



Andrew Griffith MP  
Economic Secretary to  
the Treasury  
The Correspondence and  
Enquiry Unit  
1 Horse Guards Road  
Westminster

Dear Andrew Griffith MP,

## **Open letter on the implications for Debt Advice Providers of the recent High Court decisions on the Debt Respite Scheme (England and Wales)**

We, the undersigned, represent debt advice charities and other organisations who assist people by providing free-to-client debt advice.

Our involvement in the Debt Respite Scheme as implemented under the Debt Respite Scheme Regulations (the regulations) is various.<sup>1</sup> Our roles include administering moratoria directly as Debt Advice Providers (DAPs),<sup>2</sup> providing second tier consultancy for advisers, producing written content on the law to support advisers, and providing expert knowledge within our organisations on policy issues relating to debt respectively.

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<sup>1</sup> The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020

<sup>2</sup> See definition of DAP at Regulation 3

We wish to express our deep concern that the recent judgments detailed below have put DAPs in an intractable position when assessing whether a person is eligible for a Mental Health Crisis Moratorium (MHCM) or a 'standard' Breathing Space Moratorium (BSM) under the regulations:

- *Kaye v Lees* [2022] EWHC 3326 (KB) [1] (21 December 2022)<sup>3</sup>
- *Kaye v Lees* [2023] EWHC 152 (KB) [2] (27 January 2023)<sup>4</sup>
- *Kaye v Lees* [2023] EWHC 758 (KB) [3] (31 March 2023)<sup>5</sup>

## The evidential requirements

These judgments have effectively stated that where eligibility for a MHCM relies upon the definition of crisis treatment as being in receipt of '*...crisis, emergency or acute care or treatment in hospital or in the community from a specialist mental health service in relation to a mental disorder of a serious nature*',<sup>6</sup> DAPs must take steps to obtain and assess evidence of such crisis treatment, in addition to the certified Evidence of Mental Health Crisis Treatment (EMHCT) form. This form was drafted and prescribed by HMT following stakeholder consultation to; (a) provide a practical solution to satisfying evidence requirements that would also comply with the law (as it was understood) and policy aims, and (b) to ensure DAPs are not required to undertake further enquiries or assessment.<sup>7</sup>

The courts acknowledge that it is the role of the Approved Mental Health Practitioner (AMHP), and not the DAP, to assess whether a patient is in mental health crisis. However, the *Kaye v Lees* judgments state that DAPs must: '*ensure evidence is cogent*', '*ask themselves whether the evidence from the AMHP genuinely shows that the debtor is in mental health crisis*'.<sup>8</sup>

Regarding the MHCM requirement for confirmation of ongoing receipt of mental health crisis treatment, *Kaye v Lees* [2] specifically approves a passage from the previous judgment.<sup>9</sup> This states that DAPs must '*closely assess the information available... and seek clarification or further*

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<sup>3</sup> [\[2022\] EWHC 3326 \(KB\)](#) [tinyurl.com/AdviceOL2] (See Mr Justice Swift at para 25)

<sup>4</sup> [\[2023\] EWHC 152 \(KB\)](#) [tinyurl.com/AdviceOL3] (See HHJ Dight CBE para 39)

<sup>5</sup> [\[2023\] EWHC 758 \(KB\)](#) [tinyurl.com/AdviceOL1] (See Mr D Locke KC para 29)

<sup>6</sup> Regulation 28(2)(e)

<sup>7</sup> See the Treasury's Debt respite scheme (breathing space): Guidance on mental health crisis breathing space at paragraph 1.15 and the Insolvency Service Debt Respite Scheme (Breathing Space) guidance for money advisers.

See also the explanatory memorandum to The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 at paragraphs 7.14 and 7.15.

<sup>8</sup> See footnotes 4 to 6

<sup>9</sup> *Kaye v Lees* [2023] EWHC 152 (KB) at paragraph 39 referring to *Kaye v Lees* [2022] EWHC 3326 (KB) at paragraph 25.

information as necessary, before concluding that the conditions for continuation of a mental health crisis moratorium are met.' But, as the relevant regulation makes no reference to obtaining or assessing information,<sup>10</sup> there appears to be no justification for the court to insist on these further requirements.

