

**2006 No. 2492**

**LEGAL SERVICES COMMISSION, ENGLAND AND  
WALES**

**The Criminal Defence Service (Financial Eligibility)  
Regulations 2006**

*Made* - - - - *11th September 2006*

*Coming into force* - - *2nd October 2006*

The Lord Chancellor makes the following Regulations in exercise of the powers conferred by section 26 of, and paragraph 3B of Schedule 3 to, the Access to Justice Act 1999(a).

A draft of this instrument has been laid before and approved by a resolution of each House of Parliament in accordance with section 25(9A) of that Act.

**Citation and commencement**

1. These Regulations may be cited as the Criminal Defence Service (Financial Eligibility) Regulations 2006 and come into force on 2nd October 2006.

**Interpretation**

2.—(1) In these Regulations—

“the Act” means the Access to Justice Act 1999;

“child care costs” means the costs of care which is provided by one or more of the following care providers—

- (a) a school on school premises, out of school hours;
- (b) a local authority, out of school hours—
  - (i) for children who are not disabled, in respect of the period beginning on their eighth birthday and ending on the day preceding the first Monday in September following their 15th birthday;
  - (ii) for children who are disabled, in respect of the period beginning on their eighth birthday and ending on the day preceding the first Monday in September following their 16th birthday;
- (c) a child care provider approved in accordance with the Tax Credit (New Category of Care Provider) Regulations 1999(b);

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(a) 1999 c.22. Section 26 includes definitions of ‘regulations’ and ‘prescribed’. The reference to the Lord Chancellor in section 26 was changed to the Secretary of State by the Secretary of State for Constitutional Affairs Order 2003 (S.I. 2003/1887) and was changed back to the Lord Chancellor by the Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005 (S.I. 2005/3429). Paragraph 3B of Schedule 3 and section 25(9A) were inserted by section 2(2) and (5) of the Criminal Defence Service Act 2006 (c.9).

(b) S.I. 1999/3110.

- (d) persons registered under Part XA of the Children Act 1989(a);
- (e) persons referred to in paragraph 1 or 2 of Schedule 9A to the Children Act 1989, in schools or establishments referred to in those paragraphs;
- (f) persons prescribed in regulations made pursuant to section 12(4) of the Tax Credits Act 2002(b);

other than costs paid in respect of the child’s compulsory education or by the individual to his partner (or vice versa) in respect of any child for whom either or any of them is responsible in accordance with regulation 10 of the Council Tax Benefit Regulations 2006(c), or in respect of care provided by a relative of the child wholly or mainly in the child’s home;

“the Commission” means the Legal Services Commission established under section 1 of the Act;

“gross annual income” means total annual income, as at the date of the application for a representation order, from all sources, other than the receipt of any of the following—

- (a) any of the following payments made under the Social Security Contributions and Benefits Act 1992(d)—
  - (i) attendance allowance paid under section 64;
  - (ii) severe disablement allowance;
  - (iii) carer’s allowance;
  - (iv) disability living allowance;
  - (v) constant attendance allowance paid under section 104 or paragraph 4 or 7(2) of Schedule 8 as an increase to a disablement pension;
  - (vi) council tax benefit;
  - (vii) any payment made out of the social fund;
- (b) any direct payments made under the Community Care, Services for Carers and Children’s Services (Direct Payments) (England) Regulations 2003(e) or the Community Care, Services for Carers and Children’s Services (Direct Payments) (Wales) Regulations 2004(f);
- (c) any exceptionally severe disablement allowance paid under the Personal Injuries (Civilians) Scheme 1983(g);
- (d) any pensions paid under the Naval, Military and Air Forces etc (Disablement and Death) Service Pensions Order 2006(h);
- (e) any Independent Living Funds payments;
- (f) any financial support paid under an agreement for the care of a foster child;

“the Independent Living Funds” means the Independent Living Fund, the Independent Living (Extension) Fund and the Independent Living (1983) Fund;

