ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

Ministry of Justice Consultation: Transforming Legal Aid – ILPA response

'If all members of society cannot gain genuine access to the courts, then the possibility exists for society to become exploitative, as some elements take advantage of the fact that they can ignore the law with relative impunity'. Lord Neuberger President of the Supreme Court of England and Wales, Harbour Litigation Funding First Annual Lecture, *From Barretry, Maintenance and Champerty to Litigation Funding* 09 May 2013.

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Introduction

The Immigration Law Practitioners' Association (ILPA) is a professional membership association, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training, through disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government bodies, including UK Border Agency consultative and advisory groups among others.

In this response, ILPA has not commented substantively on the criminal defence legal aid proposals and has confined itself to those matters within its particular expertise. We consider that the proposals have the potential to decimate legal aid in criminal cases and that the lack of choice of a lawyer will have a particularly adverse effect upon those such as trafficked persons accused of crimes who stand in particular need of expert help.

We have included extracts from the consultation paper in this response to make it more accessible to the general reader. These extracts are in Times New Roman.

We have had the benefit of reading the responses of a number of other organisations in draft and we acknowledge our debt to them. We draw particular attention in this regard to the work of the Public Law Project and in particular its analysis *Unpacking JR statistics*[1] and to the work of the No Recourse to Public Funds network which has provided a succinct and trenchant analysis of the proposals.

In 2009, the last time a similar package of proposals was mooted[2], ILPA wrote:

> *Parliament enacts many laws, and government sets up many schemes; Legal Aid acts as insurance policy to ensure that these are properly administered in accordance with the law. …*
>
> *We consider it should be a priority of an independent Legal Services Commission that it should ensure that cases can be brought against public authorities, where the limited means of the applicant would otherwise mean that the actions of public authorities went unchallenged. This contributes to ensuring equality of arms between State and individuals of limited means.*

We recall the Ministry of Justice's statement in its 2010 consultation paper *Proposals for the reform of legal aid in England and Wales*[3]*:*

> *4.16 In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly.*

The principled position expressed in that analysis might usefully be revisited. The proposals go against that principled position and against the rationale behind the changes made by Legal Aid, Sentencing and Punishment of Offenders Act 2012 as set out in our comments on the impact assessments in response to questions 34 and 35 below. It is therefore questionable to introduce these changes by secondary legislation and contract amendment, without proper consultation and without the detailed parliamentary scrutiny that is given to primary legislation. Where judicial review is concerned it arguably amounts to a

[1] Vara Bondy and Maurice Sunkin, 30 April 2013, available at http://www.publiclawproject.org.uk/documents/UnpackingJRStatistics.pdf (accessed 29 May 2013).
[2] *Legal aid: refocusing on priority cases*, Ministry of Justice, 2009.
[3] Consultation Paper 12/10, November 2010, Cm 7967.

fundamental conflict of interest for the executive to introduce in this way measures which are likely further to insulate the executive against challenges being brought to its actions or inaction. The Minister may aver that this is not his intention; it is nevertheless potentially the consequence. We recall the comments of Lord Justice Laws in *R (Evans) v Lord Chancellor et anor* [2011] EWHC 1146, a challenge to provisions in Legal Services Commission Funding Code:

> *25. … For the state to inhibit litigation by the denial of legal aid because the court's judgment might be unwelcome or apparently damaging would constitute an attempt to influence the incidence of judicial decisions in the interests of government. It would therefore be frankly inimical to the rule of law. The point is one of principle; it is not weakened by the fact that such litigation might be funded by other means.*

At Lords' Report stage of the Legal Aid, Sentencing and Punishment of Offenders Bill, the Lords Pannick, Woolf, Faulks and Hart of Chilton proposed an amendment to what is now section one of the Act so that it would read

> *…secure within the resources made available and in accordance with this Part) that individuals have access to legal services that effectively meet their needs.*

Rejecting the amendment, the Lord McNally said[4]

> *The provisions of Part 1 that relate to the general scope of civil legal aid are drafted on an inclusionary basis, where the services capable of being funded under civil legal aid are detailed explicitly in Schedule 1. As such, there is no question as to what services might be funded; they are in the Bill for all to see. Consequently, the amendment based on Section 4(1) of the Access to Justice Act is not appropriate.*
>
> *…the debate has raised questions about whether there should be a duty on the Lord Chancellor to secure access to justice. I shall briefly explain why we think that that is also unnecessary in the context of the Bill. … I repeat again that the Government consider that the rule of law and access to justice are a fundamental part of a properly functioning democracy and an important element in our constitutional balance.*
>
> …
>
> *The Government believe that financial assistance from the state in accessing the courts is justified in certain areas, and that is why we have retained categories of cases within the scope of civil legal aid. …We have also made provision for legal aid to be granted in the limited circumstances justifying exceptional funding under Clause 9. The exceptional funding scheme will ensure the protection of an individual's rights to legal aid under the European Convention on Human Rights, as well as rights to legal aid that are directly enforceable under European Union law.*
>
> *The Government do not dispute that it is a principle of law that every citizen has an unimpeded right of access to a court. However, they do not accept the proposition that there is a constitutional right to legal aid in all circumstances and at all times. …*
>
> *…The Government considered very carefully from first principles which cases should continue to attract publicly funded legal advice and representation in the light of the financial constraints that I have mentioned. As reflected in the Bill, the Government reached the view that exceptional funding under Clause 9 of the Bill should be limited to ensuring the protection of an individual's rights to legal aid under the ECHR as well as those rights to legal aid that are directly enforceable under EU law.*

[4] HL Report, 5 Mar 2012: Columns 1569-1572. See also HL Report 27 Mar 2012: Column 1253.

In addition to this the Lord Chancellor would be required in carrying out his functions to protect and promote the public interest and to support the constitutional principle of the rule of law. These considerations are inherent in the Lord Chancellor's functions as a Minister of the Crown and do not require specific reference here. In addition, the Lord Chancellor has some specific duties under the Constitutional Reform Act 2005.

… The Bill is honest about what we can do and, as such, it deserves the support of this House.

The Government won the vote on Lord Pannick's amendment by 45 votes[5]. The Bill starts to look less honest when nine days after it is brought into effect its choices about who is eligible for legal aid are revisited. The Government expressly preserved legal aid for challenges to immigration detention[6] and cases before the Special Immigration Appeals Commission[7] in the Legal Aid, Sentencing and Punishment of Offenders Act 2012[8] yet many of those bringing such challenges and involved in such cases will now be excluded by the residence test. Parliament fought hard to retain legal aid for survivors of domestic violence[9] and human trafficking[10], and won, at least to an extent, yet very many persons in both groups will be excluded by the residence test. As set out in our response to question four below, without amendment to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 those excluded by the residence test will be beyond the reach of exceptional funding.

In practice the consultation period has proved insufficient for responses to be received to freedom of information requests seeking to understand the proposals and the impact assessments[11]. Members who have attend Ministry of Justice consultation events report being told in response to their questions and requests for further information "Please raise that in your consultation response." The comments in Treasury Solicitors' *The Judge over your shoulder* on consultation are pertinent: "…only a fair procedure will enable the merits to be determined with confidence, and must therefore come first. [12]

Q1. Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.

The proposal:

> 3.4 We believe that criminal legal aid advice and assistance should be available, subject to merits and means, for any prison law case which involves the determination of a criminal charge, or which affects the individual's on-going detention and where liberty is at stake, or which meets the criteria set out in case law (see paragraph 3.14).

ILPA agrees with the matters remaining in scope; we do not agree with the proposals to remove matters from scope. It was only three years ago that the prison law contract and the requirement of prison law supervisor standards were introduced, on the basis that prison law required a specialist approach.

We highlight the effect upon foreign national prisoners and ex-offenders held in prison at the end of their criminal sentence under Immigration Act powers. Such detention is without limit of time and without any oversight of the courts; the detainee only appears before a court or tribunal if s/he is able to instigate this.

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[5] HL Report, 5 Mar 2012 : Column 1573.
[6] The Legal Aid, Sentencing and Punishment of Offenders Act, Schedule 1, Part 1, paragraphs 25 to 27.
[7] The Legal Aid, Sentencing and Punishment of Offenders Act, Schedule 1, Part 1, paragraph 24.
[8] *Proposals for the reform of legal aid in England and Wales, op.cit.*
[9] The Legal Aid, Sentencing and Punishment of Offenders Act, Schedule 1, Part 1, paragraphs 28 to 29.
[10] The Legal Aid, Sentencing and Punishment of Offenders Act, Schedule 1, Part 1, paragraph 32.
[11] See the Public Law Project's 22 May 2013 letter to the Ministry of Justice, available at http://www.publiclawproject.org.uk/documents/PLP_Letter_to_MoJ_22_May_2013.pdf (accessed 29 May 2013).
[12] Treasury solicitors, Edition 4: 2006, paragraph 2.46. See further below.

Detention under Immigration Act powers is frequently lengthy, not infrequently for years[13]. Family members, for example of those whose claims for asylum have failed, who are likely to be subsisting on non-cash support under section 4 of the Immigration and Asylum Act 1999, have difficulties in visiting at all, so the location of the detained person may result in isolation from the family and breaches of the Home Office duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of the child, whether the detainee's child be a person under immigration control, settled or a British citizen.

Legal aid is currently only available for 'treatment' cases where it is 'practically impossible' for the prisoner to use the prison complaints system[14]. The Legal Aid Agency must give prior authority in such cases and we understand that in 2011, prior authority was granted in only 11 cases. This appears to provide rigorous control on expenditure and to ensure that legal aid is used in cases where a prisoner does not have other means of redress. That a costs saving might result is far from evident, The Prisons and Probation Ombudsman budget for 2011-2012 was close to six million pounds and some 5,000 complaints were resolved.

Home Office concerns about the risk of absconding affect prison categorisation of foreign nationals. Access to rehabilitation programmes[15] and/or planning for release are affected by presumptions that the person will be removed at the end of the sentence, however strong the case against this may be and however unlikely it is in any event that a decision on return will rapidly be resolved. The proposals would cut legal aid for matters such as categorisation, segregation, dangerous and severe personality disorder referrals and assessments, and resettlement matters. These matters are all of relevance to the outcome of any parole hearing: it avails little that parole remains in scope if the evidence relevant to consideration of release is not there to put before the Parole Board.

The then Chief Inspector of Prisons, Dame Anne Owers, said in her foreword to her Inspectorate's 2006 report *Foreign National Prisoners: A thematic review*[16]*:*

> *The third essential building block of provision is to ensure that all foreign nationals are prepared for their eventual removal or release. All of them need to know, as early as possible in sentence, whether or not it is proposed to deport or remove them. They need to have access to appropriate regimes: not only to reduce the risk of reoffending, wherever they are released, but also because safety, security and decency within prisons depend upon prisoners having access to purposeful activity.*

Safety, security and decency are prime concerns for any prison governor. There is no indication anywhere in the consultation paper that the views of prison governors or of the current Chief Inspector of Prisons have been sought as to the implications of the proposals for the safety, security and decency of prisons.

Section 134 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 amends section 22 of the Criminal Justice Act 2003. It allows for "foreign offender conditions" to be attached to a conditional caution. The cautions are imposed with the objects of bringing about the departure of the offender from the United Kingdom and/or ensuring that the offender does not return for a period of time. A conditional caution can only be given if the five requirements set out in section 23 of the Criminal Justice Act 2003 are met. Immigration advice is likely to be necessary for the person to understand the effects of the caution and thus for the condition precedent to the giving of a caution set out in section 23 (4) of the 2003 Act: "that the authorised person explains the effect of the conditional caution to the offender," to be met.

[13] See *The effectiveness and impact of immigration detention casework: A joint thematic review,* Her Majesty's Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration, December 2012, available at http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/thematic-reports-and-research-publications/immigration-detention-casework-2012.pdf (accessed 28 May 2013).
[14] See Annexe B to the consultation paper.
[15] See Bail for Immigration Detainees' February 2013 submission to the Ministry of Justice consultation *Transforming rehabilitation: a revolution in the way in which we manage offenders 2013*, available at http://www.biduk.org/154/consultation-responses-and-submissions/bid-consultation-responses-and-submissions.html (accessed 28 May 2013).
[16] Her Majesty's Inspectorate of Prisons, July 2006.

Similarly with the requirement in the accompanying code to explain the implications of accepting the conditional caution[17]. Removing legal aid from such cases may well prove an "own goal" for the Ministry.

We are particularly concerned for those with mental health problems. The Government has four times in two years been found guilty of breaches of Article 3 of the European Convention on Human Rights for its treatment of foreign national ex-offenders with mental health problems, although the worse problems have consistently occurred in immigration removal centres rather than within the prison estate (see for example *R (BA) v Secretary of State for Home Department* [2011] EWHC 2748 (Admin) and *R (S) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin)). These cases were brought by one of a small number of niche firms specialising in this type of work in the context of a civil practice. They would be cut out from this work if prison law were made part of competitively tendered criminal contracts. We do not see how the expertise thereby lost to the field could be made good and nor do we understand how criminal law firms could be put in the position of having to represent prisoners for matters remaining within the scope of civil legal aid wherever in the country those prisoners were located.

Those with a history of torture and ill treatment or otherwise in need of medical care and those whose treatment in prison is affected by a limited command of English are also at particular risk. If the proposals are implemented there will be no legal aid to bring cases about prison conditions, including failure to secure the services of an interpreter to communicate with a prisoner or a detainee. There will be no legal aid to address treatment by staff such as bullying, abuse or discrimination. The risks of ill-treatment in such circumstances are very great. The treatment of mothers and babies is a particular concern.

Q4. Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

The proposal:

> 3.49 First, the individual would need to be lawfully resident in the UK, Crown Dependencies or British Overseas Territories at the time an application for civil legal aid was made. This would have the effect of excluding both foreign nationals and British nationals applying from outside the UK, Crown Dependencies or British Overseas Territories from receiving civil legal aid. It would also have the effect of excluding, for example, illegal visa overstayers, clandestine entrants and failed asylum seekers from receiving civil legal aid.
>
> 3.50 Second, the individual would also be required to have resided lawfully in the UK, Crown Dependencies or British Overseas Territories for 12 months. This 12 month period of lawful residence could be immediately prior to the application for civil legal aid, or could have taken place at any point in the past. However the period should be continuous. The fact that the residence period could have been in the past would mean, for example, that people who had previously lawfully resided within the UK, Crown Dependencies or British Overseas Territories on a visa for 12 months, or British nationals who had lived within the UK, Crown Dependencies or British Overseas Territories for 12 months, would immediately satisfy this limb of the test on their return.
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> 3.51 The residence test would be carried out by the legal aid provider who was dealing with the application for civil legal aid. They would need to see evidence that the client was lawfully resident and had previously been lawfully resident for 12 months, and they would need to retain copies of this evidence on file for audit purposes. [from footnote: For example, evidence of a right to reside lawfully in the country, such as evidence of British nationality (e.g. a passport), evidence of a right to reside (e.g. a valid EEA Passport), evidence of a right of abode (e.g. a certificate of entitlement as a result of Commonwealth ancestry) or any other evidence of being here legally (e.g. a visa).]
>
> 3.56 We propose an exception to allow asylum seekers to be exempt from the residence test for all civil proceedings (including family proceedings, as well as asylum matters). Asylum seekers are "lawfully present"

[17] For further information see ILPA's 1 November 2012 response to the Ministry of Justice consultation on the draft code for conditional cautions, available at http://www.ilpa.org.uk/data/resources/16088/12.11.01-ILPA-to-MOJ-conditional-cautions-1-Nov-2012.pdf

in this country rather than "lawfully resident" and would not otherwise qualify under the proposed test. Although asylum seekers do not have a strong connection to this jurisdiction, they are seeking refuge from their country of origin, and by virtue of their circumstances this group tends be amongst the most vulnerable in society. We therefore propose that a general exception to the lawful residence test is made for asylum seekers.

3.57 Where an asylum seeker is successful in their asylum claim, they will normally be given 'leave to remain' for five years. At this point they will be 'lawfully resident' rather than 'lawfully present', but will not qualify under the second limb of the test until 12 months have passed. We propose that where an individual is an asylum seeker and granted legal aid for a civil or family case, if they are successful in their asylum claim legal aid should continue to be available for that civil or family case. To expect the individual who was an asylum seeker to have to wait a further 12 months to comply with the second limb of the lawful residence test would disrupt the ongoing court proceedings. For any new claim for which the individual who was asylum seeker wished to obtain legal aid, they would need to satisfy the residence test in full like any other applicant.

3.58 If an asylum seeker had their claim for asylum rejected and their appeal rights had been exhausted, they would cease to qualify for legal aid under the asylum seekers exception, and funding would cease. Only where they had made a 'fresh claim' for asylum would they once again benefit from the exception for asylum seekers.

3.59 There is a risk that such an exception to the residence test for asylum seekers, might be exploited by some, who might make spurious claims for asylum simply as a means of obtaining legal aid. However, we consider this risk is low, as it is unlikely that, for example, illegal visa overstayers would wish to bring themselves to the attention of the authorities in this way. Nonetheless, we would monitor the operation of this exception and if it appeared to be being abused we would consider bringing forward secondary legislation to revise the exception.

3.60 Subject to the outcome of this consultation, it is currently anticipated that this proposal would be implemented through secondary legislation, to be laid in autumn 2013.

No.

ILPA agrees with the proposal that no residence test should be applied in the case of persons seeking asylum. We do not agree with the test being applied to anyone else and neither do we agree with the terms in which it is couched. Twelve months' lawful residence is not a good test of whether a person has a "strong connection" to the UK (including with one or more Crown Dependencies or British Overseas Territories). Persons who have lived in the UK, a Crown Dependency or British Overseas Territory for most of their lives, whether lawfully or not, are likely to have a strong connection to the UK. A baby may have a very strong connection to the UK but until s/he reaches his/her first birthday, s/he will not qualify for legal aid. Treating a baby less than 12 months old less favourably than a toddler or an adult does not appear compatible with the public sector equality duty under section 149 of the Equality Act 2010, which applies to under-18s.

If a person has no or limited entitlements to particular service etc. because of their immigration status then they will fail the merits test for legal aid in any event. Thus any proposal to cut off legal aid from persons within the UK because of their immigration status is a proposal to deny them the right to challenge a failure to treat them in the way in which they are entitled to be treated under UK law.

When he was asked "How will the Government ensure that the proposed residence test does not leave many victims of human trafficking, unaccompanied child immigrants and victims of domestic violence with no access to justice?" The Lord Chancellor, after an erroneous[18] reference to exceptional funding said "I do not think that it is unreasonable to say that if someone is going to come to this country and access public support, they should have been here for a period of time and paid taxes before they do so." We disagree. We think it wholly reasonable that a person transported to the UK and held as a slave or in

[18] See below.

servitude, alone in the UK as a child, or having fled a violent and abusive relationship, should receive public support.

There is a particular iniquity in denying foreign nationals legal aid for their asylum and, insofar as these remain in scope, immigration cases when a wrongful assessment of that status may cut them out of defending or asserting other rights and entitlements, but the residence test bites on all areas of law that remain within the scope of legal aid. The case might concern child protection matters[19]. It might concern homelessness. It might concern a challenge to the arbitrary and unlawful exercise of State power.

There must be equality before the law. It is a constitutional principle, observed by the courts, that there must be access to the courts to secure the rule of law[20]. Lord Bingham wrote in *The Rule of Law*[21]

> *…means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide disputes which the parties are unable themselves to resolve' and 'denial of legal protection to the poor litigant who cannot afford to pay is one enemy of the rule of law'. Given that we have an adversarial legal system there must be equality of arms.*

That which Lord Bingham describes is a legal obligation. The Lord Chancellor's oath as set out in section 17 of the Constitutional Reform Act 2005 includes the promise to:

> *…respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible* [22].

The residence test would violate that legal obligation.

There are four elements to the residence requirement:

- lawful
- residence
- continuously
- for more than 12 months

As an alternative to satisfying any element, a person can be seeking asylum. All elements must be satisfied. We consider each element of the test, then the implications, first as the test affects specific classes of case and then more generally.

Lawful

The lawfulness of a person's residence may be the very matter in issue in the proceedings for which legal aid is needed, be the proceedings to do with immigration, other aspects of public law or homelessness.

Those not lawfully present include:

- persons brought to the UK, a Crown Dependency or British Overseas Territory as children, some of whom are still children, some of whom are in their 50s or 60s and unaware that their country of origin's independence from the British empire has affected their immigration status. What of persons born in Jamaica as Citizens of the UK and Colonies to parents who were Citizens of the UK and Colonies (the status under the British Nationality Act 1948 that is the nearest

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[19] See e.g. *TK v Lambeth LBC [2008] EWCA Civ 103.*

[20] See, for example, *R v Secretary of State for the Home Department, ex parte Leech* [1994] QB 198 per Lord Steyn; *R (Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710; *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36.

[21] Allen Lane, 2010, at p 85 and p 88 respectively.

[22] See also section 1 of that Act.

approximation to British citizenship today) who came to the UK before Jamaica became independent, who have lived in the UK all their lives and have never had a passport? They may assert that they are British, having assumed this to be the case all their lives. Are they correct? If they are wrong, are they nonetheless lawfully resident?

- trafficked persons, for a claim for asylum is about risk on return, not what has been suffered in the past, and some trafficked persons have no claim for asylum. Some in this category will be domestic slaves. Here there is a risk of a violation of Article 47 of the EU Charter of Fundamental Rights, including because of the EU Directive on Trafficking in Human Beings[23];
- those whose claims for asylum have failed, but who cannot be removed;
- women tricked into leaving the UK by partners who then report to the Home Office that the relationship has broken down, leaving the woman stranded and often separated from her children;
- British citizens resident abroad who flee to the UK to escape domestic violence;
- persons who fall ill with a mental illness while in the UK and are sectioned and confined in hospital;
- those who made a clandestine entry or whose lawful leave has expired, who are unknown to the authorities. Such persons are likely to need assistance to attempt to regularise their stay and are unlikely to bring themselves to the attention of the authorities without advice as to what to expect and assistance in presenting their cases. Their exclusion appears to be an own goal for the Government, ensuring that such persons remain hidden;
- those in the UK without lawful leave who have come to the attention of the authorities. This class will include persons who have lived in the UK all or most of their lives, and persons with British citizen spouses and children. Those partners and children would be able to bring a human rights claim in the country court under section seven of the Human Rights Act 1998 to argue that the separation is not lawful;
- Those facing removal or deportation whose challenges are based on rights to respect for private and family life, rather than asylum claims. Such claims still involve the UK's international obligations under the European Convention on Human Rights and the obligations on public authorities under the Human Rights Act 1998 not to violate rights protected by that Act.

