil the merits criteria if the case is assessed as having a "poor" prospect of success. Paragraphs (5) to (13) of regulation 2 make equivalent amendments to other provisions of the Merits Criteria Regulations which apply a "prospects of success" test, although in some cases, a modified prospects of success test will be applied. Regulation 2(3) makes consequential provision.

(**a**) S.I. 2012/3098, to which there are amendments not relevant to these Regulations.
(**b**) 1971 c. 80.

Regulation 3(1) provides that the amendments made by regulation 2 do not apply to applications for civil legal services that are made before 22nd July 2016. Regulation 3(2) provides that regulation 42 of the Merits Criteria Regulations has effect in relation to civil legal services that are provided as a result of an application for civil legal services that is made before 22nd July 2016 as if the amendments made by regulation 2(2) and (3) had not been made.

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.

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