“the Independent Living Fund” means the charitable trust established out of funds provided by the Secretary of State for the purpose of providing financial assistance to those persons incapacitated by or otherwise suffering from very severe disablement who are in need of such assistance to enable them to live independently;

“the Independent Living (Extension) Fund” means the Trust of that name established by a deed dated 25th February 1993 and made between the Secretary of State for Social Security of the one part and Robin Glover Wendt and John Fletcher Shepherd of the other part;

(a) 1989 c.41; Part XA and Schedule 9A were inserted by section 79 of the Care Standards Act 2000 (c.14).  
 (b) 2002 c.21.  
 (c) S.I. 2006/215.  
 (d) 1992 c.4.  
 (e) S.I. 2003/762.  
 (f) S.I. 2004/1748.  
 (g) S.I. 1983/686.  
 (h) S.I. 2006/606.

“the Independent Living (1993) Fund” means the Trust of that name established by a deed dated 25th February 1993 and made between the Secretary of State for Social Security of the one part and Robin Glover Wendt and John Fletcher Shepherd of the other part;

“partner” means a person with whom the individual lives as a couple, and includes a person with whom the individual is not currently living but from whom he is not living separate and apart;

“period of calculation” means the period of one year ending on the date on which an application for a representation order is made;

“representation authority” means the Commission or a court officer or other person to whom the Commission, in accordance with section 3(4) of the Act, has delegated its functions under paragraph 2A of Schedule 3 to the Act;

“representation order” means a document granting a right to representation under section 14 of the Act.

(2) Subject to the proviso in regulation 7(1), in these Regulations a reference to the financial resources, income or financial circumstances of the individual includes a reference to the financial resources, income or financial circumstances of his partner.

### **Scope**

3. These Regulations apply to those criminal proceedings which—

- (a) are referred to in section 12(2)(a) to (f) of the Act and in regulation 3(2) (other than subparagraph (h)) of the Criminal Defence Service (General) (No. 2) Regulations 2001<sup>(a)</sup>; and
- (b) are in a magistrates’ court.

### **Relevant authority**

4. The representation authority is the relevant authority for the purposes of section 26 of, and paragraph 3B of Schedule 3 to, the Act.

### **Assessment by representation authority**

5.—(1) The representation authority must assess whether the financial resources of the individual are such that he is eligible to be granted a representation order in accordance with this regulation and regulations 7 to 10.

(2) The representation authority must treat an individual who at the date of the application is under the age of 16 or who is under the age of 18 and in full-time education as financially eligible for a representation order, and paragraphs (3) to (5) of this regulation and regulations 7 to 14 do not apply in such a case.

(3) Where the representation authority is satisfied that the individual is directly or indirectly in receipt of a qualifying benefit, it must take his gross annual income as not exceeding the sum specified for the time being in regulation 9(2).

(4) The following are qualifying benefits for the purposes of paragraph (3)—

- (a) income support;
- (b) income-based jobseeker’s allowance;
- (c) guarantee credit under section 1(3)(a) of the State Pension Credit Act 2002<sup>(b)</sup>.

(5) Except where paragraph (2) or (3) applies, the representation authority must calculate the gross annual income and, if applicable, the annual disposable income of the individual in accordance with regulations 7 to 10.

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<sup>(a)</sup> S.I. 2001/1437. Relevant amending instruments are S.I.2002/712, 2002/2785, 2004/1196 and 2005/2784.  
<sup>(b)</sup> 2002 c.16.

### **Furnishing evidence**

6. The representation authority may at any time require the individual to provide documentary evidence in support of his application.

### **Resources of other persons**

7.—(1) In calculating the income of the individual, the representation authority must treat the resources of his partner as his resources, unless the partner has a contrary interest in the proceedings in respect of which he is seeking a representation order.

(2) Where it appears to the representation authority that—

- (a) another person is or has been or is likely to be substantially maintaining the individual or his partner; or
- (b) any of the resources of another person have been or are likely to be made available to the individual or his partner,

the representation authority may assess or estimate the value of the resources of that other person and may treat all or any part of them as the resources of the individual.