All these persons may have cases of any type within the scope of civil legal aid.

Case of A

A had been in the UK for 13 years. She has severe learning disabilities and is dependent on her sister, a British citizen. When she had the opportunity, A's sister tried to resolve A's immigration status but the case was very badly handled and A was left without leave to remain. Access to healthcare was being denied on the basis of her immigration status. This was unlawful because A was pregnant and requires antenatal care, which is seen as immediately necessary treatment. Legal aid paid for a challenge to the unlawful denial of treatment ensuring that the baby was not delivered at home with no medical support, that A received the medical treatment to which she was entitled and that her health and that of her baby were not put at risk.

***OOO & ors* [2011] EWHC 1246 (QB); [2011] H.R.L.R. 29; [2011] U.K.H.R.R. 767**

This was the case which identified and addressed the duty on the police, under Article 4 of the European Convention on Human Rights, to investigate credible allegations of trafficking into domestic servitude. The claimants succeeded in establishing that the police had violated their Article 4 rights by failing to investigate their allegations. At the time of the proceedings the *OOO & ors* claimants were a mixture of those who were still seeking asylum and one claimant ('OOO' herself) who had been granted status by the time she applied for funding but who had had it for less than a year. Thus all of these claimants, other than OOO would have been eligible for funding. 'OOO' would have been excluded[24].

[23] Directive 2011/36/EU.

[24] OOO has confirmed that she is happy to be used as an example. A court order remains in place to protect her identity.

A domestic worker, under the current immigration rules[25] can only come to the UK for six months. Those kept unlawfully after their visa has expired would be unable to satisfy the residence test for however long they had continued to be exploited and would thus be unable to secure legal aid as victims of trafficking, contrary to parliament's intention as reflected in the Legal Aid, Sentencing and Punishment of Offenders Act 2012[26].

Residence

The consultation does not go into detail in distinguishing between 'residence' and 'presence'. It would appear that the term is intended to isolate those outside the UK and then distinguish those in the UK, not subject to immigration control (British citizens, etc.) or with leave, from those on temporary admission following a request for leave which has yet to be determined. However, the persons who would normally be on temporary admission for such a lengthy period would be persons seeking asylum whose situation is addressed separately.

As to those outside the UK, among the cases affected will be allegations of torture and ill-treatment by British forces abroad, international child abduction cases, international child protection and child contact cases and international cases involving the protection of "vulnerable adults." It is of constitutional importance that cases such as those brought by the family of Baha Mousa[27] and by Binyam Mohamed can be heard. Breaking news of a secret prison at Camp Bastion in Afghanistan[28] days before the consultation closed underscore the need to retain funding for these cases. The following statements of the European Committee for the Prevention of Torture are of more general application.

> *18. The possibility for persons taken into police custody to have access to a lawyer is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill-treat detained persons. Further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.*[29]

Funding arrangements must enable matters of such importance to be brought before the UK courts.

Applications for leave to enter the UK to have contact with a child depend on either agreed contact or on a court order. There are also occasions when applicants seek to enter the UK on a limited basis to progress an application for a contact or residence order. In cases where there is no order or agreement in place the immigration application by the absent party will fail unless the proceedings have already commenced. In those circumstances, the absence of funded representation may make the commencement or progressing of proceedings impossible. The differing levels of wealth in different countries mean that litigation in the UK may be prohibitively expensive for some persons outside the UK.

Claims for wrongful removal or assault in the course of removal need to be protected. We have seen cases of the wrongful removal of British citizens and others with a right of abode in the UK because their status has not been recognised. We have seen cases where persons have been wrongly removed and faced persecution on return and cases where it has taken over a year to effect the return of a person wrongfully removed. These are cases in which we consider it essential that the State be held to account. We recall the statement of the Court of Appeal in *R (Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710:

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[25] Immigration Rules HC 395, rule 159A.

[26] Schedule 1, Part 1, paragraph 32.

[27] *Al-Skeini and others v Secretary of State for Defence* [2007] UKHL 26.

[28] BBC world Service and other news sources, e.g. *UK defence secretary confirms Afghan detentions at Camp Bastion*, Hannah Kuchler, Financial Times, 29 May 2013.

[29] European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment, *CPT Standards*, CPT/Inf/E (2002) 1 - Rev. 2011.

… to have effective access to the courts, the person served with removal directions… needs to have a reasonable opportunity to obtain legal advice and assistance.

In that case, the Secretary of State for the Home Department's policy was quashed as unlawful because it "…abrogated the constitutional right of access to justice".

Some cases can only be brought in the UK courts, including, for example, arguments that another party to proceedings has breached an order of the court. In others, the principle of *forum conveniens* dictates that the case should be heard in the UK. Currently there are a number of immigration cases each year concerning whether removal of an individual would mean that they would no longer be able effectively to pursue other civil proceedings if removed. In some, the Home Office is currently successfully able to argue that the proceedings can be pursued from abroad and the applicant is removed. If legal aid funding were withdrawn as a consequence of the applicant being removed then the balance to be considered in their immigration case would be likely to shift back in favour of removal being deferred. We do not have any access to figures as to how many such cases there might be in any one year. Costs associated with such persons remaining in the UK include those associated with detention and/or support.

No detailed information has been provided about cases of persons outside the UK that have been funded to date and the case has not been made for denying such persons funding.

How quickly the Home Office deals with a case and therefore how long a person spends on temporary admission is a matter of how the Home Office allocates its resources and of its efficiency. The UK Border Agency's record on each is poor. A person on temporary admission will, if their claim succeeds, likely settle in the UK and later acquire British citizenship. This highlights the particular unfairness of the proposal set out in paragraph 3.57 of the consultation, that a person, however long they have been in the UK waiting to be recognised as a refugee must then wait 12 months to be eligible for legal aid.

A refugee is not created but recognised by a declaration of recognition of refugee status, accompanied by a grant of asylum. Once a person fulfils the definition in the 1951 UN Convention Relating to the Status of Refugees they are a refugee. Any proposal to take legal aid away from those with a claim, including a fresh claim, for asylum risks taking it away from refugees.

We recall Article 16 of the 1951 UN Convention Relating to the Status of Refugees:

Article 16. - Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from cautio judicatum solvi.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Further EU Directive 2004/83/EC (the Refugee Qualification Directive) also guarantees the content of international protection (e.g. equal access to education, health care, etc. on the same terms as nationals (British citizens)) to recognised refugees and those granted subsidiary protection. Such rights may need to be enforced in the first 12 months.

A national resident in the country for 12 months at any time in his/her life would be entitled to legal aid. A refugee may have been resident for many years but will not.

Most legal cases benefit from being prepared at the earliest possible stage and timeliness is a feature of the Civil Procedure Rules and procedure rules for tribunals. There are time limits on appeals but it is normally possible to put in an out of time appeal where it is possible to show good cause for the delay and that the interests of justice would be served by the appeal being brought. There are likely, if the proposals are implemented, to be many instances of cases being brought at a late stage because a person was unable to obtain assistance necessary for them to bring the case at an earlier stage.

The one year wait to be eligible for legal aid puts people outside the time limit for bringing claims under the Human Rights Act (one year less one day from the incident giving rise to the claim) which may have the effect of denying a remedy for breach of a right protected under the European Convention on Human Rights, in violation of Article 13 of that Convention which enshrines the right to an effective remedy. This would, for example, have affected the case of OOO described above had OOO waited until she had resided for a year to bring her case.

Continuously

This element goes to both residence and lawful residence. It appears aimed primarily at preventing persons aggregating short visits. It is unclear what would be the effect of short absences from the UK during the currency of a visa, for example for holidays if a person is in the UK with leave and able to travel. There are different permitted absences in different areas of immigration and nationality law and the reasons for an absence may affect how it is treated.

It is possible to have a break in continuous lawful residence. For example, a person might arrive as a visitor, then overstay, but subsequently have rights as the family member of a European Economic Area national. The calculation of what constitutes 'continuous' lawful residence can be formidably difficult for immigration lawyers; it will be next to impossible for any lawyers in other areas of publically funded work who have to assess whether a potential client has been in the UK for 12 months.

For 12 months

What is at issue here is the continuous period for which the person has had lawful leave, rather than the length of any leave granted. It is unclear whether the proposed provision would be for 12 months or "more than 12 months"; this could be significant as in some cases leave is granted for 12 months exactly. There appears to be no statistical evidence to suggest how many people presently in receipt of civil legal aid would not satisfy this element of the residence test and therefore what the projected saving, if any, would be. No justification has been given for choosing 12 months rather than some other period.

A person who holds a British citizen passport and thus satisfies the "lawfulness" limb of the test may have considerable difficulty in demonstrating that s/he has been resident in the UK, a British Overseas Territory or a Crown Dependency for 12 months because British passports are not stamped on entry to or exit from the UK. A British citizen may be in particular difficulty in situations where legal aid is needed as a matter of urgency and, for example, s/he does not have a passport or it has been lost, s/he is detained with no access to documents or s/he has been unlawfully evicted from accommodation and all relevant documents are inside.

A national of the European Economic Area or his/her family member may have similar evidential difficulties. EEA nationals retain rights until they divorce, even if they split from their partners, and may retain them after divorce if certain conditions are met. There is a risk of a violation of the EU law principle of EU preference if these evidential difficulties mean that in practice it is harder for an EEA national to obtain legal aid than it would be for a third country national. A third country national who came to the UK with their EEA national partner, where the latter worked in the UK but has now departed, or left her, may in certain circumstances be lawfully resident in the UK as the carer of her school-aged child.

For both British citizens and EEA nationals exercising a right to reside, rights of residence arise by operation of law, not by an administrative decision of the Home Office. There is no need for such persons to have documents from the Home Office granting residence from a certain date, nor is it lawful to stamp an EEA national's passport with dates of permitted entry. Accordingly both classes of persons (and other classes where rights vest by operation of law) will present difficulties when a lawyer tries to establish that such persons have been lawfully resident for 12 months. There is no obvious, expeditious and straightforward way for a lawyer to assess this prior to applying for funding, not least in a case with little or nothing to do with immigration where the lawyer is not even an immigration lawyer.

Those who are not British citizens or other EEA nationals may have difficulty demonstrating that they have been lawfully resident for 12 months. For example, a person who has made an application to the Home Office for an extension of leave before their leave expired but who has not received a decision on that application before the date on which their leave would otherwise have expired will benefit from leave under s 3C of the Immigration Act 1971. If refused then during the period during which they could lodge an appeal they will benefit from leave under section 3(2)(b) and if they lodge an in-time appeal from leave under section 3(2)(c). Such persons may be able to show nothing but a copy of a document that appears to confirm that their leave has run out. The Home Affairs Select Committee's March 2013 report[30] identified that some 55,000 applications had not been put onto the Home Office database. So even if it were possible to check status against the Home Office database this would not yield an accurate answer. Furthermore, there would be costs associated with providing any such checking service. Such a service would increase the administrative burden on the state and would need to be held to exacting standards as regards the accuracy and comprehensive nature of the data held.

The matter is further complicated by the need to demonstrate lawful residence in a Crown Dependency or British Overseas Territory as these have their own immigration rules and provisions as to lawful residence.

Those who will be affected by this element include:

- those in the first year of their visa or with leave for less than one year. This includes persons who fully anticipate remaining in the UK for the rest of their lives and taking British nationality (e.g. spouses and partners, children joining parents). One affected group would be children whose claims for asylum have been refused but who have been given limited leave of less than one year because no arrangements can be made for their safety and welfare on return. Such children do not have an appeal against the refusal of asylum until they are given leave of more than one year or until they face removal;
- EEA nationals in their first year of living in the UK including Accession State nationals from counties such as Bulgaria and Romania;
- trafficked persons who are likely to need assistance when first they come to the attention of the authorities;
- survivors of domestic violence. Immigration applications under the domestic violence rule can only be made by a person with limited ("probationary") leave as a spouse, thus the rule is generally used by persons who have been in the UK for a limited period;
- domestic workers who are now given only six month visit visas – some may be trafficked. Others may not be receiving all to which they are entitled as workers;
- those who are British citizens but have never spent a continuous period of 12 months in the UK.

Matters that are likely to arise on which persons would not receive assistance:

- immigration cases including challenges to unlawful refusals to transfer from one immigration category to another;

[30] Home Affairs Select Committee, *The Work of the UK Border Agency*, 26 March 2013.

- housing and community care cases, including homelessness, support for persons who have been trafficked, support for those whose claims for asylum have failed but who cannot be removed, and community care cases about support for children and families[31]. Often in such cases the very issue to be decided is whether the person has an immigration status that renders them eligible for assistance. This does not always involve looking for a Home Office grant of leave to remain. In many cases, such persons claim a status that arises by operation of law, such as a parent from a non-EEA state who cares for a British citizen child (such a parent may derive a right of residence directly from EU law)[32]. There is a risk of persons being unable to produce a document proving their right of residence that would enable them to secure funding to challenge a denial of access to social assistance by a local authority that also (wrongly) does not recognise an automatic right of residence;
- challenges to detention: applications for bail, judicial reviews of unlawful detention, habeas corpus applications[33]; applications for damages for unlawful detention. Contrast this with the approach to prison law cases where it is stated that cases going to questions of liberty or the unlawfulness of detention should continue to be funded. Immigration detention is without limit of time and as a result of an administrative decision. Persons are not brought before a court but must instigate any challenges to detention themselves;
- claims for damages for false imprisonment;
- cases of mistreatment by the police, escorts or others;
- national security cases before the Special Immigration Appeals Commission, including those British citizens deprived of citizenship whilst outside the UK and excluded from re-entry (an area previously expressly preserved within the scope of legal aid);
- age dispute cases and other challenges to local authorities brought by separated children whose asylum claim has finally been determined[34] (at least for the moment, where they have no right to an "upgrade" appeal against refusal under section 83 of the Nationality, Immigration and Asylum Act 2002). The proposals risk frustrating the purpose of the Children Act 1989;
- public law cases;
- family law cases;
- actions against the Home Office for misfeasance in public office, etc.

These thus include areas where persons are particularly vulnerable to the State acting in excess or abuse of its lawful powers and likely to be isolated and at risk. They are areas where the rule of law is always under pressure.

The reason given in the consultation paper for preserving civil legal aid for persons seeking asylum (who are "lawfully present") is because they are "vulnerable." But in all the areas above we are concerned not with high earners moving for work or study but with persons who meet the means test for legal aid. Some will be without any entitlement to support or any right to work. They are, as a group, very much at risk and the powers the State has over them far more extensive than over most citizens or settled persons.

Examples of cases likely to be affected are set out below.

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[31] See e.g. *R (Clue) v Birmingham CC [2010] EWCA Civ 460.*

[32] See e.g. *Pryce v LB of Southwark [2012] EWCA Civ 1572.*

[33] See e.g. *Muuse v Secretary of State for the Home Department [2010] EWCA Civ 453.*

[34] See e.g. *R (J) v Secretary of State for the Home Department [2011] EWHC 3073 (Admin), R (N) v LB of Barnet [2011] EWHC 2019, AAM v Secretary of State for the Home Department [2012] EWHC 2567, Durani v SSHD [2013] EWCHC 284 (Admin). On the difficulties separated children face, see Navigating the System: Advice provision for young refugees and migrants,* Coram Children's Legal Centre, 2012.

Na

Na came to the UK on a visitor's visa. She and her British husband Dave were settled in Thailand with their three year old son Oliver who is British through his father. They came to the UK for a visit in 2011 but while in the UK Oliver was diagnosed with severe learning difficulties and autism. They decided they should remain for his welfare Na did not want to leave Oliver even temporarily as she is his main carer and he needs constant attention. Dave is physically disabled so could not take on the role of primary carer. Na submitted an application in 2012 for leave to remain as a spouse on a discretionary basis. She had no permission to work or claim benefits. Dave was on disability benefits. The couple could not afford to pay the application fee of £550. The application was rejected twice for non-payment of a fee. As the Home Office would not consider the application without a fee, and there was no right of appeal against this decision, Na's solicitor issued a claim for judicial review. Treasury solicitors said they were waiting instructions from their client (the Home Office) and so needed more time to file an acknowledgment of the claim and defence. Two months after issue they did so, but argued the claim should be stayed pending the outcome of their appeal of the decision in *Omar v SSHD* [2012] EWHC 3448 (Admin), a case about payment of fees in immigration cases. Over a month later a decision on permission was given in Na's favour. The Judge said there was no doubt permission should be granted, and a stay was not justified by speculating on the outcome of an appeal, where Secretary of State had given "scant details" for requesting a stay. The Judge urged the Secretary of State to reconsider the case "to save costs and human anguish". He said the fee structure needed to recognise exceptional cases and "if ever there was a worthy case - this is it". The Home Office did not settle the case until two weeks before a full hearing. They agreed to reconsider Na's application without requiring a fee, and the claim for judicial review was withdrawn.
This case was funded under legal aid. Na was forced into making a claim as she had no other remedy. She had to wait for over a year to get a decision on the case. In that time her father died in Thailand and she was unable to go to his funeral. Na had not had 12 months lawful leave and indeed when her application was rejected twice she no longer had lawful leave to remain. The Home Office delayed the case throughout. The months up to the point of permission involved correspondence with the court and Treasury solicitors, advice to Na and a response to the Home Office defence, as well as the work undertaken issuing the claim. Na and her husband had no means to pay for advice privately. The Home Office has now made a decision to grant Na leave to remain and will pay Na's legal costs, reimbursing the legal aid fund.

***R (SO) v London Borough of Barking & Dagenham* [2010] EWCA Civ 1101**

Local authorities have the power and in certain circumstances a duty to accommodate care leavers. This includes those who are not lawfully resident in the UK.

Angela

Angela is six years old and was born in the UK. She was granted three years' leave to remain, called discretionary leave. But her parents had no leave, and were told they had to leave the country. Because Angela was a child, the Home Office said she could go live in her parents' country even though she had never even visited there. Angela's parents applied again to stay, pointing out that Angela was in the UK lawfully. The Home Office refused to accept the application and did not allow them to appeal. A legal aid solicitor helped them bring a judicial review to force the Home Office to look at it again, and they got permission so the Home Office agreed to do so. By that time the courts had found that children such as Angela should be given indefinite leave to remain instead of three years leave. The Home Office is looking at the decision again and will have to consider Angela's case properly this time.

Andrei

Andrei is from Lithuania. He came to the UK to find work after Lithuania joined the European Union. A man offered him labouring work. He accepted the job, and provided his passport to prove he was eligible to work. It was taken. He was forced to live in a shed with several other men, with no electricity or plumbing, and was taken once a week to a motorway service station to shower. He was not paid anything for his work and was told that he owed his captors money for rent and food. If he complained, he was slapped and hit. Eventually Andrei escaped and got help from the police, but he had no place to stay. The police told him to see a solicitor who could help him get homelessness assistance from the local authority, but the local authority did not consider that they were under any obligation to help. Andrei got assistance from housing solicitors and the local authority found him a place to stay. Andrei did not have identification and could not prove where he was from or when he entered the UK.

Birmingham City Council v Clue **[2010] EWCA Civ 460**

An outstanding claim under Article 8 of the European Convention on Human Rights should be treated as a barrier to return for the purposes of determining whether support should be provided.

R (KA) v Essex **[2013] EWHC 43 (Admin)**

This family with children successfully argued that a local authority should not withdraw support given that the family had asked for removal directions to be set so that they could appeal against them and establish whether they were entitled to stay in the UK, because there was a legal barrier to the family's return.

Asa

Asa received a visa to come to the UK from Iran with her children as the wife of a refugee who had arrived the year before. But the relationship broke down immediately upon her arrival in the UK. The couple went to court to fight for custody of their children. Asa was given custody, her children are now in school and she is looking for a job.

Asa received specialist advice about her immigration status which since 6 April 2013 is no longer available to people in her position If she had gone back to Iran, her ex-husband's family could have obtained custody of the children, even though he was not there. She won her case and was allowed to stay in the UK with her children, but there was an error on the visa she received. Her lawyers quickly realised the error, notified the Border Agency and sorted the problem out.

Asa was able to keep her children and live in the UK because she got good advice from legal aid lawyers in the family and immigration courts. The case would be more complicated after 6 April 2013 because the immigration problems would have had to be addressed within the family case. But although she came to the UK legally, she would not have received legal aid under the new proposals and would have had to fight her cases in family and immigration courts by herself.

Case of P

P came to the UK in 1971 as a child to join his mother, when his country was still a British colony. He has lived in the UK for 41 years. His elderly mother and sisters are still in the UK, and he has British-born adult children, and grandchildren, with whom he is close touch. Sentenced to a year in prison he has been held under immigration act powers following completion of his sentence pending consideration of his deportation. It will fall to his family to evidence his period of residence so that a bail application can be made.

***SL v Westminster* [2013] UKSC 27**

Failed asylum seeker, Iranian, diagnosed with of depression and Post-Traumatic Stress Disorder. Previous suicide attempts. Despite a weekly meeting with a social worker to monitor his condition, he was held not to have a need for care and attention and it was held that the Local Authority had no duty to accommodate him under the National Assistance Act 1948, s 21. As a consequence of this judgment, Westminster and other local authorities have not incurred expenditure that they might have occurred without it. See *also* ***R (M) v Slough BC*** [2008] UKHL 52.