It is unclear from the court's commentary how they expect DAPs to navigate these apparent contradictions. Importantly, the DAPs cannot require disclosure of medical evidence, unlike the courts who have done so in the relevant cases.<sup>11</sup> Furthermore, the courts are not bound by expert medical evidence.<sup>12</sup> DAPs must complete reviews within prescribed timeframes<sup>13</sup> (which we support) and have no powers of adjournment to gather additional evidence to inform their decision. DAPs have discretion to refuse cancellation of a moratorium, where the grounds are otherwise proven, if they consider that the person's personal circumstances would make cancellation unfair or unreasonable.<sup>14</sup> It is unclear how such discretion can be exercised compatibly with recent case law.

The HM Treasury Guidance on mental health crisis moratoria (primarily aimed at health and care professionals)<sup>15</sup> envisages that the completed EMHCT form is the sole piece of evidence required to confirm MHCM eligibility.<sup>16</sup>

*'The expertise of the AMHP allows the debt advice provider receiving the evidence form to trust that the person is receiving mental health crisis treatment without further research or assessment.'*

## The requirement for a 'realistic repayment plan'

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<sup>10</sup> reg 33

<sup>11</sup> See as follows:

- [Kaye v Lees \[2023\] EWHC 758 \(KB\)](#) at para 14,
- [Axnoller Events Ltd v Brake & Anor \(mental health crisis moratorium\) \(Rev1\) \[2021\] EWHC 2308 \(Ch\)](#) at paras 40 and 46, and
- [IV Mountain Fund Ltd SAC v Mountain \[2021\] EWHC 2870 \(Ch\)](#) at para 18
- [Guy & Ors v Brake & Ors \[2023\] EWHC 1560 \(Ch\)](#) at para 16

<sup>12</sup> [IV Mountain Fund Ltd SAC v Mountain \[2021\] EWHC 2870 \(Ch\)](#), at para 11

<sup>13</sup> Regulation 18(1) for creditor requested reviews, and Regulation 27(3) for midway reviews

<sup>14</sup> Regulations 18(3) and 34(2)

<sup>15</sup> [Debt respite scheme \(breathing space\): Guidance on mental health crisis breathing space](#) [tinyurl.com/AdviceOL6] See para 1.15

<sup>16</sup> Regulation 30(4)(c)

With respect, we disagree with the court's interpretation of the Financial Guidance and Claims Act 2018 (FGCA) in *Kaye v Lees* [3].<sup>17</sup> The judge's assertion that the 3 purposes of the scheme '*must be taken as a whole*' are arguably incorrect. The statute provides that the scheme is designed '*to do one or more of the following*...'<sup>18</sup> Furthermore, the court's conclusion that the provision imposes a requirement for those in MHCM's to engage with debt advice appears directly contrary to the explanatory memorandum to the regulations and HMT's policy proposal.<sup>19</sup> The FGCA effectively provides that regulations '*may make different provision for different purposes*' following advice from the Money Advice and Pensions Service.<sup>20</sup> This is apparent in the respective BSM and MHCM schemes, each having distinct purposes and differing debtor obligations.

We also disagree with the finding in *Kaye v Lees* [3]; that the regulations require that DAPs should provide advice on: '*...devising a realistic plan for the repayment of some or all of the debts. ...before they can ... properly conclude that it was appropriate to approve the moratorium*' under the regulations.<sup>21</sup> The regulations concerning BSMs refer to providing advice but refer only to 'debt solutions' which is defined more widely in the regulations beyond coming to a 'payment plan'.<sup>22</sup> As is well accepted amongst debt advice providers; a debt solution may not involve any payment to the client's creditors (e.g. Bankruptcy, debt relief order). This was implicitly acknowledged in the judgment which stated that bankruptcy '*may lead*' to the payment of '*some or all*' of the debts.<sup>23</sup> This aspect of the decision has significant implications for DAPs assessing a person's eligibility for both MHCMs and BSMs.

## **The threat of judicial review of the debt advice providers decisions**

Debt respite moratoria are a vital tool for assisting debtors increasingly impacted by the cost-of-living crisis,<sup>24</sup> and often suffering serious mental health conditions themselves exacerbated by

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<sup>17</sup> *Kaye v Lees* [2023] EWHC 758 (KB) at paragraph 24

<sup>18</sup> Financial Guidance and Claims Act 2018, section 6 (2).