### **Deprivation etc of resources**

8. If it appears to the representation authority that the individual or his partner has, with intent to reduce the amount of his resources, whether for the purpose of making the individual eligible for a representation order or otherwise—

- (a) directly or indirectly deprived himself of any resources; or
- (b) transferred any resources to another person,

the resources of which he has so deprived himself, or which he has transferred, are to be treated as part of the individual's resources.

### **Financial eligibility**

9.—(1) Where an individual applies for a representation order, the representation authority must calculate the gross annual income of the individual and, where he has a partner or has children living in his household, must divide the total according to the scale set out in the Schedule to these Regulations.

(2) An individual is eligible for a representation order if his gross annual income, as adjusted under paragraph (1) where appropriate, is £11,590 or less.

(3) An individual is not eligible for a representation order if his gross annual income, as adjusted under paragraph (1) where appropriate, is £20,740 or more.

10.—(1) Where an individual's gross annual income, as adjusted under regulation 9(1) where appropriate, is more than £11,590 and less than £20,740, the representation authority must calculate the individual's annual disposable income in accordance with paragraph (2).

(2) There are to be deducted from the individual's gross annual income—

- (a) any income tax paid or payable in respect of the period of calculation;
- (b) any contributions estimated to have been paid under Part 1 of the Social Security Contributions and Benefits Act 1992, in respect of the period of calculation;
- (c) any council tax paid or payable in respect of the period of calculation;
- (d) either—
  - (i) any annual rent or annual payment (whether of interest or capital) in respect of a mortgage debt or heritable security, payable by him in respect of his only or main dwelling, less any housing benefit paid under the Social Security Contributions and Benefits Act 1992; or

- (ii) the annual cost of his living accommodation;
- (e) any child care costs paid or payable in respect of the period of calculation;
- (f) if the individual is making bona fide payments for the maintenance of a former partner or of a child or a relative who is not (in such case) a member of his household, the amount of such payments paid or payable in respect of the period of calculation;
- (g) an amount representing cost of living expenses in respect of the period of calculation, being either—
  - (i) £5,304; or
  - (ii) if the individual has a partner or has children living in his household, an amount calculated in accordance with the scale set out in the Schedule to these Regulations.

(3) An individual is eligible for a representation order if his annual disposable income, as calculated under this regulation, does not exceed £3,156.

### **Duty to report change in financial circumstances**

**11.**—(1) An individual who has been granted a representation order must—

- (a) forthwith inform the representation authority of any change in his financial circumstances of which he is aware, which has occurred since any calculation of his resources and which might affect his eligibility for a representation order; and
- (b) inform the representation authority of any change in his financial circumstances of which he should reasonably be aware, which has occurred since any calculation of his resources and which might affect his eligibility for a representation order.

(2) Where, as a result of any such change, the individual is no longer financially eligible for a representation order, the representation authority must withdraw the grant of representation.

### **Re-calculation of income following error etc**

**12.** Where—

- (a) it appears to the representation authority that there has been some error in the calculation of the individual's income; or
- (b) new information which is relevant to the application has come to light (whether under regulation 11 or otherwise),

the representation authority must re-calculate the income and, if the individual is no longer financially eligible for a representation order, must withdraw the order.

### **Renewal of application**

**13.** An individual who has been refused a representation order on the grounds that his financial resources are not such that he is eligible for such an order may renew his application if, but only if, there is a change in his financial circumstances which might affect his eligibility for a representation order.

### **Review of decision**

**14.**—(1) An individual who has been refused a representation order on the grounds that his financial resources are not such that he is eligible for such an order may apply for a review of the decision—

- (a) to the representation authority, on the ground that there has been a miscalculation of his income or an administrative error; or
- (b) to the Commission, on the ground that he does not have sufficient means to pay for the cost of legal assistance, notwithstanding that his financial resources are such that he is not eligible for a representation order under these Regulations.