The cases that follow are cases that the Ministry of Justice has already seen. They were among those annexed to ILPA's response to the *Proposals for the Reform of Legal Aid in England and Wales* consultation that preceded the Legal Aid, Sentencing and Punishment of Offenders Bill. They were among the evidence that persuaded the Government not to remove asylum support cases from the scope of legal aid.

To understand some of the cases below: asylum-seekers (including those whose fresh claims have been accepted as such) receive support under section 95 of the Immigration and Asylum Act 1999, while those whose claims for asylum have failed and whose fresh claims, if any, have not or not yet been accepted, receive support (if at all) under section 4 of that Act.

Case of K

K entered the UK over 10 years ago from a war torn country in West Africa. After her application for asylum was refused and appeals failed, K found herself destitute with two young children to support and accommodate. One of K's children was a British citizen. K turned to prostitution to make ends meet. From her small earnings, K paid an immigration consultant to advise and assist her with an application to the UK Border Agency under its legacy (case resolution) work. This consultant did very little in K's immigration matter and asked her for more money, which K did not have.

In view of K's work in prostitution, the children were taken away from her by social services. This led to a mental breakdown and K was sectioned into a mental health unit.

Legal aid lawyers made an urgent application to the Case Resolution Directorate and asked for this to be expedited under the UK Border Agency's policy, and for a decision to be made within a specified period of time. After not receiving a response from the UK Border Agency, K's representatives issued judicial review proceedings challenging the delay. The UK Border Agency settled the proceedings and granted K and her youngest child Indefinite Leave to Remain.

Case of C

C's asylum support was terminated in August 2004. His appeal was heard in his absence in October 2004; because his support had been terminated he did not receive notice of the appeal hearing. The appeal was heard in his absence and, in the absence of evidence from him, dismissed. He did not know that this had happened. He applied for and was granted 'section 4' support on the grounds that there was no route of return to his country of origin. In 2009 the Secretary of State indicated an intention to cease support, on the grounds that there was now a viable route of return. C's legal representatives, a law centre, prepared submissions to demonstrate that C continued to be entitled to support on other grounds, citing the applicable case law. Meanwhile the procedure for lodging such submissions had been changed, so that people were required to secure an appointment and then to go in person to Liverpool to make the submissions, unless their representatives could demonstrate that they fell within one of the exceptions to this requirement set out in policy guidance. The Secretary of State indicated that support would be terminated before the date on which C could lodge these further submissions. This would have left C street homeless. The representatives applied for an emergency judicial review to require the Secretary of State to accommodate C until he was able to make his application. As a result of this, and within just a few days, the Secretary of State indicated that C would be granted indefinite leave to remain in the UK.

Case of D

D, with the help of a voluntary sector organisation, had applied for section 4 support as he, his wife and his children (aged three, four, and seven) had been told to leave their relative's accommodation and they had nowhere else to go. The UK Border Agency refused this application as D was not treated as having made a fresh claim for asylum as he had not submitted this in person at the Liverpool, as the Agency's policy now requires people to do. D had not done so because he could not afford to pay for himself and his family (who are required to attend) to travel to Liverpool. A duty barrister from the Asylum Support Appeals Project, acting pro bono, represented D at his appeal to the First-tier Tribunal (Asylum Support), but the appeal was refused, although it was accepted that D was destitute. D was referred to legal aid lawyers for advice about challenging those decisions (there is no appeal from the First Tier Tribunal (Asylum Support) to the Upper Tribunal) and they assisted him under the Legal Help Scheme. D's immigration background was unusual and complicated, and they advised that rather than challenge the section 4 decisions, under which support is provided to persons whose claims for asylum have failed, he should instead apply for section 95 support, which is paid to persons who have an outstanding, unresolved claim for asylum. D was provided with emergency accommodation (available in these circumstances but not in cases of section 4 support) within two days and subsequently went on to receive section 95 support.

Case of B

B was homeless and had spent several nights sleeping on the street. He suffered from mental health problems and attended the Medical Foundation for the Care of Victims of Torture for specialist counselling. A voluntary sector organisation assisted him to apply for section 4 support. That organisation, and the Medical Foundation, made repeated requests to the UK Border Agency for B's application to be treated as urgent because of their concerns about his health. However, he had been waiting for over six weeks for the application to be processed and the UK Border Agency refused to say when this would happen. Legal aid lawyers were instructed under the Legal Help Scheme. They got in touch with the UK Border Agency and explained that they were instructed to commence judicial review proceedings. They started to draft a letter before claim that day but before the day was out the UK Border Agency got in touch with the lawyers to advise that they had now granted B section 4 support.

The exception for persons seeking asylum

It is unclear how this exception is intended to operate. It is stated in the consultation paper:

> 3.56 We propose an exception to allow asylum seekers to be exempt from the residence test for all civil proceedings… by virtue of their circumstances this group tends be amongst the most vulnerable in society.
>
> 3.57 Where an asylum seeker is successful in their asylum claim, they will normally be given 'leave to remain' for five years. At this point they will be 'lawfully resident' rather than 'lawfully present', but will not qualify under the second limb of the test until 12 months have passed. We propose that where an individual is an asylum seeker and granted legal aid for a civil or family case, if they are successful in their asylum claim legal aid should continue to be available for that civil or family case.
>
> 3.58 If an asylum seeker had their claim for asylum rejected and their appeal rights had been exhausted, they would cease to qualify for legal aid under the asylum seekers exception, and funding would cease. Only where they had made a 'fresh claim or asylum would they once again benefit from the exception for asylum seekers.

Paragraph 3.57 raises the spectre of funding for, for example, a family case suddenly ceasing because a person's claim for asylum has failed. The family law cases remaining with the scope of legal aid include domestic violence cases and "public law children" cases, and cases involving child protection. It is undesirable that such cases should not be resolved. In some cases the resolution of the case will also affect whether or not the person can be removed, for example if there is a question as to whether the child can remain with the family or is at risk in the family unit.

Nor is it clear what is intended to happen if a case reaches a new stage, requiring a new funding certificate, after a person has been recognised as a refugee.

Paragraph 3.57 does not address what would happen if a person were not recognised as a refugee but were instead granted humanitarian protection, discretionary leave, leave as a trafficked person or leave on the basis of family and private life.

Paragraph 3.58 is similarly ambiguous. Would the person receive legal aid to make the fresh claim for asylum? If not, at what stage would legal aid be granted? What if the Home Office rejected the notion that further evidence submitted constituted a fresh claim? Would there be legal aid for a challenge to the rejection, which takes the form of a judicial review since there is no right of appeal against that decision?

We have raised with Home Office officials the prospect that they would be faced with a schematic fresh claim, with evidence coming through at a later stage after the claim had been "made." This raises the prospect of their having to deal with evidence piecemeal, including in some cases very shortly before a proposed removal.

The consultation paper makes clear, there will be no legal aid to assist such persons to make a fresh claim for asylum, although there will be legal aid if they succeed in doing so. There is no right of appeal against the Home Office's refusal to accept that matters raised constitute a fresh claim, the only challenge is by judicial review. Accelerated procedures such as the "detained fast track", in which claims are decided in a matter of days, before corroborating evidence, including expert evidence, can be obtained, often result in a fresh claim very soon after the initial claim is refused.

We draw particular attention to those individuals who fall within, or are treated as falling within, the Dublin Regulation[35]. These claims are normally certified under the Asylum and Immigration (Treatment of Claimants Act, etc.) Act 2004 preventing an appeal. Further, those who have previously been refused asylum in another Member State have recently been held to be failed asylum-seekers (as opposed to asylum-seekers)[36].

Even if an individual is considered to be an asylum-seeker, if his/her claim is certified on third country grounds, there is no right of appeal against the certification on the basis of *refoulement* because the Secretary of State is bound by the 2004 Act to deem the third country to be safe[37], although there is in principle a right of appeal out-of-country, where there has been a decision to certify a claim on human rights grounds[38] under paragraph 5(4). Therefore, for those challenging their removal on grounds of *refoulement* there is no alternative remedy other than a challenge by way of judicial review. For other human rights claims, a right of appeal out-of-country is of no avail where the challenge to removal is on the basis of a risk of breaches of human rights in the receiving state. It is not clear whether the proposal would cover Dublin returnees who seek to challenge their removal on the basis of a risk of onward *refoulement* from the EU Member State of return and/or on the basis of other breaches of human rights. There is a risk of the denial of an effective remedy under Article 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union, which has direct effect for the purposes of UK law. As regards matters falling within the scope of EU law (such as returns under the Dublin Regulation), Article 47 of the Charter also includes the right to a fair hearing and the guarantee that legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

[35] Regulation 2003/343/EC.
[36] *MB et ors* [2013] EWHC 123 (Admin).
[37] Asylum and Immigration (Treatment of Claimants Act, etc.) Act 2004, schedule 3, Part 2, paragraph 3.
[38] Asylum and Immigration (Treatment of Claimants Act, etc.) Act 2004, schedule 3, Part 2, paragraph 5(4).

That the position of funding for third country cases is unclear, was evidenced by application of the new provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 from 1 April 2013. The newly formed Legal Aid Agency refused funding in a number of in third country cases where the proposed challenge was to the third country certificate as well as to removal directions. The refusal of legal aid was based on the argument that the case was excluded under paragraph 19 (6) of Schedule 1, Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Legal Aid Agency faced judicial review and backed down.

The UK is bound by Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Article 15 of which provides for the right to legal assistance and representation (this Article is also applicable to the meeting referred to in Article 12(2)(b)).

> ***Article 15***
>
> ***Right to legal assistance and representation***
>
> *1. Member States shall allow applicants for asylum the opportunity, at their own cost, to consult in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their asylum applications.*
>
> *2. In the event of a negative decision by a determining authority, Member States shall ensure that free legal assistance and/or representation be granted on request, subject to the provisions of paragraph 3.*
>
> *3. Member States may provide in their national legislation that free legal assistance and/or representation is granted:*
>
> > *(a) only for procedures before a court or tribunal in accordance with Chapter V and not for any onward appeals or reviews provided for under national law, including a rehearing of an appeal following an onward appeal or review; and/or*
> > *(b) only to those who lack sufficient resources; and/or (c) only to legal advisers or other counsellors specifically designated by national law to assist and/or represent applicants for asylum; and/or*
> > *(d) only if the appeal or review is likely to succeed.*
> >
> > *Member States shall ensure that legal assistance and/or representation granted under point (d) is not arbitrarily restricted.*
>
> *4. Rules concerning the modalities for filing and processing requests for legal assistance and/or representation may be provided by Member States.*
>
> *5. Member States may also:*
>
> > *(a) impose monetary and/or time-limits on the provision of free legal assistance and/or representation, provided that such limits do not arbitrarily restrict access to legal assistance and/or representation;*
> >
> > *(b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.*
>
> *6. Member States may demand to be reimbursed wholly or partially for any expenses granted if and when the applicant's financial situation has improved considerably or if the decision to grant such benefits was taken on the basis of false information supplied by the applicant.*

This Article and Article 16 (Scope of Legal Assistance and Representation) goes to some pains to meet both the rights of the applicant and the concerns of the State. The Government's proposals do not. From consideration of all the relevant provisions arising from EU law, whether under the Charter or under the secondary regulations and directives, it is clear that these proposals run the serious risk of found to be unlawful by virtue of being found incompatible with EU law.

Case of Joy

Joy (not her real name) entered the UK on a false passport. Her travel and passport were arranged by a man from her country. Joy thought she was coming to the UK to work. When she arrived she was met by another man at the airport. He took her to a house where she was forced to work as a prostitute for two years. The men who kept her there then arranged for her to leave the UK, again on a false document. It was on departing the UK that she was stopped by UK authorities. She was arrested and charged with possession of a false document. She was later convicted and sentenced to 12 months' imprisonment. While in prison she claimed asylum. This was refused and a decision made to deport her. Joy appealed but was unsuccessful. She had not disclosed the true circumstances that led to her leaving her home country and her exploitation until after her asylum appeal had been dismissed as she was still in fear of her traffickers' threats of harm.

While in detention she built up a trusting relationship with a befriender and disclosed what had happened. She was referred to a solicitor to help challenge her detention and a decision by the Home Office that there were no reasonable grounds to consider her a victim of trafficking. These solicitors obtained a report from an expert who concluded that Joy was a victim of trafficking and explained why it had taken time for her to disclose what happened to her. They issued a claim for judicial review in relation to the trafficking decision. Joy was referred to a criminal solicitor to help appeal her criminal conviction and an immigration solicitor to help prepare a fresh claim for asylum and application to revoke the deportation order on the basis of new evidence about her trafficking and case law about the lack of protection for victims of trafficking in her country. All of these cases were funded by legal aid. The Home Office have now made a conclusive decision that Joy is a victim of trafficking and she has been released from detention. Her fresh claim and criminal appeal are still under consideration. Joy was only educated until her early teens and has been very traumatised by her experiences so cannot navigate legal proceedings alone. Under these proposals Joy would not have been eligible for legal aid following the failure of her initial claim for asylum and would have faced deportation.

Case of Linda

Linda is a Zimbabwean national. Her parents live in the UK and she originally arrived in the UK as a visitor and was later granted a student visa. Her studies finished, but because of the violence being perpetrated by Zanu-PF in Zimbabwe in 2008 she claimed asylum as she was fearful for her safety. In the UK, Linda had been involved with Restitution of Human Rights Zimbabwe and had written articles about Zimbabwe. Her asylum application was refused, as was her appeal, the immigration judge finding that she had only got involved in opposition groups to 'manufacture' an asylum claim and also not to be at risk because of her low profile, citing *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083.

Because she was still fearful for her life in Zimbabwe, Linda did not return voluntarily to Zimbabwe. The Home Office was also not forcibly removing failed asylum applicants to Zimbabwe. Linda remained involved in politics, joining the MDC and the Labour Party.

In mid-2012, the Supreme Court gave judgment in *RT (Zimbabwe)* [2012] UKSC 38 which looked at the meaning of the freedom to hold and express political opinion and found that asylum applicants returned to Zimbabwe would be asked to demonstrate their loyalty to Zanu-PF; on pain of torture and death.

In 2012 Linda obtained advice funded by legal aid as to the strength of a fresh asylum claim and was represented to make such a claim. It was accepted as a fresh claim. In 2012 Linda was recognised as a refugee. She now has a place at university to study social work and is still involved in all the political activities she was involved in before.

Case of Mehdi
Mehdi claimed asylum in the UK in 2009. He had demonstrated against the Iranian government after elections in Iran in 2009 and been involved in a fight with some Iranian secret policemen at one of the demonstrations. He feared arrest and disappearance.

Neither the Home Office nor an immigration judge believed Mehdi's account. However, because he had no passport, because the Iranian government does not accept returnees without documentation and because there is no Iranian embassy in the UK, he could not be removed from the UK nor could he leave voluntarily. He was stuck.

Mehdi converted to Christianity while in the UK. He approached legal aid lawyers about a fresh claim. They were able to book an interpreter (he did not speak English very well) and explain the evidential burden on him to show that his conversion was genuine as part of evidencing a fresh claim. They were able to help him gather more evidence from his church about his faith and commitment and to take statements from his pastor and others in the church to explain how the church made sure that they were convinced that someone was genuinely Christian before they were baptised. They were able to get an official translation of the Farsi language blog Mehdi writes. They were able to get evidence of his charitable work. Mehdi was recognised as a refugee.

Case of Sorishi
Sorishi (not his real name) is an Iranian Kurd. He is a member of a local Kurdish religion called 'Ahl-e Haqq', members of which are persecuted in Iran. At his asylum screening interview, Sorishi said that he was Ahl-e Haqq. At Sorishi's substantive interview, no questions were asked about his faith. When asked at the end whether there were any other reasons he was claiming asylum not previously mentioned, he stated that he was from a persecuted minority. However, no further questions were asked of him. The Home Office refused his asylum application. Sorishi was unrepresented at his asylum appeal and the immigration judge ignored Sorishi's being is from a persecuted religious minority; most people outside of Kurdistan are unaware of the existence of this religion at all.

Sorishi made two fresh claims on the basis of his Ahl-e Haqq faith, both of which were refused by the Home Office who (incorrectly) stated that this was the first time he had mentioned his faith. He was also refused as he had not laid out proof that the Ahl-e Haqq are persecuted. Solicitors found where Sorishi had previously mentioned his faith. They found evidence of the persecution of the Ahl-e Haqq. The fresh claim is pending.

Case of Fikre
Fikre left Eritrea illegally because he did not want to be conscripted into the army. Fikre claimed asylum in the UK whilst still a teenager. His claim was refused by the Home Office and by an immigration judge, both of whom did not believe how he managed to leave Eritrea.

Fikre did not have an Eritrean passport the lack of exit stamps in which would have been relevant. However, unexpectedly, about nine months after his asylum appeal, Fikre's aunt sent him a letter and copies of receipts for large sums paid by Fikre's mother. The reason given on the receipt was "Because of her son crossing the border illegally".

Because Fikre was able to access Legal Aid for a fresh claim he was able to present this evidence in the way prescribed by the Home Office and with supporting evidence:
- translated by a 'recognised translation agency' at a cost of £82;
- with the envelope in which they were sent to him; and
- pointing out how the evidence of fines matched information known about Eritrea

Other than the translation of documents these prescriptions cannot be found in Home Office literature, but lawyers know that they are necessary from experience and from case law. Lack of transparency as to the extra requirements placed upon asylum applicants is one reason for the need for legal representation. Fikre was recognised as a refugee.

In addition, ILPA member Asylum Aid, working with women claiming asylum, highlights the following reasons why the clients with whom they deal need to make fresh claims and the difficulties they encounter in doing so. Many of these concerns apply more broadly than only to women:

- Applicants submitting gender-related applications concerning, for example, sexual or domestic violence, forced marriage, honour crimes, female genital mutilation, forced prostitution and trafficking may feel unable or reluctant to disclose information for many reasons. These reasons include the effects of trauma, stigma and shame, other mental health problems, lack of trust in authorities and fear of serious harm as a reprisal. Because of this an applicant may be reluctant to identify the real reasons for the application, or the true extent of the persecution they have suffered and/or feared.
- People may not know that such types of harm are relevant to their asylum claim if they have not been adequately advised about the merits of their claim.
- Psychological symptoms, including those experienced during asylum interviews, such as dissociative experiences, flashbacks, avoidance behaviours (e.g. avoiding thoughts or feelings associated with the trauma and not being able to remember details) have an impact on asylum seekers' ability to disclose. Shame has been identified as particularly salient for people with a history of sexual violence preventing them from disclosing information. Indeed being forced to talk about a traumatic event could potentially activate feelings of shame, and so people experiencing shame may engage in strategies such as non-disclosure to avoid this feeling.[39]
- The Home Office's own guidance on credibility identifies that mitigating factors for delays in providing details or material facts would include trauma and painful memories, particularly those of a sexual nature.[40]
- The gender, cultural and educational background of an applicant may affect their ability to give an account to the interviewer. A person unaccustomed to communicating with strangers and/or persons in public positions due to a background of social seclusion and/or social mores dictating that, another person speaks on the applicant's behalf in public situations may lead to problems in disclosing information.

The cases that follow also formed part of ILPA's February 2011 submissions to the Ministry of Justice consultation on *Proposals for the Reform of Legal Aid in England and Wales.*

Case of A

A was a failed asylum seeker with physical and mental health problems. His eyesight was very poor, as a result of having been tortured. He was destitute and living on the streets. A Law Centre advised him to submit further representations regarding his asylum claim by post as he was unable to travel by person to the Further Submission Unit in Liverpool. They also helped him apply for support. The UK Border Agency refused him support on the grounds that he had not attended the Liverpool Further Submissions Unit in person, as required by their policy. They made no mention of his postal submissions nor did they address his request to submit them by post for medical reasons. They also failed to abide by their own policy of returning all postal submissions to the sender. Funded by Legal Aid, a Law Centre, was able to advise A about his options for challenging the refusal of support. This included appealing to the Asylum Support Tribunal or judicially reviewing the decision not to accept his submissions by post. Without the Law Centre's advice, it would have been very difficult for Mr A to consider his next steps and he may have been left destitute, even though he was clearly eligible for and in desperate need of support.

[39] Bögner et al (2007) 'Impact of sexual violence on disclosure during Home Office interviews', *The British Journal of Psychiatry*, London: Royal College of Psychiatrists, Online. Available at http://bjp.rcpsych.org/content/191/1/75.full (accessed 21 May 2013).
[40] UK Border Agency (2012) *Asylum Process Guidance: Considering Asylum Claims and Assessing Credibility*, paragraph 4.31, Online. Available at
http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanddecidingtheclaim/guidance/considering-protection-.pdf?view=Binary> (accessed 21 May 2013).

***AK (Sri Lanka) Court of Appeal* [2009] EWCA Civ 447**

AK entered the UK in 1992. Her appeal against her unsuccessful claim for asylum was dismissed in 1996 and she was refused leave to bring a further appeal to the (then) Immigration Appeal Tribunal. In 2002, she made a claim to remain in the UK under Article 8 (right to family and private life) of the European Convention on Human Rights. This was refused by the Secretary of State in 2003 and her appeal was also refused that year. In 2004 she was refused leave to appeal to the (then) Asylum and Immigration Tribunal. She was not removed from the UK and in 2005 she applied to be given indefinite leave to remain. Subsequent correspondence followed, which included evidence about her mental health. In 2008 a Home Office letter was drafted which provided for her to be removed from the UK by way of a same day removal procedure and which gave no consideration to whether any of the correspondence since 2005 amounted to a fresh claim within rule 353 of the Immigration Rules.

The decision letter was not delivered and AK attended a routine interview on 18 February 2008. She raised again her mental health and a suicide attempt. The letter drafted but not sent was found. She was removed the same day.

The case turned on whether "further submissions" had been made to the Secretary of State since the adjudicator's determination of 23 December 2003, requiring the Secretary of State to consider whether these amounted to a fresh claim within the meaning of rule 353; and whether a reasonable Secretary of State would have concluded that she had indeed advanced a fresh claim, i.e. that she had submitted material "significantly different" from that advanced in her unsuccessful case. It was held that a reasonable Secretary of State would so have concluded and would have concluded that the material in her further submissions meant that the case had "realistic prospect of success" (rule 353 of the immigration rules) on the grounds of Article 8. The removal was found to have been unlawful. In total the AK spent 18 months out of the UK subsequent to her unlawful removal before the Home Office finally agreed to return her and to give her indefinite leave to remain.