<sup>19</sup> See the explanatory memorandum to The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 at paragraphs 7.14 and 7.15 and HM Treasury's Breathing space scheme: consultation on a policy proposal at paragraph 3.5.

<sup>20</sup> Financial Guidance and Claims Act 2018, section 7 (2) & (5)

<sup>21</sup> *Kaye v Lees* [2023] EWHC 758 (KB) at para 32

<sup>22</sup> Regulation 24(5)(a)(iv)

<sup>23</sup> *Kaye v Lees* [2023] EWHC 758 (KB) at paragraph 24

<sup>24</sup> Christians Against Poverty 'UK facing personal debt crisis as new data reveals impact of rising costs'(accessed 25/05/2023) <https://tinyurl.com/yrzc3dc2>(accessed 25/05/2023) <https://tinyurl.com/yrzc3dc2>

debt<sup>25</sup>. We are therefore very concerned about the comments in the latest judgment suggesting that judicial review (JR) of a DAP's decision making is a possibility,<sup>26</sup> with the accompanying risk of an adverse costs order.<sup>27</sup> This could undermine the scheme by having a 'chilling effect'; influencing DAPs to potentially administer moratoria self protectively, with resulting detriment to those the scheme is intending to help.

We want to see robust regulatory amendments, protecting the DAP's position and guidance clarifying that in HMT's view, judicial review of the DAP's decision is inappropriate because regulation 19 provides creditors with an 'adequate alternative remedy'.<sup>28</sup>

## The latest HMT guidance issued on 9th June 2023

The various updated guidance from HMT dated 9<sup>th</sup> June 2023, issued in response to the latest judgments discussed above, does not address the problems we have identified.

## Summary - the regulatory changes we would like to see

We are sceptical that further government guidance alone can resolve these problems. There are arguably conflicting judicial views on the extent of the DAP's role in obtaining and assessing evidence of mental health crisis treatment.<sup>29</sup> But, the emerging majority view expressed in the *Kaye v Lees* judgments appears directly contrary to the Treasury Guidance in place at the time. Considering the recent case law, we believe that the regulations need to be amended to address these problems in the following ways:

- Clarification that the DAP can rely solely on the EMHCT form as **evidence** that the person is in receipt of mental health crisis treatment.
- Clarification that it is not the DAP's role to **assess** whether the person is in mental health crisis or in receipt of mental health crisis treatment, other than with reference to the EMHCT form, at any stage of the moratorium process.

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<sup>25</sup> The Royal College of Psychiatrists 'Debt and mental health' (accessed 25/05/2023) <https://tinyurl.com/5anks65r>

<sup>26</sup> *Kaye v Lees* [2023] EWHC 758 (KB)

<sup>27</sup> *Kaye v Lees* [2023] EWHC 758 (KB) at para 54

<sup>28</sup> *Kaye v Lees* [2023] EWHC 758 (KB) at paragraph 53

<sup>29</sup> See the comments of HHJ Paul Matthews at paragraphs 37 – 46 of *Axnoller Events Ltd v Brake & Anor* (mental health crisis moratorium) (Rev1) [2021] EWHC 2308 (Ch) (17 August 2021). These appear at odds with those in the *Kayes v Lees* cases referred to above in footnotes 3 –5

- Clarification that it is not a requirement for persons in MHCMs to engage with debt advice.
- Clarification that neither MHCMs or BSMs necessarily require the devising of a realistic repayment plan for some or all of the debts and can be used for clients who are insolvent and need time to get a DRO or Bankruptcy set up.
- Clarification that the information requirements regarding a person's ongoing receipt of mental health crisis treatment are not as envisaged in *Kaye v Lees* [3]<sup>30</sup>

## **Summary - the guidance changes we would like to see**

In addition, we are requesting guidance, confirming that in HMT's view, judicial review of the DAP's decision is inappropriate because regulation 19 provides creditors with an 'adequate alternative remedy'.<sup>31</sup>

This letter is signed by Shelter and on behalf of the following organisations:

Advice UK

Christians Against Poverty

Citizens Advice

Community Money Advice

The Child Poverty Action Group

The Institute of Money Advisers

The Money Advice Trust

Rethink Mental Illness

StepChange

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<sup>30</sup> See footnotes 8 and 9

<sup>31</sup> *Kaye v Lees* [2023] EWHC 758 (KB) at paragraph 53