(2) An application for a review must be made on such form as the Commission may specify.

(3) Where the grounds of the application are those mentioned in paragraph (1)(b), the individual must provide full particulars of his income and expenditure and a certificate by a solicitor as to the individual's likely costs of the proceedings.

(4) Where—

(a) the grounds of the application are those mentioned in paragraph (1)(a); and

(b) the representation authority is not the Commission,

the representation authority may refer the application to the Commission for its decision.

(5) On a review the representation authority or the Commission (as the case may be) must uphold the decision or grant the individual a representation order.

(6) The Commission may, if it thinks that the application raises a question of such importance that it should be decided by the High Court, refer that question to the High Court for its decision.

### **Withdrawal of representation order**

15. Where the individual fails to comply with a requirement under regulation 6 and a representation order has been granted, the representation authority must withdraw the order unless it is satisfied that there are good reasons why it should not do so.

### **Transitional provisions**

16. An application for a representation order which is received before 2nd October 2006 is to be dealt with as if these Regulations had not been made.

Date 11 September 2006

*Vera Baird*  
Parliamentary Under Secretary of State  
Department for Constitutional Affairs

## **SCHEDULE**

### **Scale for the purposes of regulations 9(1) and 10(2)(g)(ii)**

For the purposes of regulation 9(1), add the relevant figure below to 1.00 and divide the individual's gross annual income by the total.

For the purpose of regulation 10(2)(g)(ii), add the relevant figure below to 1.00 and multiply £5,304 by the total.

A partner	0.64
Each child of the individual in his household, aged 0-1	0.15
Each child, as above, aged 2-4	0.30
Each child, as above, aged 5-7	0.34
Each child, as above, aged 8-10	0.38
Each child, as above, aged 11-12	0.41
Each child, as above, aged 13-15	0.44
Each child, as above, aged 16-18	0.59

## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations set out the criteria relating to financial eligibility which must be satisfied before individuals involved in criminal proceedings in a magistrates' court may receive publicly funded representation. They take effect from 2nd October 2006, when the relevant amendments to the Access to Justice Act 1999 effected by the Criminal Defence Service Act 2006 come into force.

Individuals in receipt of certain benefits such as income support are automatically eligible, as are those under 16 or under 18 and in full-time education (regulation 5). If the individual has a partner, the partner's resources are to be treated as those of the individual, unless the partner has a contrary interest in the proceedings (regulation 7). The individual may be required to provide evidence in support of his application; if he fails to do so, the representation authority (the Legal Services Commission or its delegate) must normally withdraw a representation order if it has granted one (regulations 6 and 15).

An individual is financially eligible for a representation order if his gross income, adjusted to take account of any partner or children living with him, is £11,590 or less, and ineligible if it is £20,740 or more (regulation 9). Where it falls between these amounts, the representation authority is to calculate the individual's annual disposable income, making deductions in respect of any income tax, national insurance, council tax, housing expenses, child care costs, maintenance and living expenses. The individual is eligible if his annual disposable income does not exceed £3,156 (regulation 10).

Where there is a change in an individual's financial circumstances which might affect his eligibility for a representation order, he must notify the representation authority of the change if he has been granted a representation order, and he may make a renewed application if his previous application had been refused because he was financially ineligible (regulations 11 and 13).

An individual may apply to the representation authority for the review of a decision that he is financially ineligible, on the grounds that his income has been miscalculated. He may also apply to the Commission, notwithstanding that he is financially ineligible under the Regulations, on the grounds that he can nevertheless not afford to pay for legal assistance (for example, because the costs of the case are likely to be particularly high). The Commission may refer a question arising on a review to the High Court for its decision (regulation 14).

A regulatory impact assessment has been prepared for instruments relating to the Criminal Defence Service Act, which is available from Criminal Legal Aid Strategy Division, Department for Constitutional Affairs, 54 Victoria Street, London SW1E 6QW and can also be found at <http://www.dca.gov.uk/risk/crime-defence-act-ria.pdf>.

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