Case of N

N was seven months pregnant and had been street homeless and sleeping inside a church and on a park bench for two months. She was waiting for the UK Border Agency's decision on whether it would accept her fresh claim for asylum as such. She had become street homeless after the person with whom she had been living had asked her to leave. A voluntary sector organisation had assisted her to apply for section 4 support. At the time when she saw legal aid lawyers, the application had been outstanding for 14 days, during which time N continued to be sleeping in the church and outside. The UK Border Agency refused to say when a decision would be made and therefore the voluntary sector organisation referred her to legal aid lawyers. The lawyers assisted N under the Legal Help Scheme and sent the UK Border Agency a letter before claim threatening judicial review due to the delay in making a decision on N's section 4 application. She was provided with section 4 accommodation that day. The lawyers also ensured she was provided with accommodation in London in accordance with the asylum support policy bulletin on dispersal and pregnancy, a matter which the voluntary sector organisation had not identified.

Case of B

B was informed that his support should have ended two years previously as it was alleged that B had breached the conditions of his support at that time. This was not something that had previously been put to B and he denied the allegation of a breach in any event. A voluntary sector organisation assisted B to make a new application for section 4 support, and asked that this be treated as urgent due to his imminent homelessness and because he has a disability; his leg has been amputated and he wears a prosthetic limb. However, the UK Border Agency refused to give B's application any priority or provide him with accommodation before his current accommodation was due to end. The voluntary sector organisation referred B to the legal aid lawyers as they considered that B would be street homeless unless legal action was taken. B instructed lawyers under the Legal Help Scheme two days before his accommodation was going to end. The lawyers sent the UK Border Agency a letter before claim threatening judicial review and he was provided with accommodation the following day.

Effect in immigration detention cases

Following Legal Aid, Sentencing and Punishment of Offenders Act 2012, legal aid is available to enable individuals to challenge their detention by way of applications for temporary admission and release, applications for bail to the First-tier Tribunal (Immigration and Asylum Chamber); and applications for judicial review and *habeas corpus*.

According to the 2010 Ministry of Justice consultation *Proposals for the reform of legal aid in England and Wales*:[41]

> *4.83 In these cases, the issue at stake – the appellant's liberty – is extremely important. We do not consider that there are sufficient alternative forms of advice or assistance, or alternative sources of funding, in relation to these issues to justify the removal of legal aid. Nor do we consider that these cases are ones in which the individual could be expected to resolve the issue themselves.*
>
> *4.84 Given the importance of the issues at stake, and the absence of other routes to fund or resolve them, we therefore consider that legal aid is justified and propose that cases involving challenge to detention under immigration powers should continue to attract legal aid for advice and representation before the First-tier and Upper Tribunals, and higher courts…*

The current consultation proposes that legal aid should continue to be available in prison law matters where a person's liberty is at stake.

The majority of people in immigration detention are unlikely to meet the residence test, in most cases having been through the immigration process. In most cases, being at the end of the process is the stated justification for immigration detention.

As set out in our response to question 1, the statutory immigration detention powers permit the executive to detain migrants in various circumstances, principally pending removal and deportation from the UK. There is no automatic oversight by the courts. The powers are not time limited. The powers have in recent years been used with increasing frequency and for longer periods of time. Cases have come before the courts where individuals have been detained for periods of four to five years.[42] Litigation exposed that the Home Office had been operating an undisclosed, unlawful practice of detaining foreign national former prisoners on a blanket basis, without permitting officials to consider release in any circumstance[43]. In the last two years, the courts have made unprecedented findings in four cases that mentally ill men have been subjected to inhuman and degrading treatment in contravention of Article 3 of the European Convention on Human Rights[44]. A recent case revealed that the Home Office and its contractors had been operating an unlawful policy on the use of force on pregnant women and children in immigration detention[45]. Another recent case exposed "disturbing" evidence of systemic failures concerning the detention of survivors of torture[46].

In many cases, there are reasons outside of the control of a person in immigration detention as to why they cannot return to their country of origin[47]. As the Government has recognised, these cases are

[41] *Op.cit.*
[42] See, for example, *R (Sino) v SSHD* [2011] EWHC 2249 (Admin) (four years and 11 months) and *R (Mhlanga) v SSHD* [2012] EWHC 1587 (Admin) (five years two months). Mr Sino and Mr Mhlanga would not have met the proposed residence test.
[43] *R (Lumba) v SSHD* [2012] 1 AC 245.
[44] *R (S) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin) (5 August 2011), *R (BA) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin) (26 October 2011), *R (HA) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin) (17 April 2012), *R (D) v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin) (20 August 2012).
[45] *Chen and Others v SSHD* CO/1119/2013.
[46] *R (EO, RA, CE, OE and RAN) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin)
[47] For example, Government decisions not to enforce returns (e.g. Zimbabwe, Iraq), delays in the courts issuing country guidance (e.g. Somalia) and delays in foreign governments issuing travel documents.

complex and cannot be brought without the assistance of a lawyer. There are many cases that show that the Home Office cannot be relied upon to comply with its duties of candour and disclosure in explaining why a person is being detained[48]. It is essential that these cases are brought to ensure that migrants are not arbitrarily deprived of their liberty. It is essential that individuals have access to the courts to ensure that the wide ranging powers of immigration detention entrusted to the Home Office by parliament are exercised within the legal limits set by parliament and the courts. Whilst in some of these cases, the claimants would have benefited from the proposed exemption for persons seeking asylum, the matters being litigated were not matters to which that status was relevant: a person's immigration status is not relevant to whether that person has a strong challenge to their detention, to the gravity of the matters raised or to whether the person is the victim of arbitrary, unlawful detention.

When the Minister introduced the consultation, he compared the cost of the UK's legal aid system with that of France. That is not comparing like with like. France has a very different legal system, where the courts are allocated greater resources than is the position in the UK, and bear more of the burden managing cases. In France, immigration detention is subject to automatic oversight by the courts and has a maximum time limit of one and a half months[49].

The 2010 legal aid consultation[50] recognised the importance of these cases; recognised that they require lawyers to bring them; recognised that there are not alternative ways of funding them; and recognised that there are not alternative ways of resolving them. If this proposal is implemented, there will be thousands of people detained each year, in principle without time limit, with no automatic oversight by the courts, and, on the Government's own analysis, no access to legal representation. The result would be a system of indefinite detention without charge and without legal oversight; a system inimical to the rule of law, and contrary to democratic traditions.

Effect on inquests and civil actions against public authorities

Following Legal Aid, Sentencing and Punishment of Offenders Act 2012, legal aid is available in relation to:

1. Inquests and associated civil actions;
2. Civil actions where a public authority has abused its position or powers that is deliberate or dishonest and results in harm that is reasonably foreseeable;
3. Civil actions concerning "significant" breaches of human rights; and
4. Civil actions concerning discrimination contrary to the Equality Act 2010.

Cases based on negligence and those in which the primary objective of the claim is financial compensation are expressly excluded. According to the 2010 consultation[51]:

> *4.45. We do not generally view primarily financial matters as being of sufficiently high importance to warrant intervention and support in the form of legal aid and we are less likely to view as justified uses of civil legal aid for cases which merely concern financial advancement. However, we recognise that there are some claims which raise issues about public safety and the misuse of state power where the grounds for providing public funds are much stronger.*
>
> *[…]*

48 See in particular *Lumba* and *Sino*.
49 See the joint Her Majesty's Inspectorate of Prisons/Chief Inspector of Borders and Immigration report, *The effectiveness and impact of immigration detention casework*, December 2012 at 2.7. The Netherlands too has a maximum time limit of one and a half months and Spain a limit of two months.
50 *Op.cit.*
51 *Op. cit.*

4.53…We consider that cases where state agents are alleged to have abused their position of power, significantly breached human rights, or are alleged to have been responsible for negligent acts or omissions falling very far below the required standard of care have an importance beyond a simple money claim. We consider that these cases are an important means to hold public authorities to account and to ensure that state power is not misused. We consider that the class of individuals bringing these claims is not necessarily likely to be particularly vulnerable and some cases will be suitable for funding through CFAs. However, we believe that the determining factor is the role of such cases in ensuring that the power of public authorities is not misused…

And, in relation to inquests:

4.120 Finding the answer to the questions concerning the death of a family member, or someone close, can be an important element in enabling those who have been bereaved to move on with their lives.

A person has the right not to be racially abused and assaulted by a police officer whatever their immigration status. A victim of trafficking who reports abuse to the police has the right to have his/her allegations investigated properly. A person whose partner dies as a result of restraint by escorts during enforced removal has the right to participate in the investigation of the death and to have his/her questions answered, whatever his/her immigration status. According to the 2010 consultation[52], the determining factor requiring public funding in these cases is to ensure that public authorities do not misuse their powers. That justification applies irrespective of the immigration status or personal interest of the migrant who has been wronged. These claims also provide a valuable mechanism for exposing systemic failures and ensuring that public authorities make improvements and learn lessons.

There is a specific problem with the proposed residence test in the context of these claims. Claims under the Human Rights Act 1998 must ordinarily be commenced within 12 months of the events giving rise to the claim. It is proposed that migrants must accrue 12 months' lawful residence before they are eligible for legal aid. That will mean in many cases that by the time they are eligible to legal aid, they will be statute barred from bringing a claim under the Human Rights Act 1998. For example, in the case study cited below, *OOO v Commissioner of Police of the Metropolis*, [2011] EWHC 1246 (QB); [2011] HRLR 29; [2011] UKHRR 767, which concerned the failure of the Metropolitan Police to investigate allegations of ill treatment by victims of slavery/servitude, the Claimant OOO had, by the time she applied for public funding, been granted leave to remain. If she had had to wait to accrue 12 months' lawful residence she would have fallen outside the one year time limit for bringing claims under the Human Rights Act 1998, and the police would have avoided scrutiny for their unlawful actions.

The same problem arises, *a fortiori*, where the remedy for the unlawful act of a public authority is judicial review, where the time limit is promptness and in any event within three months of the illegality giving rise to the claim.

To permit a situation where the police and other public authorities are able to abuse their powers and commit significant human rights breaches without the victim being able to obtain redress would be inimical to the rule of law.

Effect on Special Immigration Appeals Commission cases

Following Legal Aid, Sentencing and Punishment of Offenders Act 2012, legal aid has continued to be available for cases in the Special Immigration Appeals Commission. According to the 2010 consultation:

4.85 We also propose to continue to provide publicly funded legal assistance for proceedings before the Special Immigration Appeals Commission (SIAC). In making this judgement, we have taken into account the

[52] *Proposals for the Reform of Legal Aid in England and Wales, op.cit.*

importance of the issues considered by SIAC – the removal or exclusion of an individual from the United Kingdom on national security or other public interest. These are not cases which the litigant could resolve themselves, since they may not be able to see all the evidence against them, or could use alternative forms of advice or assistance or access alternative funding. We therefore consider that legal aid is justified for these cases.

Proceedings before the Special Immigration Appeals Commission are complex, both evidentially and procedurally. Appellants are not entitled to see certain evidence and there are closed hearings from which appellants are excluded. The Government has recognised the importance of the issues raised in Special Immigration Appeals Commission proceedings; has recognised that appellants cannot resolve these cases themselves and that there is not alternative advice, assistance or funding available. In those circumstances, there can be no justification for making eligibility to legal aid for these cases to a residency test. We recall the comments of the Joint Committee on Human Rights:

"After listening to the evidence of the Special Advocates, we found it hard not to reach for well-worn descriptions of it as 'Kafkaesque' or like the Star Chamber. The Special Advocates agreed when it was put to them that, in the light of the concerns they had raised, 'the public should be left in absolutely no doubt that what is happening…has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.' Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them."[53]

To require appellants to these proceedings to navigate them without legal representation would inimical to the rule of law.

The test in practice

Immigration, and many other, practitioners do need to know immigration status to identify rights and entitlements but this is not the same as checking status to refuse help. The checks will present difficulties for those legal representatives who are not immigration specialists. The consultation paper is simplistic[54]: the UK Border Agency guidance for employers on preventing illegal working, which is concerned with verifying immigration status, runs to 89 pages and still employers rely on lawyers to help them interpret it. The NHS says of the Charges to Overseas Visitors Regulations 2011[55]that deal with immigration status in the context of eligibility for health care:

5.27 In some departments, catering for very elderly or mentally confused patients, or when direct admission from critical care is needed, the baseline questioning may be inappropriate or unworkable. [56]

This sentence is reproduced verbatim in guidance on the regulations produced by very many NHS trusts. The UK Border Agency provides a service to NHS staff to try to confirm immigration status when NHS staff come across documents with which they are not familiar.[57]

In 2012 the UK Border Agency contracted with Capita Plc for the latter to assist in the identification and removal of those with no lawful leave to be in UK. Capita had access to the Agency's database. Its failings

[53] Joint Committee on Human Rights, HL Paper 157, HC 394, 30 July 2007. See also Joint Committee on Human Rights *Counter-Terrorism Policy and Human Rights* (Sixteenth report): Annual Renewal of Control Orders Legislation 2010, HL Paper 64/HC 395, 26 February 2010.
[54] See footnote 30 in the consultation paper.
[55] SI 2011/1556.
[56] *Guidance On Implementing The Overseas Visitors Hospital Charging Regulations*, Department of Health, document 17038, May 2012.
[57] Department of Health, Guidance on Implementing the Overseas Visitors Hospital Charging Regulations, 05.12, paragraph 5.38-5.44.

hit the headline as it told British citizens (including those whose families had been British for many generations), those with leaves as nurses, and those with leave as investors, among others, that they had no right to be in the UK.

We recall the words of one young British citizen who naturalised subsequent to being recognised as a refugee:

> *…it's the most expensive thing I own, my British passport, I think, more expensive than any pair of shoes! What I did I waited a year from the time I got my indefinite status and then I had to apply for Nationalisation, well I waited more than a year because, to be honest, I couldn't afford it, I didn't apply for nationalisation until December. So I had to…first I had to go for a test to prove that I can speak English, which still costs a lot of money £35, which is really a lot of money, then after doing that test, I had to apply for nationalisation* [58]

Even where persons are British by birth, low-income households are particularly unlikely to hold passports, because they are unlikely to be able to afford travel abroad. Absent a passport, a person may find it difficult to evidence lawful residence.

Where immigration status is relevant to a matter in another area of law, ILPA members are frequently asked to provide legal opinions as to a person's immigration status.

In the week in which the consultation paper came out we saw a case that involved the status of the a man, born in the 1930s, to a mother who was not British, whose maternal and paternal grandparents were not British, whose father (who held a passport from another country) was born on a ship, registered in the UK, as it sailed on the high seas of the Pacific Ocean. Some immigration lawyers would ask you whether the man's mother and father were married and then tell you that the man was British. Other immigration lawyers could tell you after some research. But some excellent and highly skilled lawyers would struggle considerably with that one. ILPA holds a copy of an undated document produced and shared by the Nationality Directorate of that part of the Home Office dealing with immigration and asylum cases, called *Precedent-based scenarios* which sets out, *inter alia,* some of the difficult nationality cases with which they have had to deal. It would be instructive if those dealing with this consultation consulted it and ILPA would be happy to make its copy available for the purpose. A couple of examples from that document will suffice [abbreviations in the originals have been expanded, this is indicated by Roman text]:

> *NC 4*
>
> *Applicant had pursued a claim to British nationality by descent since 1962. He claimed to have been born in France in 1932 to a British born father and a Russian born mother (a* British Subject *by marriage). He had not been able to produce a birth certificate and circumstantial evidence suggested that he was legitimate. A birth certificate was finally obtained which named his mother's British-born husband as the father. As the marriage still legally subsisted at the time of his birth the presumption was that he was legitimate unless the balance of evidence showed that his mother's husband was probably not the father (see Legitimacy in Vol 2 of the Nationality Instructions).*
>
> *NC 16*
>
> *These two children were born in 1980, after the father was registered as a* Citizen of the UK and Colonies *in 1974. A certificate was produced relating to the parent's marriage in Pakistan in 1968. The file showed however that in 1976 it had been concluded that the marriage – in potentially polygamous form – was not regard as valid because the husband had acquired a domicile of choice in the UK before that date. The decision was communicated to the wife in 1976, and accordingly s.1 of the Legitimacy Act could*

[58] GF10, female, southern Africa, 20's, British citizen, cited *in Becoming British citizens? Experiences and Opinions of Refugees Living in Scotland,* Emma Stewart and Gareth Mulvery, Scottish Refugee Council, February 2011.

> *not subsequently apply to any of the children of the Union (see "Legitimacy" in Vol.2 of the Nationality Instructions.*
>
> *The case was reconsidered in the light of more recent judgments on the question of domicile, in particular Bell v Kennedy where it was held that "unless you are able to show with perfect clearness and satisfaction that a new domicile has been acquired, the domicile of origin continues (see para.8 "Domicile, Vol 2, Pt.2 B4 Div Insts). In answer to the question "in which country do you intend to live when you retire?" the children's father had replied in 1976 "Don't know yet". This it was agreed, was sufficient, in relation to the standard set by the courts to show that he not lost his domicile of origin at the time of this marriage. There was nothing to prevent us taking a different view from that taken in 1976, and since the matter had again come to our attention were obliged to reconsider our position in accordance with the current interpretation of domicile. The children were accordingly accepted as having been at birth* Citizens of the UK and Colonies *under s. 5(1) of the* British Nationality Act 1948, *becoming* British citizens *under s.11(1) of the* British Nationality Act 1981 *on 1 January 1983*.

The matter is further complicated by the need to understand lawful residence in the Crown Dependencies and British Overseas Territories.

What degree of diligence will be expected from the legal representative and at what point will this start to interfere with the relationship of trust and confidence between legal representative and client?

The practitioner who decided against a person may have got it wrong, for the issue is not always straightforward, - yet the person would have no way to challenge that decision.

A legal representative under his/her code of conduct must not discriminate unlawfully against a client. However, this would appear to be a different matter from the legal representative concluding in a particular case that they are simply unable to identify whether or not the client has been lawfully resident in the UK for 12 months and thus to decline to take them on for fear of making a mistake or because they cannot afford to make the necessary investigations. Will a decision that you are unable to determine the question of lawful residence be grounds for refusing instructions? How does that fit with obligations to ensure that legal aid is delivered without discrimination? Legal aid funding risks entrenching discrimination and unequal treatment rather than being a tool to be used to challenge discrimination and unequal treatment.

What of the case in which the person has indeed been lawfully resident for 12 months but the legal representative has failed adequately to investigate this, for example because the person holds a British citizen passport and the lawyer has failed to obtain evidence to show that the person has been continuously lawfully resident for 12 months? What if the same lawyer has rejected other, non-British, clients on the basis that s/he cannot be satisfied that the client has indeed been lawfully resident for 12 months?

It seems likely that those most affected by this will be those who are not British nationals or British nationals who are dual nationals and /or who were not born in the UK. We recall that when the foreign national prisoners' scandal broke in 2013 there were a number of instances of British citizens not released at the end of their sentences and unlawfully held in immigration detention because prison records recorded place of birth not nationality. In the case of persons born, for example on British military bases overseas, the assumption was (wrongly) made that they were not British. In one case a British citizen was removed to Pakistan, whither he had never been, because his nationality was not understood. We have seen a British citizen with learning disabilities removed although he had in his possession evidence that demonstrated his nationality, because he failed to produce it and no one else sought such evidence. It is likely that some British citizens and others lawfully resident in the UK will be unable to secure legal aid to which they are properly entitled under the proposals.

There is always a risk that a person who is lawfully resident in the UK and has been for 12 months will nonetheless seek to procure documentation to which they are not entitled to provide a less complicated way of demonstrating their status.

What if the legal representative, despite his /her conscientious efforts, is wrong in his/her assessment of whether the person is and has been lawfully resident or not? What if a legal representative discovers at a later stage in a case that a person is not lawfully resident? What, and this is not fanciful,[59] but a real scenario, if a legal representative rejects a person as not lawfully resident and subsequent case law shows this assessment to have been wrong? What if counsel is instructed and identifies the client has not been lawfully resident for 12 months in circumstances where the solicitor had made diligent efforts to identify the client's status but had got it wrong? On audit, if someone has evidence on file demonstrating that they carried out the residence test and showing why they thought the client satisfied it, but it turns out that they were wrong, will they get paid? Will counsel get paid? Will counsel only get paid if s/he has reviewed the solicitor's decision on the matter before starting work?

In cases of public funding certificates eligibility is not devolved to lawyers but rests with the Legal Aid Agency and there would be no justification for asking lawyers rather than the Legal Aid Agency to verify status in such cases.

How, in these cases and on audit, will the Legal Aid Agency identify whether a person has been lawfully resident for 12 months? What will happen in the event of a dispute between the Agency and a legal representative? In ILPA's experience, born out by other evidence, getting in touch with the Home Office will not necessarily resolve a dispute. As described above, the Home Affairs Select Committee has recently reported a backlog of 55,000 applications that have not been logged on the Home Office database. We anticipate satellite litigation against the Legal Aid Agency in cases where it declines to pay.

Lawfulness of the proposals

It is no answer to allegations of discrimination to say that the proposals equally affect British nationals who are not lawfully resident in the UK: the test will have a disproportionate effect upon foreign nationals. It thus appears to violate common law principles and in addition constitutes indirect discrimination under the Equality Act 2010, which is unlawful unless justification can be demonstrated.

The residence test is a blunt instrument and the most enthusiastic advocate of it could not deny the grave injustices to which it will give rise. A refusal of funding (and at the moment as immigration and asylum judicial reviews are one of the areas in which there are no "devolved powers") where the Legal Aid Agency determines eligibility in advance would only be able to be challenged by way of judicial review, which would itself also be subject to the residence test in order to secure funding or such a challenge. Thus, justice would be hermetically sealed against those subject to the test.

Discrimination on the grounds of nationality is prohibited under the treaties of the European Union. Discrimination between European Union citizens exercising their rights to free movement in their access to and enjoyment of social advantages is prohibited. Legal aid is treated as a social advantage. The proposal will disproportionately affect EEA nationals other than British citizens and thus amount to unlawful indirect discrimination.

An EEA national cannot exercise Treaty rights once in prison, therefore such an EEA national, and in certain circumstances their family members, would no longer satisfy the residence test once the EEA national were in prison. This appears to treat EEA nationals less favourably than third country nationals, who will continue to satisfy the test unless and until their leave is curtailed and thus to breach the principle of EU preference.

In some areas, such as derived rights of residence under EU law, the law is unclear. It may be impossible to determine whether a person's status is lawful or not without litigation.

[59] See, for example, *Maria Texeira (European citizenship)* [2010] EUECJ C-480/08; *Harrow LBC v Ibrahim and Secretary of State for the Home Department,* Case C-310/08.

Article 47 of the Charter of Fundamental Rights of the European Union provides that legal aid shall be made available to those who lack sufficient resources to ensure effective access to justice in the implementation of European Union law. Article 21 of the Charter prohibits discrimination, with article 21(2) making specific reference to discrimination on the grounds of nationality.

There are specific guarantees of a right to an effective remedy in a range of European Union instruments[60].

We draw to the Ministry's attention the European Legal Aid Directive 2002/8/ESC of 27 January 2003. As set out in Article 1(2), the Directive applies to civil and commercial matters and does not, in particular, apply to revenue, customs or administrative matters. ILPA recalls the statement in the sixth Preamble to the Directive that:

> *(6) Neither the lack of resources of a litigant, whether acting as claimant or as defendant, nor the difficulties flowing from a dispute's cross-border dimension should be allowed to hamper effective access to justice.*

As set out in the eighth preamble, the purpose of the Directive is to establish minimum standards and that Member States are free to adopt higher standards.

In April 2008, ILPA provided comments on the draft Lord Chancellor's Direction on Cross Border Disputes' (implementation of Council Directive 2003/8/EC), 27 January 2008[61]. These are available on the Briefings page of ILPA's website, www.ilpa.org.uk. Article 4 of the Directive provides for the matters within the scope of the Directive that Member States must grant legal aid without discrimination to Union citizens and also to third-country nationals residing lawfully in a Member State. It makes no mention of a 12-month or other residence qualification. Article six of the Directive sets out that only legal aid applications for actions that appear 'manifestly unfounded' can be rejected, unless pre-litigation advice on legal aid is offered (see also Article 13(3) which provides for refusal only where applications are unfounded or outside the scope of the Directive).

The Directive specifies in Article 5(1) that member States shall grant legal aid to persons who are 'partly or totally unable to meet the costs of proceedings'. It further states at Article 5(5) that

> *Thresholds defined according to paragraph 3 of this article may not prevent legal aid applicants who are above the thresholds from being granted legal aid if they prove that they are unable to pay the cost of proceedings referred to Article 3(2) as a result of differences in the cost of living between the Member States of domicile or habitual residence and of the forum.*

Article 6 of the European Convention on Human Rights protects the right to a fair trial, which can include the right to legal aid, not least to render the rights not "theoretical and illusory", but "practical and effective"[62]. This must be read with Article 14, the prohibition on discrimination under the Convention. All the rights protected under the Convention must be read with Article 13, the right to an effective remedy for violations of those rights. In *P, C and S v United Kingdom*_(App.No.56547/00) (2002) 35 EHRR 31 the European Court of Human Rights recalled that "Whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8"[63]. It held that the lack of legal representation of P. during the care proceedings deprived the applicants of a fair and effective hearing. There is no means test and no merits test for legal aid in care proceedings. There are many cases where there are concerns before the birth and, as in the case of *P, C and S*, a local authority acts rapidly after the birth. Yet where the baby was under one year old there would be no prospect of separate legal representation for him/her

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[60] See for example Directive 95/46/EC - The Data Protection Directive.

[61] Available at http://www.ilpa.org.uk/data/resources/13095/08.04.588.pdf

[62] See for example, *Airey v Ireland* Series A, No.32,(1979-80) (1979) 2 EHRR 305.

[63] Paragraph 119 of the judgment.

while parents who could not show a year's lawful residence would not qualify for legal aid either. The burden placed on the judge and on the lawyers for the local authority would be enormous and the risks of injustice and of subsequent damages claims high. Nowhere in the consultation paper is it suggested that local authorities have indicated that they are untroubled by the notion that parents and/or children might be unrepresented in such proceedings.

The case of children, understanding of Article 8 is informed by consideration of the Convention on the Rights of the Child. The residence test is not compatible with Articles 3 and 12 of the Convention on the Rights of the Child. The Supreme Court in *ZH (Tanzania) v Secretary of State* [2011] UKSC 4 drew express attention to the obligations on those deciding cases involving children to ensure that Article 12 of the UN Convention on the Rights of the Child, the right of the child to be heard, is respected[64]. The UN Committee on the Rights of the Child's *General Comment No. 6 on Treatment of Unaccompanied and Separated Children Outside their Country of Origin* (2005) says that when such children are involved in administrative or judicial proceedings they should be given legal representation.[65] Similarly, the Committee of Ministers of the Council of Europe have produced guidelines on child-friendly justice which include:

> *3.7 Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.*
>
> *3.8 Children should have access to free legal aid, under the same or more lenient conditions as adults.*[66]

That obligation will become all the more onerous if neither the child nor the parents are represented, with procedural and costs implications for decision-makers.

Where local authorities must meet the cost of legal advice and representation for children, they must do so at private rates, which are generally higher than legal aid rates. Section 22(3) of the Children Act 1989 imposes an obligation to ensure that the child receives legal advice and representation:

> *"22…(3) It shall be the duty of a local authority looking after any child—*
>
> > *(a) to safeguard and promote his welfare; and*
> >
> > *(b)to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case. "*

The obligation to meet costs in its turn gives rise to conflicts of interest, while a failure to discharge the obligation may lead to an action in negligence.

We anticipate that if the residence test is implemented it will give rise to litigation which will advance our understanding of right to representation under the European Convention on Human Rights, because we anticipate that violations of the Convention will be identified.

Exceptional funding

[64] Paragraphs 34 to 36 of the judgment. See also the Lord Chancellor's comments at HC Report 21 May 2013, col 1042.
[65] CRC/GC/2005/6 1 September 2005, paragraph 36.
[66] Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, adopted 17 November 2010 at the 1098th Meeting of the Ministers' Deputies.

It is stated in the consultation paper that exceptional funding will still be available to those who fail the residence test.[67] This does not appear to be accurate as a matter of law. There would be no exceptional funding in cases excluded by the proposed residence test. Section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 makes provision for exceptional funding, so that an application can be made for funding of a case not within the scope of legal aid.

Section 10 begins:

> 10 Exceptional cases.
>
> (1) Civil legal services other than services described in Part 1 of Schedule 1 are to be available to an individual under this Part if subsection (2) or (4) is satisfied.
>
> …

Thus it will be seen that exceptional funding is available only for matters not included within the scope of legal aid in Part 1 of Schedule 1 of the Act. If the proposed residence test were implemented a person denied legal aid for a matter within scope solely because they have not been lawfully resident in the UK for 12 months, would not be able to make an application for exceptional funding. The case is excluded from legal aid *ratione personae*, but not *ratione materiae* and it is with the latter that section 10(1) is concerned.

The Lord Chancellor's guidance on the exceptional funding has only one page on child applicants and says nothing of children in care.[68]

Summary

At the moment a legal aid merits tests operates. Cases with poor prospects of success are not funded by the State. A means test operates. The legal aid means test may involve checks and lead to refusal of help, but a person who is identified as having funds can be directed toward help for which s/he can (in theory) pay. The impecunious person failing the residence test would simply be turned away. The lawyer would be telling a client that their case has excellent prospects of success, that they have been wronged, including, as in immigration cases, by the State, but that because of their poverty they must suffer that wrong without redress.

The cases affected are not just immigration cases. They include homelessness cases, cases involving matters of child protection, domestic violence cases, unlawful detention, etc. In the field of immigration affected cases include domestic violence cases or cases involving human trafficking where the victim is not making an asylum claim (which looks to future risk rather than past suffering), including a number of cases of domestic slavery and servitude. The test could affect a judicial review of removal brought on human rights grounds by a person who has lived in the UK for much for their life and who may have a British or settled partner or children (themselves eligible to bring a human rights claim in the county or high court).

Persons who have a strong case against a Government department, including cases involving misfeasance in public office, action ultra vires or action tainted by bias, will not be able to bring a challenge because they are indigent and lack the necessary status.

The test has no place in a system of justice founded on respect for the rule of law and the principle of equality before the law.

[67] Paragraph 3.54and Annexe K 5.3.3.
[68] Lord Chancellor's Exceptional Funding Guidance (Non-Inquests), 2013.

Q5. Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an onward permission appeal to the Court of Appeal, if permission is granted by the court (but that reasonable disbursements should be payable in any event? Please give reasons.

The proposal:

> 3.65 In 2011–12 there were 4074 cases where legal aid was granted for an actual or prospective judicial review. Of these, 2275 ended before applying for permission to the Court.
>
> 3.66 Of the 1799 cases which did apply for permission, 845 ended after permission was refused, either on application or on renewal.
>
> 3.67 In 330 of these 845 cases, the provider recorded that the case was of 'substantive benefit to the client'. This might have been because the public authority had modified its decision to some extent as a result of the proceedings or had conceded the position in advance of the Court's consideration (and the application was not withdrawn, perhaps for costs reasons). Or it might have been because the challenge was for a delay in reaching a decision and the relevant decision had been taken by the point that permission was considered by the Court.
>
> 3.68 Therefore there were just over 500 cases funded by legal aid which did not settle, applied for permission and failed, and ended without benefit to the client but with potentially substantial sums of public money expended on the case. These figures suggest that there are a substantial number of cases which benefit from legal aid, but are found by the Court to be "unarguable".
>
> 3.69 We propose that providers should only be paid for work carried out on an application for permission including a request for reconsideration of the application at a hearing, the renewal hearing or an onward permission appeal to the Court of Appeal), if permission is granted by the Court.
>
> 3.70 Currently a similar system exists for immigration and asylum Upper Tribunal appeals. In an immigration or asylum appeal case, (subject to some exceptions) where an application for permission to appeal to the Upper Tribunal is refused, then funding for the permission application is not payable.
>
> 3.71 Legal aid would continue to be paid in the same way as now for the earlier stages of a case, to investigate the strength of a claim, for example, and to engage in pre-action correspondence aimed at avoiding proceedings, as is required by the Pre- Action Protocol for Judicial Review. [Footnote 42 This work is usually carried out under the Legal Help or the Investigative Representation form of service.] Where a permission application was made the claimant would continue to be technically in receipt of legal aid for the permission stage of the case, and so would continue to benefit from cost protection, and would therefore not be personally at risk of paying costs if the permission application were unsuccessful.
>
> 3.72 We recognise that the merits criteria are in place to help weed out weak cases, however we do not consider that these are sufficient by themselves to address the specific issue we have identified in judicial review cases. When making an application for legal aid, the provider certifies their assessment of the merits of the case based on their detailed knowledge of the case and specialist understanding of the law in the relevant area. The LAA is necessarily strongly guided by the provider's assessment of the prospects of success of the proposed judicial review claim in deciding whether the claim should receive funding. We consider that it is appropriate for all of the financial risk of the permission application to rest with the provider, as the provider is in the best position to know the strength of their client's case and the likelihood of it being granted permission.
>
> 3.73 We also recognise that this proposal would affect the 330 cases identified where permission was refused but a benefit to the client was recorded. Our approach would tackle the large proportion of cases (61% in 2011–12) in which permission is refused and which have no benefit to the client, thereby incurring unnecessary costs for public authorities and the legal aid scheme. We do not consider it would be appropriate to retain funding for such cases simply in order to retain funding for the minority of cases in which permission is refused but which are recorded by the provider as having substantive benefit to the client. In the

immigration and asylum Upper Tribunal appeal system, costs are not paid if permission to appeal is refused even if the provider records that there is a substantive benefit to the client.

3.74 We do not consider that it would be sensible to make an exception and allow funding to be provided where a provider says the case was in any event of substantive benefit. Providers have been incentivised by LAA contract key performance indicators to record substantive benefit as part of their management information. Allowing providers to decide whether or not they get paid for the permission work of failed cases would not provide a robust control of funds.

3.75 In addition, depending on the circumstances, it may well be possible for the provider to recover their costs in these situations, either as part of a settlement between the parties or through a costs order from the court. For example, if the challenge is to a failure by a public authority to make a decision, and the decision is taken after the permission application is made, permission may well be refused because the case is academic, however, the claimant can pursue a costs order and the court can grant any costs reasonably incurred by the claimant if, arguably, the proceedings have brought about the making of the decision.

3.76 The same reasoning applies in relation to cases where an application for permission for judicial review is made and the case is withdrawn because the defendant concedes or the parties settle the case. Again, depending on the circumstances, the claimant may agree the costs of the permission application as part of the settlement, or if no costs are agreed, the claimant can seek a costs order from the court.

3.77 Therefore we consider that this proposal is the appropriate way in which to ensure that legal aid is not used to fund a significant number of weak cases and is focussed on cases that really require it.

3.78 Reasonable disbursements, such as expert fees and court fees, which arise in preparing the permission application, would continue to be paid, even if permission was not granted by the Court. This reflects the exceptions made for the payment of interpreters and experts under the immigration and asylum Upper Tribunal remuneration scheme.

Implementation

3.79 Subject to the outcome of this consultation, it is currently anticipated that this proposal would be implemented through secondary legislation to be laid in autumn 2013 and, if necessary, contract amendment

No.

ILPA does not agree with this proposal, save to the extent that we agree that reasonable disbursements should be payable in any event. There is a real risk that implementation of this proposal will deny individuals who have suffered a wrong at the hands of the State the opportunity to seek redress through judicial review. This is because legal aid providers, after more than a decade of frozen pay rates, followed by the introduction of fixed fees and fee cuts, cannot assume any more financial risk in their businesses. Even where a lawyer is willing to bring an application on this basis, this approach will affect the amount of judicial review a solicitor or a barrister can do at any one time, because the work is "at risk." Many legally aided firms are limited to 100 or so cases ("matter starts) in asylum and those immigration cases remaining within scope. There is a relationship between the amount of "at risk" work a business or individual can carry and the guaranteed income it has. In particular in the case of not-for-profits that do not take paying clients, the limits on matter starts will have the effect of imposing a cap on the amount of "at risk" work on the go at any one time. Risk exposure will increase with the complexity of the judicial review.

Future claimants pursuing judicial review claims as litigants in person will be in an unequal position *viz à viz* the State, because the defendant government department will continue to be legally represented. In all these circumstances, and those described below, the proposal engages Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union.

The proposal to put costs at risk until permission is granted in a judicial review claim is wrong in principle and the consultation paper contains no credible evidence whatsoever that implementation would bring about the £1m saving the Government anticipates, as is set out in our response to questions 34 and 35

below.[69] Even were implementation apt to achieve such a saving, balanced against the threat it would pose to access to justice in the particularly important matter of judicial review – the primary means within the UK's constitutional system by which an individual may bring an effective legal challenge to the exercise of State power – implementation would be a disproportionate measure.

There exists a wealth of carefully researched material on judicial review to which the Ministry of Justice could usefully have regard[70]. Not least among which Treasury Solicitor's *The Judge over your shoulder*. Sir Gus O'Donnell KCB in his foreword[71] commends the publication as as a key source of guidance for improving policy development and decision-making in the public service. Paragraph 1.1 of the publication says

> *1.1 Administrative law (and its practical procedures) play an important part in securing good administration, by providing a powerful and effective method of ensuring that the* ***improper exercise of power*** *can be checked.* [emphasis in original]

This statement is all the more important given its source: those whose job it is to act for the defendant Government departments in judicial review.

That specialist legal advice and representation is needed in judicial review is acknowledged by government departments' instructing specialists to represent them. Inequality of arms between claimants and defendants in legal proceedings concerning the exercise of State power over individuals' lives will result from the State being represented by experts while the individual is not.

Public confidence will not be inspired by further steps towards making access to justice the preserve of the wealthy. In the consultation paper it is asserted that '…in the past decade our legal aid bill has risen dramatically, so that it is now one of the highest in the world, costing the taxpayer nearly £2bn each year'. Not so. According to the Comptroller and Auditor General, between 2000-01 and 2008-09 civil legal aid expenditure fell by nine per cent. Since 2003-04 civil legal aid expenditure has decreased by 15 per cent[72]. Cutting away at access to justice by making it increasingly difficult for legal aid providers to remain in business is not a solution; it is not even part of a solution because as Lord Neuberger recently indicated[73], threatening access to justice threatens the rule of law and increases the potential for society to fail.

The Lord Chancellor has responsibility for the efficient functioning and independence of the courts. This responsibility is not discharged by measures such as this, which risk increasing the number of litigants in person with which the courts have to deal. The Lord Chancellor has a role in appointing Judges to the Courts of England and Wales. He is the 'Keeper of the Queen's conscience' and clearly has a significant degree of responsibility for ensuring that not only the law, but the rule of law is upheld within the United Kingdom's particular set of unwritten constitutional arrangements. Judicial Review is central to upholding the rule of law and it is therefore vital that this recourse should be accessible to all, irrespective of ability

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[69] Civil Credibility Impact Assessment, paragraph 31 at page 9.

[70] See for example the Law Commission's *Administrative Law: Judicial Review and Statutory Appeals* (No 226)*; Item 10 of the Fifth Programme of Law Reform relating to Judicial Review* (HC 669) 1994; *Administrative Justice – Some Necessary Reforms: Report of the Committee of the JUSTICE-All Souls Review of Administrative Law in the United Kingdom, 2000;* Sir Geoffrey Bowman and his committee *Review of the Crown Office List: A Report to the Lord Chancellor, 2000, The Dynamics of Judicial Review Litigation: The resolution of public law challenges,* Vara Bondy and Maurice Sunkin, 2009. before final hearing. Discussions of judicial review in court judgments are also in point, see for example *O'Reilly v Mackman* [1983] 2 AC 237, *R v Legal Aid Board, ex p Hughes* (1992) 5 Admin LR 623, *R (Federation of Technological Industries et ors) v The Commissioners of Customs and Excise* [2004] EWHC 254 (Admin), *R (Grierson) v OFCOM* [2005] EWHC 1889 (Admin), *Sharma v DPP et ors (Trinidad and Tobago)* [2006] UKPC 57.

[71] Edition 4: 2006.

[72] *The procurement of Criminal Legal Aid by the Legal Services Commission*, National Audit Office, Report by the Comptroller and Auditor General, HC 29 Session 2009–2010, National Audit Office 27 November 2009.

[73] *Supra.*

to pay. If this recourse becomes the exclusive preserve of the wealthy the UK's reputation for upholding the rule of law will be left in tatters.

A judicial review, including one won by the State, identifies the extent, and limitations, of State obligations. Public confidence is unlikely to thrive where these are unknown.

Given the lack of any credible evidence that this proposal will save money and/or deter unmeritorious claims from being brought, there must be a real concern that what this proposal amounts to is the executive trying to reduce the number of challenges brought to the exercise of its power over individuals. It is often the poor and marginalised who find themselves in the position of needing to challenge State action or inaction toward them; it is the poor and marginalised who need legal aid to do so.

Far more significant savings, we suggest, could be achieved by robust attempts to address defendant behaviour, including the behaviour of the Government Legal Service. An attempt to save costs within any government department must be based on identification of the main cost drivers in the department's budget. If the proposal is implemented there is a very real risk of transferring and augmenting costs to defendant government departments, to Her Majesty's Courts and Tribunals Service and of increasing costs to the Ministry of Justice overall. The risk to the Courts is referred to in the Civil Credibility Impact Assessment, but no attempt is made to quantify the risk, or the reasons for, and extent to which, costs may rise in Her Majesty's Courts and Tribunals Service as a result of implementing this proposal.

Statistics

The stated rationale for this proposal is that there are currently too many unmeritorious judicial review claims brought with legal aid funding. The Government's statistics in the consultation paper (paragraphs 3.65 – 3.68), when subject to proper scrutiny, do not support this purported rationale and on the contrary demonstrate that the majority of claims brought with legal aid funding are successful in some degree.

The Government has obtained data from the Legal Aid Agency which shows that in 2011 – 12 (presumably the contract year, April 2011 – April 2012, though this is not specified) legal aid was granted in 4074 cases for an actual or potential judicial review.[74] Thus the Legal Services Commission (as it was, during the period in question) agreed with legal aid providers in 4074 cases that there was sufficient merit in the proposed judicial review for funding to be granted, and duly granted, a funding certificate to enable an application for permission on the papers and subsequently, in some cases, orally, to be made.

Although during the period in question some legal aid providers had 'devolved powers' which entitled them in emergency situations to grant legal aid funding for a judicial review without immediate reference to the Legal Services Commission, those providers were required to send a full application to the Legal Services Commission within five working days of the exercise of devolved powers by the provider. As such, legal aid granted under devolved powers remained subject to the Legal Services Commission's scrutiny and it was open to the Legal Services Commission to reject the application if it disagreed with the provider's assessment of the merits.

In the consultation paper it is maintained that the provider knows best about the merits of the case and so should assume the risk until permission is granted and that the Legal Aid Agency 'is necessarily strongly guided by the provider's assessment of the prospects of success'[75].

This should be contrasted with page 32, paragraph 3.74 of the consultation, which implies that providers do not always record accurate information about whether proceedings have brought about a substantive

[74] It is stated that there were an additional 111 grants of legal aid for an actual or potential judicial review in the same period, but these cases 'lack codes.' This we take to mean the outcome of the case was not clearly reported or recorded for some reason, although this is unclear.
[75] Consultation paper – page 32, paragraph 3.72.

benefit to clients. If however the assertion is that providers do not record accurate data then this is a grave allegation. It should be viewed with particular concern given the statement in Annexe K, the equality impact assessment, that:

> In common with all civil & family legal aid providers for whom data is available, those managing firms engaged in work impacted by this proposal [judicial review being at risk] are more likely to be male and non-disabled when compared to the population as a whole but, unlike the majority of civil and family providers, they are more likely to be BAME when compared to the population as a whole (29% amongst affected providers compared to 14% in the general population). [76]

See below re the uplift in asylum and immigration appeals and the comments at paragraph 5.12.2 of Annexe K, where a similar statement is made. There could be no justification for the Ministry of Justice taking a particular view of the probity of representatives based on their ethnic origin and it should be quick to correct any impression to the contrary.

The Legal Aid Agency requires that practitioners must be accredited and providers must be audited. If the Legal Aid Agency has so little faith in the professional standards/ethics and probity of those with whom it has contracted, why has it given them contracts as recently as April 2013? The Agency's and its predecessor Commission's own failures must be at root of such problems.

Very often it will be the respondent government department that is best placed to assess the merits of the case because they will hold all the information[77]. The real potential for costs savings lies in the way government departments deal with litigation. Prior to sending a pre-action letter, the provider does not know what the response will be and if the pre-action letter is ignored so that Legal Aid has to be obtained for a judicial claim to be issued, then the provider still does not know. ILPA agrees that at the outset the provider is better placed than the Legal Aid Agency to assess the prospects of a case succeeding, but the Legal Aid Agency is not supine or passive in this process. It does not always agree with providers' assessments, hence the process by which a provider can apply for review and then appeal of a refusal by the Legal Aid Agency to issue a funding certificate.

In the vast majority of cases, legal aid for judicial review is granted only where the prospects of success are at least 50%.

As the case progresses and the defendant provides summary grounds of defence, the original assessments of the prospects of success may change, in some cases becoming weaker and in some cases stronger. That more than one reasonable view of the merits of a case may be taken is underscored by the existence of a process by which, if a paper application for permission is rejected, there is an automatic right for the claimant to renew the application orally, i.e. experienced and conscientious Judges may disagree about the merits of a claim. Therefore the assertion that 'provider knows best about the merits and therefore provider should bear the risk' is not a coherent rationale for putting costs at risk until permission is granted.

Of the 4074 aforementioned cases, in the consultation paper it is reported that 2275 (55.8%) 'ended before applying for permission to the Court' but it is not stated why these cases ended. This is data that the Legal Aid Agency holds. The experience of ILPA members is that this is not a case of the feckless legal aid provider coming to their senses at some stage before issuing the claim at court and advising their clients that, contrary to earlier advice, there is no merit in issuing, but rather that in the majority of these cases the defendant conceded some or all of the proposed claim (as articulated in the requisite pre-action letter) before it was issued at court, i.e. the defendant government department conceded its action / inaction towards the claimant was wholly or partly unlawful. What the Government's own statistics and our experience suggest to us is not at all an argument for putting costs at risk to the permission stage, but

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[76] Annexe K, paragraph 5.4.2.

[77] See *Guidance on discharging the duty of candour and disclosure in judicial review proceedings*, Treasury Solicitors, 2010.

an argument for robust attempts to tackle unlawful decision making / delay in decision making by defendant government departments.

Any assertion that in these 2275 cases the dispute was not resolved on terms favourable to the proposed claimant whereby the pre-action letter was sufficient to resolve some or part of the dispute should be evidenced.

ILPA has a particular interest here. It has long been the case that the majority of all judicial reviews, those brought with and without legal aid, concern immigration and/or asylum. In terms of addressing defendant behaviour, we suggest the Home Office would be a very good place to start. The Minister responsible for the erstwhile UK Border Agency, the Rt. Hon. Theresa May MP, described the agency as 'closed, secretive and defensive' in announcing to Parliament on 26th March 2013[78] her intention to abolish the Agency. She described it as a 'troubled' agency whose performance was 'not good enough'. ILPA members, many of whom have far too extensive experience of having to bring judicial reviews of decisions or inaction by the UK Border Agency, can only agree. Statements in the consultation paper refer to the need to preserve valuable court and judicial time, drive greater efficiency and focus legal aid on cases that really require it. ILPA does not disagree with these aims but putting costs at risk until permission is granted will not achieve them and the behaviour of defendant government departments should be scrutinized in this context.

Case of C

C's asylum appeal to the Court of Appeal had been allowed and, with the consent of the Secretary of State for the Home Department, C's representative entered into correspondence with the Secretary of State inviting her to grant C leave accordingly. Seven months after the Court of Appeal's order allowing the appeal, a pre-action letter was sent to the Secretary of State by C's representatives challenging the Secretary of State's failure to grant C leave to remain. The Secretary of State's only response was to say that C's case had been 'allocated to a caseworker'. Nine months after the Court of Appeal's order a judicial review claim was issued. The claim was settled and the Secretary of State was ordered to pay indemnity costs.

Case of P

P had applied to remain in the United Kingdom on the basis that she was a victim of human trafficking (who had originally fled the Rwandan genocide) and was suffering significant mental illness as well as chronic and incurable physical illness. P was provided with accommodation and subsistence support by the National Asylum Support Service (NASS) whilst her application was pending. The Secretary of State for the Home Department refused the application in due course, maintaining (amongst other grounds) that P's removal from the UK was 'necessary in the interests of immigration control'. The Secretary of State did not give P a right of appeal to the tribunal because the Secretary of State did not give directions for P's removal from the UK. The Secretary of State gave P notice to leave her NASS (asylum support service) accommodation and terminated her support on the basis that her application had been refused and she had no appeal pending. A pre-action letter was sent, challenging the Secretary of State for obstructing P's access to an independent tribunal and for threatening to make her homeless and destitute. No response was received and the judicial review claim was issued. It then transpired that the Secretary of State had sent a response, according a right of appeal to a firm of solicitors who were not representing P. The judicial review claim was withdrawn and the small costs incurred were paid by the Legal Services Commission (as it then was).

[78] HC Report 26 March 2013, col 1500ff.

Case of L

In 2005 the Claimant L had made further submissions, articulating a fresh claim for asylum several years after his initial application for asylum had been refused. Those submissions were left unanswered for approximately one year. After a judicial review claim was issued, the Secretary of State for the Home Department agreed to settle on terms that she acknowledged she was required to make a further, substantive decision, according L a right of appeal to the tribunal if the decision were a refusal. In this case no order for costs was made and so the Legal Services Commission (as it then was) paid L's costs. Almost five years later, the Secretary of State for the Home Department had still not made a decision on L's application. L pursued a complaint, via the UK Border Agency's formal complaints procedure. L's MP took up the matter with the Agency. Still no decision was forthcoming, no explanation was offered for the delay and no realistic timescale was provided for notification of a decision. Legal aid was obtained and a judicial review claim issued, following which, before permission was considered on the papers, the Secretary of State agreed to make a decision within a specified timescale and to pay L's costs.

It should not have been necessary to bring any of the claims above and each of the above examples provides clear support for the view that costs savings to the justice system as a whole should be achieved by addressing the behaviour of defendant government departments, not by making it more difficult for those who suffer such incompetence and injustice at the hands of the State to find representatives willing to take on their cases.

The Government's analysis of the statistics goes on to assess the remaining 1799 cases in which an application for permission for judicial review was brought and finds that 845 'ended after permission was refused either on application or renewal.' Thus on the face of it, in 954 of the cases permission was granted, i.e. in 53% of cases. To say that permission was granted in more than half the cases which were issued is not a compelling basis for proposing to put costs at risk to the permission stage in judicial review. Again it suggests that it is not those acting for claimants who, in the majority of cases, are getting their assessments of the merits wrong.

The analysis then acknowledges that in 330 of the 845 cases that ended after permission was refused the provider recorded that there was nevertheless a 'substantive benefit to the client'. We agree that such an outcome may be recorded even when permission is refused, and this is for a variety of reasons, including those suggested in paragraph 3.67, e.g. the defendant may have conceded some or all of the claim but for some reason the claim was not withdrawn. Inclusion of these 330 cases gives a potential overall success rate of 71% – up to and including the permission stage - in cases where judicial review claims were issued.

Based on the figures in this section of the main body of the consultation paper, this leaves 515 cases in 2011 – 12 in which legal aid was granted, a judicial review claim was issued, permission was refused on the papers or at a hearing and there was no substantial benefit to the client. In the Civil Credibility Impact Assessment the 515 aforementioned cases which may be seen as unmeritorious has somehow become 800,[79] as discussed in our comments on the Civil Credibility Impact Assessment below in response to questions 34 and 35.

The Government expresses concern at the 'potentially substantial sums of public money expended on [these cases]'[80], which brings us to the projected savings, in terms of legal aid funds paid to legal aid providers, which it is said may be achieved by putting costs at risk until permission is granted.

It is pointed out in the consultation paper that in the immigration/asylum appeal system, if an application for permission to appeal from the First-tier to the Upper Tribunal is refused, there is no legal aid funding for the costs of making the application.[81] Judicial review is an altogether different remedy for different

[79] Civil credibility impact assessment: paragraph 31 at page 9.
[80] Consultation paper: paragraph 3.68 at page 31.
[81] Consultation paper: paragraph 3.70 at page 31.

problems and has overwhelming constitutional importance in this jurisdiction. Moreover, in the Upper Tribunal applications with which comparison is invited, those cases have at least had the benefit of having been before a tribunal judge of the First-tier Tribunal, with the case fully prepared for that initial appeal. This will have included preparation of a bundle of documents, witness statements and skeleton argument by counsel. On receipt of the First-tier Tribunal's determination some funding (although limited) is available for reviewing the determination and considering whether there is an error of law in it. In practice the work at risk is drafting the grounds in support of the application to the Upper Tribunal. The work at risk may be in the order of about 10% of the work done. The current time limit for permission to appeal to the Upper Tribunal is five business days[82] (28 if the appellant is outside the UK[83]). The application is a paper application. Not only the sums at risk but also the delays in knowing the outcome are much less than in most judicial reviews. The proposal to put costs at risk in judicial review until permission is granted risks obstructing any access to a court at all because there is far more work to be done at risk than there is in the Upper Tribunal applications, and there are diminishing prospects of finding legal aid providers willing to assume such risk.

If ILPA is right that in the majority of the 2275 cases which did not issue the dispute was resolved on terms wholly or partly favourable to the proposed claimant, and if this figure is added to the 954 grants of permission and 330 cases of substantive benefit, the position is in fact that far from 'wasting taxpayers' money' on 'unmeritorious' judicial review claims, in only 13% of the 4074 cases was there verifiably no benefit. Thus legal aid providers secured successful outcomes (up to and including the permission stage) to some degree in up to 87% of the 4074 cohort. On this basis the Government's rationale (deterring unmeritorious claims/saving one million) is wrong and the figure of 61% of cases having permission refused and no substantive benefit is a distortion[84]. The statistical analysis needed in connection with such a proposal as this would be to look at Legal Aid Agency/Legal Services Commission data for judicial review which concluded in the last two years and to ask:

i) who – to any degree – won?
ii) at what stage? and
iii) who paid?

There is no evidence in this consultation paper that legal aid is being used to fund 'a significant number of weak cases'[85].

The consultation paper identifies that 1799 applications were issued in 2010-11 by legally aided claimants. HM Courts Statistics indicate that in 2011 the total number of applications for made for permission was 11,359. While the years do not correlate neatly these figures raise the suggestion that private clients/litigants in person are bringing a large number of judicial review applications, judging it worth their while to do so. It is likely that it is the prospects of settlement that mean that judicial review is within the reach of private clients. ILPA has seen many such cases where the matter at issue is inordinate, and in the case of EEA applications, unlawful delay on the part of the Home Office. Very often the result of applying for permission is that Home Office gets on and makes the decision is question. The judicial review falls away but the privately paying client has obtained the desired result, and costs at *inter partes* rates.

As set out in our response to question five, the proposed changes are likely to give rise to unintended consequences including:

- more work being done at the pre-action stage, before the at risk work starts;
- the application for permission having to be determined rather than the parties sorting matters out between themselves;

[82] Rule 24 Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230).
[83] Rule 24 Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230).
[84] Consultation paper: paragraph 3.73 at page 32.
[85] Consultation paper: paragraph 3.77 at page 33.

- there will be fewer "rolled up" hearings where the permission application and the main application are dealt with at the same hearing; and
- there will be applications for the judge to exercise discretion to award costs at the permission stage.

Implementation of this proposal risks creating a perverse incentive for claimants to seek permission at the earliest possible stage, as soon as pre-action protocol time limits are up. There are risks of increased litigation and of increased costs.

Implementation of this proposal risks creating a perverse incentive for defendants to refuse to settle at the pre-action stage. If a defendant knows that a claimant's case is publicly funded then there may be a risk, and in the case of the Home Office our experience suggests there is definitely a risk, that instead of responding in a timely manner to a pre-action letter, thereby avoiding costs to the court and the defendant government department, the defendant may decide to 'wait and see' whether the claimant, or more accurately the claimant's representative, is willing to take the risk of issuing the claim. Pre-action letters very often go unanswered, or else all that is received is a standard, two-line acknowledgement letter from the Judicial Review Unit at the Home Office. Acknowledgment of service is often the first time lawyers for a defendant examine the case in detail and consider whether settlement is desirable[86]. Acknowledgment of service takes place 21 days after the application for permission has been filed and all the work necessary for that completed.

We have very recently started to see some modest improvements because of the judgment in *Bhata & Others v SSHD* [2011] EWCA Civ 895 as defendants become aware that unanswered pre-action letters will weigh against defendants in costs considerations. But, until very recently, no answer was the norm. If in future we were to have a situation in which the defendant knew that the claimant's representative had to take a risk and might not do so, there is a real danger that the small progress achieved since *Bhata* will be lost.

The contents of the consultation paper itself demonstrate how costs risk being transferred to Her Majesty's Courts and Tribunals Service by these proposals. At paragraphs 3.75 and 3.76 it appears to be suggested that the risk of legal aid providers not taking on cases if costs are at risk until permission is granted is mitigated by the fact that costs may well be recoverable from the defendant, even if permission is not granted, indeed even if permission is refused. This is correct, and the opportunity to recover costs from the defendant arises, as indicated in the consultation paper, if the defendant makes an acceptable offer of settlement, such that the case is withdrawn before permission is considered. However, the defendant is not automatically obliged to pay the claimant's costs in these circumstances, and the experience of ILPA's members is that the defendant often wrongly resists doing so. Thus instead of the defendant's agreement to pay the claimant's reasonable costs being recorded in an agreed draft consent order to withdraw the claim, the defendant may insist that the decision on costs should be made by the court. This usually entails further work, with both parties providing written submissions on costs to the court. Implementation of this proposal will make it far more likely that the claimant will seek an order from the court if the defendant refuses to agree to pay the claimant's costs, thereby increasing the workload of costs Judges in the Administrative Court. The proposal would mean that cases are less likely to settle unless costs are paid. There is a likelihood that claimants will ask the court to grant permission and award costs.

In cases where the claimant is represented by a legal aid provider, if permission is refused on the papers then the prospect of not being remunerated for the work done may tip the balance in favour of renewing the application to a hearing in a borderline case. Similarly, the prospect of not being remunerated may lead to counsel's being unable to agree to a rolled-up hearing, which would involve instructing solicitors and counsel doing a larger amount of work at risk. This would increase costs overall.

[86] Bondy, V and Sunkin, M (2009) *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf (Accessed 27 May 2013.)

Courts may direct that permission be considered at an oral hearing. This is usually done in cases of particular importance or sensitivity. What will be the obligations of a legal representative if a court so directs, and what pressure will this put on judges not to make the direction? If a judge considers that a hearing is appropriate this suggests that the case is one of substance that has not been improperly brought, whatever the outcome.

The Home Office normally requires that when persons are being removed by charter flight then before it will stay a removal[87] an injunction must be obtained from the court, including in cases stayed behind a test case, for example a case testing the safety of return to a particular country. An injunction is also sometimes required in other cases as well. Proceedings must be issued to obtain injunctive relief, although if the test case settled it extremely likely that the case will not proceed to a permission hearing. Test cases have been seen as efficient case management by the courts that designate them as such. They can keep court costs down. But if there is no prospect of being paid in a case that will be stayed behind a test case, despite having done work on an injunction, then it is unlikely that legal representatives will agree to act in these cases.

This problem arises in other areas of law, for example community care or housing cases where the injunctive relief may take the form of accommodating a person or providing services. The Court will order injunctive relief if satisfied that a strong prima facie case is made out[88], a higher test that the arguability threshold that applies in permission applications. For this reason, where injunctive relief is ordered, the Home Office or local authority will frequently change its mind about the initial decision. Such cases will not proceed to a permission hearing because there is nothing left about which to argue except costs. If costs are awarded, this will be at *inter partes* rates. Costs awarded by a court may be higher than those agreed between the parties where the case settles. We recall that Lord Justice Jackson had proposed that one way costs shifting be introduced in judicial review cases so that where a defendant settled the case after the claim had been issued then, subject to the claimant having complied with the pre-action protocol, the defendant should normally pay the claimant's costs[89].

If clients cannot find qualified, expert providers to take on their judicial review cases, it cannot be assumed that those claims will simply not be brought. In immigration and asylum cases in particular the issues at stake concern fundamental rights and it is no exaggeration to say that in some such cases matters of life or death are at stake. In, for example, removal cases the clients considering issuing judicial review claims may have nothing to lose by doing so and will bring these claims themselves if they cannot find lawyers who are willing to do so. In our comments on the Civil Credibility Impact Assessment we look at the potential for costs to arise from an increase of litigants in person.

Q6. Do you agree with the proposal that legal aid should be removed for all cases assessed as having "borderline" prospects of success? Please give reasons.

The proposal:

> 3.85 Cases must generally have at least a 50% chance of success to receive legal aid funding for full representation (i.e. must have a moderate or better prospects of success). However, there are certain types of housing or family cases which will receive funding with borderline prospects of success. In other cases funding will be available if there is a borderline prospect of success and the case has special features (that is to say it is a case of significant wider public interest or a case with overwhelming importance to the individual). Funding may also be granted in public law claims, claims against public authorities and certain immigration and family claims which have these special features or if the substance of the case relates to a breach of ECHR rights.

[87] UK Border Agency Enforcement Instructions and Guidance, Chapter 60: **2**.4 Charter Flights Claimants being removed by charter flight (with special arrangements) who wish to legally challenge their removal are normally required to seek injunctive relief as a JR application will not usually result in deferral of removal.
[88] *De Falco v Crawley BC* [1981] 1 QB 406.
[89] *Review of Civil Litigation Costs,: final report,* Lord Justice Jackson, December 2009, Chapter 30, paragraph 5.1.

3.89 This proposal would apply equally to asylum cases assessed as having 'borderline' prospects of success. The Government recognises its responsibilities under Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status. This requires the Government to provide legal assistance for those refused asylum. However article 15(3)(d) of the Directive makes clear that this obligation only extends to those appeals which are 'likely to succeed'.

No.

Immigration practitioners with a mere 100 or so matter starts are unlikely to be in any position to squander one on a case that they do not think winnable. However, they are frequently in the position of challenging cases that they know will be hard to win, for example because there is settled law in the higher courts against them. It is frequently impossible fairly to judge the merits of a case before it has been prepared, which is why the borderline category is important. In such cases and in cases generally, the State has an obligation to ensure that appropriate evidence should be made available[90].

Problems in immigration and asylum are exacerbated by the "country guidance" cases in the Upper Tribunal that, purporting to judge of the factual situation in a country, go out of date in a way that legal precedents do not. The low standard of proof in asylum cases[91] makes it difficult to use examples from other areas of the law as to whether a case is borderline.

One possibility is that this will simply lead to increased use of the 'unclear' category where it is available. Another is that instead of saying "..the case is borderline but I shall do all I can to ensure that we win" a provider will instead say "I shall do all I can to ensure that we win and therefore this case cannot be called borderline."

The cases funded where the prospects of success are borderline are a very particular class of case, cases of particular importance which are likely to involve substantial injustice or suffering[92]. They are:

- cases of significant wider public interest/ of overwhelming importance to the individual and in immigration, cases involving a breach of rights under the European Convention on Human Rights[93];
- investigative help in public law cases[94];
- housing possession cases[95];
- public law children cases[96];
- domestic violence family cases[97];
- cases where breaches of international treaties relating to children are alleged[98] .

The interpretation paragraph[99] of the Civil Legal Aid (Merits Criteria) Regulations 2013 defines "case with overwhelming importance to the individual" as follows:

> *"case with overwhelming importance to the individual" means a case which is not primarily a claim for damages or other sum of money and which relates to one or more of the following–*

[90] E.g. where the European Court of Human Rights said the court should have ensured that a report on scars was obtained to support the appellant's case, *RC v Sweden*, Application no. 41827/07, Council of Europe: European Court of Human Rights, 9 March 2010) at paragraph 53.
[91] *R v Secretary of State for the Home Department, ex p Sivakumaran* [1988] AC 958).
[92] Civil Legal Aid (Merits Criteria) Regulations 2013, SI 2013/104.
[93] *Ibid*., regulations 43 and 60.
[94] *Ibid*., regulation 56.
[95] *Ibid*., regulation 61.
[96] *Ibid*., regulation 66.
[97] *Ibid*., regulation 67.
[98] *Ibid*., regulation 68.
[99] Paragraph 2.

(a) the life, liberty or physical safety of the individual or a member of that individual's family (an individual is a member of another individual's family if the requirements of section 10(6) are met); or

(b) the immediate risk that the individual may become homeless;

Under the previous contracts (there is no equivalent under the current contract) Chapter 29 of the previous Immigration Funding Code made clear that when an unaccompanied minor had a right of appeal on asylum grounds and *prima facie* came with the 1951 Convention relating to the status of refugees or the European Convention on Human Rights then the child would be considered to meet the merits test to at least the borderline level. There is no equivalent test under the current contract but our experience of the operation of the previous contract leads us to fear that abolition of the category may put separated refugee children at particular risk.

Where there is such injustice or suffering, the State should encourage attempts to use the law to put them right.

At paragraph 3.88 of the consultation paper a right of appeal to an Independent Funding Adjudicator is identified as a safeguard in cases affected by this proposal. Not so. If borderline cases are no longer within scope then such a right of appeal will not assist those whose cases have quite properly been identified as having borderline prospects of success.

There are no figures whatsoever in the consultation paper that look at the success rates in these cases. We ask the Ministry of Justice to provide these figures.

The consultation paper proceeds on the assumption that if the borderline category is funded the cases within it should no longer be eligible for legal aid instead of looking at the particular cases and whether it is necessary to make special arrangements for them.

Questions 31 to 32 introduction

Legal Aid practitioners will have to cope with the proposed ‘transformation’ against the background of successive and increasing restrictions in Legal Aid Agency contracts. Legal aid firms and organisations, especially not-for-profits that cannot balance reduced earnings from legal aid with increased private work, are in many cases struggling to survive. Any change disturbs whatever precarious equilibrium they have reached. Many have, however good they are and however good the Legal Aid Agency thinks they are, been able to secure a contract for only some 100 legal aid cases at the initial stages and have built the types of work now under attack, such as judicial review, into their survival strategy. With so little wriggle room it is difficult to do much work “at risk.”

The matters that follow are not primarily an attack on the legal profession. The final options for lawyers are:

- Make a loss on legal aid work and eventually close/get closed down;
- Do less legal aid and do more private work;
- Leave this area of work entirely.

En route to those options we may see:

- Those who cut corners lasting longest, with standards of advice falling;
- Those who do the least legal aid relative to private client work last longest – with the risk that the volume of legal aid work makes it difficult to maintain expertise and difficult if not impossible for those new to this area of work to gain expertise.

Lawyers, one way or another, will for the most part survive. What will not survive is work funded by legal aid in the areas under threat and thus on the clients who would benefit from this work. Those who will suffer are the persons who would benefit from legal precedents being set or government departments being called to account.

Q31. Do you agree with the proposal that fees for self-employed barristers appearing in civil (non-family) proceedings in the County Court and High Court should be harmonised with those for other advocates appearing in those courts. Please give reasons.

No.

This is not about harmonising, it is about levelling down. There is no suggestion that other advocates should be paid what a barrister is currently paid, instead it is suggested that the barrister's fee be reduced. People are represented at hearings because solicitors are able to secure the services of counsel. The number of solicitors who appear in such proceedings is small because, we suggest, of the very low rates of pay. To level fees down is likely to reduce the number of persons who can find representation.

We cite from *The cost of Quality: Review of quality issues in legal advice: measuring and costing quality in asylum work*, research undertaken by the Information Centre about Asylum and Refugees and published in March 2010:

> *3.8 Hourly rate fees under GFS*
>
> *Certain legal aid work has continued to be paid at an hourly rate since the introduction of civil contracting in January 2000 and despite the introduction of fixed fees. However, the hourly rates have not been index-linked. The rate currently payable for legal aid attendance and preparation for London-based firms, (£57.35/hour, a rate first introduced in April 2001), would be £71.08/hour if the 2001 hourly rate were to be adjusted to reflect the 24% increase in RPI [*30 Adjusted to allow for increases in RPI between 2001 and 2008, the most recent year for which annual averages are available. Office for National Statistics, 'Focus on Consumer Price Indices: Data for November 2009' Table 4.1 RPI all items: 1947 to 2009, available at http://www.statistics.gov.uk/downloads/theme_economy/Focus_on_CPI_Nov_09.pdf*] during the intervening period.*
>
> *When contracting started in 2000 legal aid advice and assistance was remunerated at the hourly rates formerly payable for 'Claim 10' work at a rate first introduced for work done on or after 1st April 1996 (LSC Focus 27, September 1999: 29 [*31 See Focus newsletter archive at LSC website, available at http://www.legalservices.gov.uk/archive/9782.asp]*). Between 1st July 2000 and 2nd Apr 2001 new rates for Legal Help and Help at Court were introduced to reflect whether or not a firm was franchised in, for example, the immigration & nationality category of work (LSC Focus 31, July 2000: 3). The current hourly rates listed in the 2007 Payment Annex of the Unified Contract have been in place since the 2nd April 2001 (LSC Focus 34, 2001: 34). In July 2008 the only set of hourly rates that changed were the hourly rates used to calculate the actual profit costs of GFS cases (which were therefore only paid if the case became exceptional).*

No reason has been given why this work is worth less than it was worth in 2001.

The rates of pay for Treasury Counsel, acting in the same cases as legal aid lawyers on behalf of Government departments are:

> ***London Panel Rates***
> *A Panel - £120 per hour*
> *B Panel - £100 per hour*
> *C Panel - £80 per hour if over 5 years call. £60 per hour is under 5 years call*

Regional Panel Rates
Ten years' or more experience £110 per hour, Over five years' experience but under ten £90, Under five years' experience £60.[100]

Baby Barristers [not panel members]

£25 per hour or £125 per day for 2nd six pupils and £45 for tenants.

QCs [not/no longer Panel members]

As a general rule when Counsel take silk (and are doing work for which a nomination is required i.e. work they did not start as A panel Counsel) they are paid at the rate of £180 per hour for the first 12 months. Other silks are generally paid at an agreed rate between £180 and £250 per hour. It is open to QCs to agree a lower rate and some have done so.[101]

Barristers are subject to the cab-rank rule and cannot pick and choose their cases to achieve a particular balance of work. It is wrong to assume, as the consultation paper does, that just because a cut of 10% in rates has not affected supply, further cuts will not do so. This ignores the prospect that cuts to a certain level are absorbed, but then this stops. The cumulative effect of measures on the self-employed specialist bar must be considered. The Bar Code of Conduct precludes a barrister from doing work for which they are not suitably qualified. A split now exists between legally aided work, the majority of which is asylum, and immigration work. If barristers do not practise regularly in asylum they may conclude that it would be contrary to the Code to accept instructions in a particular case.

From fees are deducted expenses and costs. The fees proposed make it very difficult for barristers to devote a significant part of their practice to these cases. The availability of a cadre of barristers skilled in immigration issues (including unlawful detention and false imprisonment actions in civil courts) able to undertake advocacy provides a service to publicly funded solicitors operating in this area, many of whom will not be able to undertake advocacy at the rates offered for other advocates and would not in any event be able to maintain in-house advocates, especially in a smaller firm. Securing advocacy services from barristers on a case-by-case basis broadens access to justice in a cost effective way. Legal aid solicitors have access on an equal footing to barristers skilled in advocacy and drafting and can chose a barrister with expertise relevant to the case in hand.

The rates for barristers should be maintained. Harmonisation can be achieved by increasing the rate paid to solicitors, which would be in no way unreasonable given all the levels of pay for this work.

Q32. Do you agree with the proposal that the higher legal aid civil fee rate, incorporating a 35% uplift payable in immigration and asylum Upper Tribunal appeals, should be abolished? Please give reasons.

The proposal:

> 6.28 Providers currently receive uplifted legal aid rates of payment for immigration and asylum Upper Tribunal appeals. The higher rate was put in place under an old scheme of retrospective funding where work on the whole appeal was 'at risk', and was intended to compensate providers for carrying the risk of non-payment throughout a case. Under existing arrangements only work on the permission application is 'at risk' and payment is made after a successful application. However the higher rate of payment still applies. Given the different arrangements in place since the higher rate was introduced, we do not consider continued payment of the higher rate to be justified.
>
> 6.30 We consider that there is no justification for the continuing payment of the higher rate, and that it may potentially incentivise applications to appeal in weaker cases.

[100] See http://www.tsol.gov.uk/PanelCounsel/appointments_to_panel.htm Accessed 28 May 2013.
[101] *http://www.tsol.gov.uk/PanelCounsel/work_outside_panel.htm*

No.

The stated rationale for this proposal does not withstand scrutiny. This is straightforward cut to fees from which the Government projects savings of £1m per year may be made[102]. However it is acknowledged that the assumption on which this projection is based: that the uplift has been paid in all immigration and asylum cases, may not be correct and the relevant data cannot be identified by the Legal Aid Agency[103]. This is not robust basis for implementing a proposal that threatens the survival of hundreds of small businesses.

Reference is made to the current funding arrangements for applications for permission to appeal to the Upper Tribunal, and the subsequent appeal once permission is granted. These are contrasted with the funding arrangements which were in place between April 2005 and February 2010 for what was essentially the same legal procedure: seeking permission to challenge the determination of an appeal at first instance in what was then known as the Asylum and Immigration Tribunal.

In reality there has been no great difference between the two schemes. It is correct that under the pre-February 2010 scheme, the costs of the application for permission to appeal and the appeal itself were in theory at risk unless and until the immigration judge determined at the conclusion of the case that the appellant's costs should be paid by the Legal Services Commission (as it then was). The Government maintains that the intention behind the introduction of retrospective funding was to 'reduce the number of weak challenges' and that the 35% uplift was intended to 'compensate providers (to some extent) for the risk of non-payment'[104]. However, at the outset of the scheme it was made clear by the Department for Constitutional Affairs that if permission to appeal was granted, and the representative had acted in good faith, funding should be awarded[105]. This was followed shortly by the Tribunal's determination on the test for making a cost order in *RS (Iran) v SSHD* [2005] UKAIT 00138, which equated the test for getting permission to appeal with the test for awarding costs. It is nevertheless wrong to say that under the pre-February 2010 regime the 35% uplift was 'routinely awarded'[106]. The uplift was more or less routinely awarded in cases where permission was granted, and it was not when permission was refused.

Since February 2010 the provision for payment of the 35% uplift to be paid in cases where permission is granted has been written into the contract, as explained at paragraph 6.31 of the consultation paper. Again, since February 2010, if permission is refused then the provider is not paid at all.

Thus in these cases the position as regards funding has in practice been much the same since April 2005 and thus the assertion that 'Given the different arrangements in place since the higher rate was introduced, we do not consider continued payment of the higher rate to be justified' is not based on an accurate understanding of the position[107].

It is moreover misleading to assert that under the current system 'payment is made after a successful application [for permission]'[108]. Under the current regime, as under the pre-February 2010 regime, providers cannot claim payment for their work, counsel's work or disbursements on the case until the very end of the case, which leaves providers with work in progress that they cannot bill for months, sometimes for more than one year, and leaves the Legal Aid Agency carrying a large debt to providers that it is not in a position to quantify.

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[102] Civil fees impact assessment, paragraph 37.
[103] Civil fees impact assessment, paragraph 43.
[104] Consultation paper, pages 94–95 at paragraph 6.32.
[105] Department of Constitutional Affairs – evidence to the Constitutional Affairs Committee: http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/276/276ii.pdf
[106] Consultation paper, page 95 at paragraph 6.32.
[107] Consultation paper, page 94 at paragraph 6.28.
[108] Consultation paper, page 94 at paragraph 6.28.

The assertion that the 35% uplift 'may potentially incentivize applications to appeal in weaker cases' is not supported by any evidence. The test for permission to appeal being granted is a robust one. In an application for permission to appeal it is necessary both to identify an error (or errors) of law in the determination and to demonstrate that the error is material, i.e. that the case may arguably have had a different outcome had the error not been made. Considering and drafting grounds of appeal to the Upper Tribunal is a skilled task which requires experience and expertise. ILPA disagrees that such work is properly the work of 'junior legal professionals'[109]. It is less still the work of unrepresented appellants. The implication that providers, 'incentivized' by the prospect of the 35% uplift, may not always make honest assessments of the merits is a serious slur on those practicing in accordance with their professional obligations. If it is contended that there are providers who make such dishonest assessments then the Legal Aid Agency ought not to be contracting with such providers because to do so would amount to a reckless waste of public money. But no is provided evidence to support this insinuation/speculation. It should be viewed with particular concern given the statement in Annexe K, the Equality Impact Assessment, that:

> We anticipate the impact of this proposal will be adverse, as providers will see a reduction in legal aid income. In common with all civil & family legal aid providers for whom data is available, those managing firms engaged in work impacted by this proposal are more likely to be male, and non-disabled when compared to the population as a whole, but unlike the majority of civil and family providers, they are more likely to be BAME when compared to the population as a whole (48% amongst affected providers compared to 14% in the general population). The proposal may therefore have a disproportionate impact on those groups[110].

This is the second time in this consultation[111] that the Ministry has evinced a particularly negative view of the conduct of providers in an area where it is has identified BAME providers predominating. There could be no justification for the Ministry of Justice taking a particular view of the probity of representatives based on their ethnic origin and it should be quick to correct any impression to the contrary.

The work in these cases that is truly at risk is the work involved in drafting the grounds for permission to appeal. This work should not be at risk at all. Providers will assess the merits of their cases but as the Constitutional Affairs Committee observed in 2005 with regard to the introduction of retrospective funding:

> *Lawyers considering whether applicants face possible human rights concerns, if deported, should not have to gamble on funding decisions.*[112]

It is arguable that the 35% uplift has been factored in each time legal aid rates have not been increased, both by providers in working out whether their businesses can remain viable and by the Legal Services Commission (as was) in working out how little providers could be paid for other work. The underlying payment rates in immigration and asylum cases have remained essentially unchanged for 10 years, save for a 10% cut in 2012 as explained in response to question 31 above. The proposed rates can be compared with the Guideline Hourly Rates used by the High Court in assessing costs. They fall far short. Currently the legal aid rates for travel time are, at least nominally, between £26.51 and £36.82, preparation and attendance at between £47.30 and £74.36, the highest rate in each case being the current uplifted rate paid in only some of the Upper Tribunal cases. Without the uplift, these cases will be paid at a considerably lower level than the proposed standard advocates' fee for High Court and other Upper Tribunal cases and where there is enhancement of the fee.

The proposed new rates fall far short of what is required to maintain and sustain specialists advocates who of necessity, and particularly in view of the recent scope cuts, will have to leaven legal aid work with

[109] Civil Fees impact assessment – paragraph 37.
[110] Annexe K, paragraph 5.12.2.
[111] See comments on judicial review and on paragraph 5.4.2of Annexe K above.
[112] Constitutional Affairs Committee, *Legal aid: asylum appeals Fifth Report of Session 2004–05*, HC 276 http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/276/276.pdf (accessed 26 May 2013).

private work (or work in other fields). Different knowledge and skills are needed for what remains of legal aid work (mainly asylum) and private work (in which there is much less asylum work).

Providers have factored in the 35% uplift in their assessment of whether their businesses can remain viable after the scope cuts introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, implemented in the 2013 contracts. We take issue with statement about the impact of removing the 35% fee uplift:

> *The most recent LAA tender [for the 2013 contracts] suggests there is still currently some appetite to undertake publicly funded work despite previous fee reductions.*[113]

Only days after the 2013 contracts have started, it is proposed to move the goal posts by introducing a further fee reduction to which providers did not sign up. The effect of cuts is cumulative. The risk of providers withdrawing from legal aid work carries a concomitant risk of an increase in appellants seeking to represent themselves in Upper Tribunal, which in turn carries a risk of transferring and augmenting costs to the Tribunal. This risk is acknowledged in the civil fees impact assessment. No attempt is made to quantify it, which means that there is no account of how much of the uncertain one million projected costs savings from the implementation of this proposal would be offset by increased costs to the Ministry of Justice's budget as a whole.

Q33. Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons.

Rates paid to expert witnesses in immigration and asylum cases vary from expert to expert. There also appear to be differences between what is paid to experts working in immigration and asylum cases and what is paid to the same experts in other areas of law. We are un-persuaded that in general the baseline rates on which a 20% cut could be imposed exist in this area of law.

The proposed fee for an interpreter as listed in Annexe J would be £20 per hour. This rate will make it difficult to find interpreters, in most cases but particularly where the language is an unusual one. The Ministry of Justice is well aware of the difficulties because of the problems with court interpreting, where, we suggest, the cuts in fees have proven a false economy. The Asylum Support Tribunal was, as far as we know, the first tribunal to be allowed to identify its own interpreters because the delays and adjournments resulting from there being no, or no adequate, interpreter particularly grave where appellants were destitute and street homeless.

Heavy reliance is placed on expert evidence, especially in asylum cases. In so called "country guidance" cases before the Upper Tribunal it is the Tribunal that wishes to make statements about the situation in a particular country to facilitate its own and the First-tier Tribunal's handling of other cases from that country. In these circumstances it is necessary to be able to instruct an expert with the skills and knowledge to assist the court. If fee levels interfere with this then they will interfere with these cases.

Q34. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

and

Q35. Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

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[113] Civil fees impact assessment – paragraph 38(a).

No to both questions.

The quality and reasoning of the Impact Assessments is poor. Perhaps the most striking example is the assumption in the Civil Credibility Impact Assessment (in connection with the removal of funding for borderline cases) that

> *Civil legal aid claimants are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution (e.g. resolve the issue themselves or pay privately to resolve the issue).*

No reasons are offered for this assumption, which is question-begging to say the least, and indeed the rest of the Equality Impact Assessment serves to illustrate that it cannot properly be made. Moreover, borderline cases are often complex, difficult and ground-breaking. That, in many cases, is what leads to their being assessed as borderline.

More generally, the line taken in the Equality Impact Assessment is that any 'disproportionate effect' is justified and it is unclear whether this would be revisited if/when calculations and reasoning are shown to be wrong.

It is stated in Annexe K, the Equality Impact Assessment, that

> LAA client data is recorded by providers, not legal aid clients themselves, and is therefore unlikely to be as accurate as self defined data, particularly in respect of disability / illness and race.[114]

No reason is given for considering that a qualified lawyer familiar with equalities legislation is more likely to make an accurate categorisation than an unrepresented client.

The statements in Annexe K that

> We are currently unable to assess the extent of impact of the proposals on providers' legal aid income by protected characteristic, as the implementation of scope and fee changes under Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 will alter the 2011/12 baseline that income reduction can be assessed against, and therefore any assessment could potentially be misleading [115]

suggest that no attempt has been made to look at the equalities impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 or of the tenders. In any event, not to attempt a projection, however hedged around with caveats it might be, does not evidence a concern for the equalities impact of the proposals.

In Annexe K it is stated

> Where we have identified a risk of disproportionate impact, we consider that such treatment constitutes a proportionate means of achieving a legitimate aim for the reasons set out above and in the paragraphs below.[116]

The statement loses what little force it might have had because it is presented as a catch-all, regardless of the particular impact in question. It is difficult to identify an equalities impact that could not be brushed aside by such a statement. The comment "(assuming for this purpose that the proposals amount to provisions, criteria or practices)" in paragraph 4.4 might be read as suggesting that the Ministry has not taken the trouble to form a view on whether or not this is the case. The overall impression is that equalities legislation is viewed as an irritant and an obstacle.

[114] Annexe K, paragraph 3.2.
[115] Annexe K, paragraph 3.3.
[116] Annexe K, paragraph 4.1.

Nowhere in the impact assessment do we find attempts to cost alternatives to the legal assistance and any case. The effects upon social workers of a person being unable to take steps to obtain or retain housing or to enforce a contact order, the effect on the police of a survivor of domestic violence being unable to obtain a non-molestation order, these are not considered. The costs to local authorities of paying for legal aid for children in their care is not counted.

Prison law

Ministry of Justice research indicates that persons with disabilities are over-represented in the prison population[117], concluding

> The large minority of the prison population likely to be disabled has implications for prison(er) policies, including prisoner and ex-prisoner employment and other programmes. It is important to examine how disability is classified and identified in prisons, to ensure that programmes are being effectively targeted and delivered.

Persons with learning disabilities[118] and, again as indicated by Ministry of Justice research[119], members of ethnic minorities are also overrepresented in prison populations. Not only do they stand to lose access to legal aid under the proposals, they stand in particular need of it as the matters going out of scope concern them particularly. The statement at paragraph 5.1.1

> The LAA has indicated that of the 11 treatment cases to receive prior approval since July 2010 a significant proportion have involved prisoners with learning difficulties and/or mental health issues. The proposal could therefore potentially have an impact on this group of prisoners.

Is unnecessarily vague. It should be possible among a mere 11 cases to quantify the "significant proportion." It is unclear why it is felt that the impact is potential only.

The proposals are likely to breach the Equality Act 2010.

Residence test

It is stated in the consultation paper that making legal aid available to people without a strong connection to the United Kingdom "undermines public confidence in the scheme".[120] There is no evidence for this assertion. Meanwhile, research recently commissioned by Legal Action Group showed widespread public support for legal aid.[121]

At 2.5 of the consultation it is said that:

> …we do not believe it is right for the taxpayer to pick up the bill for those who can afford it, for civil cases that lack merit, or for matters which are not of sufficient priority to justify public money and which are often

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[117] *Estimating the prevalence of disability amongst prisoners: results from the Surveying Prisoner Crime Reduction (SPCR) survey, Research Summary 4/12*, March 2012.
[118] Loucks, N. (2007) *No One Knows: Offenders with Learning Difficulties and Learning Disabilities. Review of prevalence and associated needs*, London: Prison Reform Trust.
[119] *Statistics on Race and the Criminal Justice System 2010 report*, Ministry of Justice, 26 March 2012.
[120] Consultation, paragraph 2.1. See '*Right Way*', an interview with the Lord Chancellor, published in the Law Society Gazette on 20 May 2013: '…justice secretary Chris Grayling explains that change [*to the Legal Aid system*] is needed to 'boost public confidence' and cut costs…Speaking to the Gazette he offers no empirical evidence that the public has lost confidence in the system. But he claims to have received 'lots of letters and emails' from people concerned about legal aid entitlement'. The Lord Chancellor appeared to indicate that the correspondence he received raised concerns about the entitlement of 'migrants' to legal aid, but following the scope cuts implemented by the Legal Aid Sentencing and Punishment of Offenders Act 2012, almost all initial application and appeal work in non-asylum immigration cases has been removed from the scope of legal aid.
[121]See *Social Welfare Law: what the public wants from civil legal aid: findings from a nationwide opinion poll* http://www.baringfoundation.org.uk/CivilLegalAid.pdf (accessed 28 May 2013).

better resolved through other non-legal channels. We are also clear that someone should have a strong connection with the UK in order to benefit from legal aid.

It is not therefore the Government's stated position that the proposal to remove from scope legal aid for people without a strong connection to the UK is justified because:

1. They can afford to pay their own legal fees;
2. Their cases lack merit; or
3. Their cases are not of sufficient priority to justify public funding and are better resolved through non-legal channels.

However, the Civil Credibility Impact Assessment states:

> (i) We assume individuals who no longer receive legal aid will now adopt a range of approaches to resolve issues. They may choose to represent themselves in court, seek to resolve issues by themselves, pay for services which support self resolution, pay for private representation or decide not to tackle the issue at all.
>
> […]
>
> (iv) Civil legal aid claimants are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution.

If those assumptions were wholly or partly accurate, the Government purports to justify this aspect of the proposed changes by reference to (1)-(3) above. The Government is at best in a muddle, at worst, is not being explicit, about the reasons for and impact of this aspect its proposals.

It is also said, at paragraph 3.42 of the consultation paper that the Government is "concerned that individuals with little or no connection to this country are currently able to claim legal aid to bring civil actions at UK taxpayers' expense" and therefore are "able to benefit financially from the civil legal aid scheme". Another stated concern is that the availability of legal aid for cases brought in the UK, irrespective of a person's connection, "may encourage people to bring disputes here".[122]

The posited dichotomy between taxpayer and legal aid applicant, upon which these proposals are in part premised, is a false one. Many current, past and future taxpayers are also applicants for legal aid whether because they are taxed on their income or because they pay indirect taxes such as Value-Added Tax.

The concerns are misconceived. Legal aid is not a financial benefit. It is there to ensure that those who cannot afford to pay for their own legal representation are not denied access to justice. The stated concerns are inconsistent with the Government's stated approach to the reforms to civil legal aid that led to Parliament passing into law the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The rationale for the changes in scope brought about by Legal Aid, Sentencing and Punishment of Offenders Act 2012, and for the areas of work left in scope, was that only the most serious cases, for example involving life, liberty, homelessness and abuse of power by the state, would be eligible for legal aid.[123] It was stated, for example, that cases in which an individual was primarily seeking monetary compensation would not generally be of sufficient importance to justify public funding.[124] It was also stated that cases resulting from an individual's "own choices in their personal life" would not receive public funding.[125] The Government sought, and Parliament ultimately agreed, that matters should be removed from scope if a financial benefit was the main objective of the case or that the case was only being brought due an individual's personal choices.

[122] Consultation, at paragraph 3.44.
[123] Ministry of Justice Consultation, "Proposals for the Reform of Legal Aid in England and Wales", November 2010 ("the 2010 consultation"), at paragraphs 4.7-4.29.
[124] Paragraph 4.17.
[125] Paragraph 4.18.

Much of what was left in scope post- the Legal Aid, Sentencing and Punishment of Offenders Act 2012 was litigation where there will be good prospects of recovery of *inter partes* costs from an opponent. If the merits criteria are properly applied, in many cases *inter partes* costs will be recovered and legal aid repaid in full. One of the fundamental flaws with the proposals is that the Government has not set out what it expects to save by making this change[126]. It has therefore not factored in what proportion of cases funded by legal aid are likely to be successful, with significant benefit to the individual, recovery of *inter partes* costs and legal aid repaid in full.

Many litigation cases take a long time to resolve. For example, it is not uncommon for police actions to take two to three years from start to finish. It is proposed that asylum seekers should be eligible for all civil legal aid but will cease to be eligible in the event that their cases fail. In those circumstances, substantial legal aid funds may have been invested in a case and the result of legal aid being withdrawn is likely to be that a case will be discontinued with the costs met by the legal aid fund rather than the opponent. The Government has not sought to factor in the additional costs to the legal aid of cases being discontinued in this way.

It is problematic to assert that the justification for the changes, thus including the discrimination that will arise from the imposition of the residence test, is to improve the credibility of the legal aid scheme. The suggestion that the change is made to save money is isolated in paragraph 4.2 of the Civil Credibility Impact Assessment. Absent any information that would allow expenditure, displacement of expenditure to other areas and any savings to be quantified, it does not detract from the main thrust of the assessment, which is that confidence is in issue. It is the responsibility of Government to inform the public how funds are spent and why money is being used wisely. If people do not have confidence in the legal aid scheme the first question to ask is whether this is the fault of Government's lack of explanation and what could be done better to explain how money is being spent. Public confidence thus means here either:

a) confidence of the Government in its own work; or
b) that the Government does not consider it possible to cut legal aid in any area while it still remains available for foreign nationals and that their cases must be sacrificed in the cause of overall cuts.

Neither argument, we suggest, satisfies the requirements that the aim be legitimate and that the response be proportionate.

Paragraph 15 of the Civil Credibility Impact Assessment states that the Legal Aid Agency does not currently record immigration status. Not only does the Government not know how many persons will be affected by its proposals, it does not know who they are. This is one of the reasons given for the consultation failing to quantify the cost saving that would result from this proposal.

In the Impact Assessment, it is stated:

> There is likely to be a reduction in legal aid volumes and expenditure from imposing residency restrictions on civil legal aid. However, the LAA do not currently record the residency status of a client and therefore the data is not available to estimate the impact on the value or volume of cases this policy affects.[127]

It is acknowledged that the Legal Aid Agency "could face an increase in costs due to auditing providers' assessments of eligibility".[128] However there is no estimate of these costs:

> 19. The one-off costs from the proposed change have not been estimated. However we expect them to be negligible. These costs in the main will be one-off costs relating primarily to amending IT systems to take account of the new arrangements.

[126] See Impact Assessment, p2 and p8, "The LAA do not currently record the residency status of a client and therefore data is not available to estimate the impact on the volume of cases this policy affects"
[127] Transforming Legal Aid: Scope, Eligibility and Merits (Civil Legal Aid), Impact Assessment Ministry of Justice, 194, 09 April 2013, page 8.
[128] Transforming Legal Aid: Scope, Eligibility and Merits (Civil Legal Aid), Impact Assessment MoJ194, 09.04.13, p.2

> 20. There are also likely to be small ongoing costs. These costs in the main will be costs relating primarily to auditing providers' residency assessments and appeals against merits decisions.[129]

This is surprising when data should be available to enable these costs to be quantified. Figures on Value-Added Tax for legal aid services are kept. The place where someone has their usual or permanent place of residence determines whether Value-Added Tax is payable on legal services. A person is considered to only have one place of residence and their immigration status can determine whether Value-Added Tax will apply to legal services provided to them. For example, a person seeking asylum without leave to remain will not be considered to be resident in the UK for Value-Added Tax purposes, so Value-Added Tax will not apply to the legal aid claim.[130]

The assessment of whether Value-Added Tax applies to legal aid services has been identified as a priority area by the National Audit Office because of frequent errors. A letter from John Sirodcar (then Legal Services Commission Head of Contract Management) dated 28 August 2012 to all immigration contract holders highlighted the most commonly made errors in immigration claims in an attached "crib sheet", stating:

> *"The purpose of this document is to highlight the key Immigration issues that continue to be identified by the LSC and the National Audit Office (NAO) which are contributing to the qualification of the LSC accounts."*

The "crib sheet" attached states:

> *"It should also be noted that these areas will be specifically scrutinised by the LSC during any future visits or audits."*

Value-Added Tax is identified as one of the areas for scrutiny. The Legal Services Commission reminds practitioners *inter alia*:

> *"Do not confuse being granted temporary admission (TA) while an asylum claim is being considered as having residency rights."*

The Legal Aid Agency will have access to data about how often the errors have occurred, both alleged errors that required time to investigate, and actual. Providers will have been asked to verify data by the Provider Assurance team. Data on the costs associated with this could be made available to those working to improve the impact assessments.

The process of identifying actual and alleged errors must place a burden of administrative cost on the Legal Aid Agency and its Provider Assurance department. Without details of how this scheme would work in practice, it is not possible to ascertain how complex it would be. However, on the information made available in the consultation paper, the residence test will be more complicated than a decision about whether Value-Added Tax applies to services, so there is far greater potential for error.

We find it hard to conceive that it was deliberate that children under 12 months were cut out of representation in care proceedings, proceedings for which there is no means or merits test because it is recognised that the parties should be represented when a child is being removed, perhaps permanently, from their parents, even in the most grave cases of abuse. No impacts on social workers, on the child protection system, on the police, are identified, suggesting that the effects of the proposed residence test are not understood.

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[129] Transforming Legal Aid: Scope, Eligibility and Merits (Civil Legal Aid), Impact Assessment MoJ194, 09.04.13, page 8.

[130] Legal Services Commission, *Focus,* issue 49, December 2005, page 10.

Paragraph 16 of the Civil Credibility Impact Assessment, which identifies that there will be cases where residence status cannot immediately be proven, assumes that the case will be one in which it will be possible to wait for the documentation to be obtained, and in which the person has the means to pay for, for example, a copy of a birth certificate. Such assumptions cannot properly be made. In cases of removal from the UK, the lack of legal aid may simply hold proceedings up. In cases such as an asylum support case for a person whose claim for asylum has failed and who is destitute and street homeless, or an eviction case in the county court, justice delayed is likely to be justice denied.

It is unlikely to be the case that the effect of the residence test on the providers of legal aid will depend on the behaviour of their clients. As discussed above, a provider may be unable to satisfy his/herself of the immigration status of the client, or may determine that it would take him/her a very long time to do so, and may on that basis decline to take on the client.

There is no evidence in the Impact Assessment to justify an assertion that the proposal will save money, let alone an assertion as to the size of any saving. Should arguments of principle not prevail, the possibility that its implementation will increase costs, to Her Majesty's Courts and Tribunals Service, for other areas of Ministry of Justice expenditure and to other Government departments, merits detailed and careful consideration.

Judicial review

There is no credible evidence whatsoever that implementation would bring about the one million pound saving the Government anticipates[131]. See our response to question five for an analysis of the statistics in the consultation paper. Based on the figures in this section of the main body of the consultation paper, there were 515 cases in 2011–12 in which legal aid was granted, a judicial review claim was issued, permission was refused on the papers or at a hearing and there was no substantial benefit to the client. The Government expresses concern at the 'potentially substantial sums of public money expended on [these cases].'[132]

In the Civil Credibility Impact Assessment the 515 aforementioned cases, which may be seen as unmeritorious, has somehow become 800.[133] The latter figure is then multiplied by £1350 to arrive an approximate figure of one million in savings. The sum of £1350 is used because this is the initial (emergency) cost limit on a Legal Aid funding certificate for judicial. If the sum of £1350 is multiplied by 515 (the true figure, based on the Government's data, for cases without merit), the potential saving reduces to just under £700,000. ILPA does not accept the assumption that in every case the full cost limit on the certificate would be used up; no evidence is cited for this assumption and the data about the actual cost of these cases should be readily available from the Legal Aid Agency.

The Civil Credibility Impact Assessment identifies that there is a risk that providers may refuse to take on judicial review cases if the financial risk rests with them[134]. ILPA agrees, but ILPA does not agree with the statement in the Civil Credibility Impact Assessment:

> There is a risk that providers may refuse to take on judicial review cases because the financial risk of the permission application may in the future rest with them. However, these are likely to be cases that would not be considered by the Court to be arguable in any case. [135]

This assertion puts the cart before the horse and ignores the risk to clients whose cases are at present rightly funded on the basis that the prospects of the case succeeding are 50 – 60%. The Legal Aid Agency (and the Legal Services Commission before it) operates a banding system in terms of prospects of success. Cases where the prospects of success are between 50 – 60% are in Band C. Band B cases have between 60

[131] Civil credibility impact assessment: paragraph 31 at page 9.
[132] Consultation paper: paragraph 3.68 at page 31.
[133] Civil credibility impact assessment: paragraph 31 at page 9.
[134] Civil credibility impact assessment: page 4 'Key assumptions/risks/sensitivities'.
[135] *Ibid*.

– 80% prospects of success and Band A cases have 80 – 100% prospects of success. There is a huge risk that if this proposal were implemented, providers would turn away cases with Band C prospects of success, possibly inviting the client to return to them if permission is granted. Legal aid providers operate in an environment utterly lacking in business certainty. The emergence of this consultation only days after the implementation of the scope cuts contained within the Legal Aid Sentencing and Punishment of Offenders Act 2012 and the start of the April 2013 civil legal aid contracts incorporating those scope cuts is an example of such uncertainty. The recent scope cuts, which will have a dramatic impact on the incomes of civil legal aid providers, came on top of the introduction of fixed fees for controlled work (initial applications and Tribunal appeals) and very shortly after an across the board 10% cut to fees. In this climate providers will become increasingly risk adverse. Any business must balance the risks it takes against its assured income. Assured incomes have declined and will continue to decline as a result of fixed fees, the 10% fee cut and the scope cuts; risk adversity will undoubtedly increase in proportion.

It is stated in Annexe K[136]:

> Where a provider refuses to take a case on a legally aided basis, clients may choose to proceed privately and bear the financial risk of the application themselves.

We do not accept this analysis given that eligibility for civil legal aid involves a means test. Individuals may have no funds and may struggle to pay even the court fee if representing themselves. We consider that an impact assessment should look at the risk that persons find funds by engaging in dangerous and exploitative work.

Risks of transferring / augmenting costs to other parts of the justice system, in particular Her Majesty's Courts and Tribunals Service.

As set out in our response to question five, the proposed changes are likely to give rise to unintended consequences including:

- more work being done at the pre-action stage, before the at risk work starts;
- the application for permission having to be determined rather than the parties sorting matters out between themselves;
- fewer "rolled up" hearings where the permission application and the main application are dealt with at the same hearing;
- applications for the judge to exercise discretion to award costs at the permission stage.

Implementation of this proposal would carry a real risk of shifting and augmenting costs to other parts of the justice system. This proposal is not apt to save costs to the Ministry of Justice budget overall. The true costs to the Ministry of Justice and beyond have not been properly quantified.

As set out in our response to question five, we anticipate an increase in litigants in person. We emphasise that these cannot be assumed to be cases that are 'unarguable in any event'. Our concern is for the Band C cases and in an increasingly risk adverse climate there is also a real risk that providers may also avoid cases which have more than 60% chances of success. Reputable legal aid providers have saved the justice system untold sums of money over the years by giving accurate, robust advice to would-be claimants who do not have a case. No attempt is made to estimate these savings in the impact assessment.

Alternatives are suggested that are not in practice available. These include alternative dispute resolution[137] when few if any Government departments use this to resolve disputes with persons in the relationship to them that is that of an immigrant to the Home Office. Funding a judicial review oneself is suggested, but

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[136] At paragraph 5.4.1.

[137] Civil Credibility Impact Assessment paragraph 26.

judicial review is beyond the means of very many persons who are not eligible for legal aid and it is unclear why it is though that a person eligible for legal aid would have these funds.

Persons under immigration control who are not allowed to work and have no entitlements may have no funds, however small, out of which to start to save to pay legal fees. Considerable numbers of persons get in touch with ILPA looking for help to pay Home Office application fees because they have no way of obtaining the funds for this. Insofar as people try to raise the fees by undertaking dangerous work, exploited by employers or those using their services, who take advantage of their precarious situation, these impacts should be factored in. Desperate people sell what they have.

It is no answer to say that cases with 60% or more chances of success could be done on the basis of a Conditional Fee Arrangement. Providers' costs remain at risk with such an agreement, and the claimant is exposed to the risk of having to pay the defendant's costs if the claimant loses the case. The experience of members to date is that there is no market for 'After the Event' insurance to protect claimants in immigration judicial review cases, or if offers are made, the premiums (which cannot be recovered from the defendant if the claim succeeds) are prohibitive, running to five figures.

If judicial review claims are brought by litigants in person, costs to the Her Majesty's Courts and Tribunals Service will rise. In terms of the filing and service of documents, litigants in person will need far greater assistance and guidance from Court and tribunal staff than would an experienced legal aid provider, particularly if the litigant in person decides to apply for leave to appeal to the Court of Appeal against the refusal of permission at a hearing.

We recall the comments of Sir Alan Ward in the case of *Wright v Michael Wright Supplies Ltd & Anor [*2013] EWCA Civ 234:

> *2. What I find so depressing is that the case highlights the difficulties increasingly encountered by the judiciary at all levels when dealing with litigants in person. Two problems in particular are revealed. The first is how to bring order to the chaos which litigants in person invariably – and wholly understandably – manage to create in putting forward their claims and defences. Judges should not have to micro-manage cases, coaxing and cajoling the parties to focus on the issues that need to be resolved. Judge Thornton did a brilliant job in that regard yet, as this case shows, that can be disproportionately time-consuming. It may be saving the Legal Services Commission which no longer offers legal aid for this kind of litigation but saving expenditure in one public department in this instance simply increases it in the courts. The expense of three judges of the Court of Appeal dealing with this kind of appeal is enormous. The consequences by way of delay of other appeals which need to be heard are unquantifiable. The appeal would certainly never have occurred if the litigants had been represented. With more and more self-represented litigants, this problem is not going to go away. We may have to accept that we live in austere times, but as I come to the end of eighteen years' service in this court, I shall not refrain from expressing my conviction that justice will be ill served indeed by this emasculation of legal aid.*

And of the President of the Immigration and Asylum Chamber of the Upper Tribunal in *Farquharson (removal – proof of conduct) Jamaica* [2013] UKUT 146 (IAC) (08 April 2013):

> *…it is important that legal representation should be available in such cases. The appellant told us that his reading ability is not great. He was able to read back parts of his statement to us to our satisfaction, but absorbing the detail in the CRIS reports would undoubtedly have been a challenge without professional assistance. The appellant will also have been disadvantaged by a long period of pre-appeal detention. We hope that legal aid is granted readily in such cases whatever the apparent weight of the case against him. Without it there is a very real risk that his common law right to a fair hearing will be undermined.*[138]

[138] *Farquharson (removal – proof of conduct) Jamaica* [2013] UKUT 146 (IAC) (08 April 2013).

If the application is refused on the papers, litigants in person are more likely to renew the application to a hearing whether or not there is merit in so doing because a litigant in person is not so well placed as an experienced legal aid provider to analyse the Judge's reasons.

At present permission hearings are listed for 30 minutes and there needs to be good reason for requesting a longer time slot. Faced with a litigant in person and poorly drafted (if any) grounds for renewal it may be very difficult for a conscientious Judge to conclude a permission hearing within 30 minutes. Judicial reviews often do involve claimants with a mental illness, problems of homelessness or who are simply not able to read or write English. The Judge may have to rely on counsel for the defendant to provide information about the case, in particular if the paper application is also poorly prepared, which is very likely to be the case if the claimant is unrepresented. Speaking at a recent public meeting[139] at the London School of Economics, Natalie Lieven QC, whose public law practice is mainly in representing defendant government departments / local authorities, anticipated that the burden will fall heavily on defendants to do, in a sense, the work of both the claimant and the defendant. She envisaged the need arising far more frequently for permission hearings to be adjourned for further investigation of the case, and explained that her view was based in part on experience of judicial review work in social security cases, where it is already difficult to get legal aid[140]. There may be costs for Government associated with the increased workload for counsel for the Crown.

Implementation of this proposal also risks an increase in litigants in person by risking a reduction in the supplier base. In the immigration (asylum) category a far greater number of contracts were awarded following the 2013 tender than was the case following the 2010 tender. This was because of the system introduced in the 2013 tender of bidding in lots for the number of controlled work case starts each provider would be awarded[141]. As was anticipated, by representative bodies such as ILPA if not by the erstwhile Legal Services Commission, a large number of providers ended up each with relatively small contracts, a small allocation of controlled work case starts. In London and Manchester for example all providers were limited to 100 matter starts for non-detained cases, regardless of their capacity. Many providers would have factored judicial review work, which generally does not use up a case start, into their survival strategies. Only on the basis of such work could providers see a viable, even if only just viable, financial future. Any business must balance the risks it takes against its assured income, and with such diminished assured income the proposal to put costs at risk until permission is granted in judicial review may prove to be the last straw for some. Even where a lawyer is willing to bring an application on this basis, this approach will affect the amount of judicial review a solicitor or a barrister can do at any one time as it is prudent to maintain a relationship between the volume of guaranteed work and work done at risk on the books of a firm at any one time. There is a risk of a large-scale exodus of providers of quality from legal aid work. The courts will be left to deal with the consequences, at potentially very significant cost.

Q36. Are there forms of mitigation in relation to impacts that we have not considered?

This supposes that the effects of the cuts are acceptable and that the issue is solely one of mitigation. Instead we suggest that the impacts of the proposals are such that it is necessary to withdraw the proposals.

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[139] 20 May 2013.

[140] Natalie Lieven QC addressing a meeting hosted by Professor Conor Gearty at the London School of Economics, on 20 May 2013.

[141] Case starts, or 'matter starts' in the Legal Aid Agency terminology, are the fixed number of initial application and Tribunal appeal cases a legal aid provider is entitled to start in each contract year. These cases represent a minimum guaranteed income, though providers are not always paid for all the work they so on these cases. Since the introduction of fixed fees, providers are not paid for all the time they spend working on these cases unless their 'profit costs' amount to more than three times the fixed fee and the Legal Aid Agency assesses that all time working on the case was in its view justified. On appeals to the Upper Tribunal, as explained in the consultation paper, the providers' costs are at risk until permission is granted.

An alternative, in our view, is not to make the cuts but to opt for a "polluter pays" approach[142]. The frequency with which the Home Office changes the law and the number of changes where it anticipates challenges before the courts are notorious and costly, to the legal aid budget and to the courts and Tribunals. Were the Home Office made to pay this is likely to force it to improve its work. We set out these arguments in great detail in February 2011 in our response to the *Proposals for the Reform of Legal Aid in England and Wales* consultation and in briefings on the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Adrian Berry
Chair,
ILPA
3 June 2013

[142] For more detailed consideration of this please see ILPA's response to the Ministry of Justice consultation *Proposals for the Reform of Legal Aid in England and Wales,* February 2011.