

# Consultation response

## Ministry of Justice: Transforming legal aid

### Refugee Action consultation response

June 2013

#### Introduction to Refugee Action

1. Refugee Action is an independent, national charity working to enable refugees to build new lives in the UK. We provide practical support for newly arrived asylum seekers as well as a long-term commitment to their settlement. Through our 'One Stop Service', Choices Assisted Voluntary Return (AVR) Service and Gateway Protection Programme, the Home Office funds us to give confidential, independent and non-directive advice and information to asylum seekers, refugees and irregular migrants on a breadth of topics. We also offer support through a range of independently funded projects.<sup>1</sup>
2. Refugee Action is grateful for the opportunity to contribute to the Ministry of Justice consultation on transforming legal aid. If we can provide further information to assist please contact Sile Reynolds, Policy and Information Manager, [siler@refugee-action.org.uk](mailto:siler@refugee-action.org.uk)

#### The scope of our response

3. Refugee Action is alarmed that we find ourselves again in the position of defending access to civil legal aid so soon after the severe cuts brought in by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. It is hard not to interpret the repeated reforms of civil legal aid as a form of salami-slicing, and an approach that fundamentally undermines the integrity of the UK justice system.
4. We would also like to highlight our concerns about the Ministry of Justice's plans to bring in proposals following this consultation through secondary legislation in the autumn of 2013. This means there will be no real parliamentary scrutiny of the proposals despite their far reaching, complex and serious nature. In our view this is inappropriate.
5. Refugee Action is not a legal advice provider. For this reason our response focuses on our objections to the basic premise of the consultation document and then provides specific case studies in answer to questions four and five about how the proposals would impact on our client group of refugees, asylum seekers and migrants. Our case studies highlight how the Ministry of Justice's proposals risk several (we assume) unintended consequences that could jeopardise the UK's obligations concerning access to protection and the prevention of destitution, as well as the delivery of objectives related to refugee resettlement and assisted voluntary return.

<sup>1</sup> Alongside our Home Office-funded reactive advice services, we have substantial experience delivering innovative, proactive advice services, including the key worker pilots in Liverpool and Manchester, Fresh Start project in Leicester and Bristol women's project. For more information please visit our website at [www.refugee-action.org.uk](http://www.refugee-action.org.uk)



## Proposals to restrict access to legal aid - key messages

6. Refugee Action objects to the erosion of the rule of law that we believe would be brought about by the proposals in this consultation. We strongly believe that in our adversarial legal system there must be equality of arms in order to ensure justice. In our view, access to justice is a universal right with no qualification based on nationality or immigration status.
7. The proposals in this consultation threaten these fundamental principles by cherry-picking groups of people who will be excluded from access to legal aid to protect them against injustice or to challenge unfair decision-making. The impact of these measures, we believe, is to create an underclass of people who have the potential to be abused at will with no meaningful recourse to the courts.
8. It is hard to read the groups this consultation proposes to exclude from legal aid, without inferring a political undertone to the proposals. In privileging the British taxpayer the consultation demonises vulnerable groups already on the margins of society - the poor, prisoners, foreign nationals - many of whom pay tax themselves but are political easy pickings. The consultation document sets up a 'them and us' mentality in which people are being asked to agree to the diminishing of rights for some in order to (financially) protect the rights of the majority. Not only does this have serious implications for the individuals involved, it has the pernicious impact of undermining the concept of the rule of law for all (including British taxpayers).
9. We believe the proposed restrictions to legal aid threaten to create a society where unaccountable and arbitrary decision-making flourishes; where people who have a strong case against a public authority acting unlawfully will be unable to pursue it - not because their case lacks merit but because they are unable to afford legal representation to make a challenge. Again, this will impact not only on those denied access to legal aid but, as it creates a culture where the decision-making of government bodies is beyond the scrutiny of the law, the repercussions of these proposals are likely to reverberate throughout UK society.
10. Our reading of the consultation is that the proposals are unlawful (as they work against the UK's international human rights obligations), unworkable (as they are administratively cumbersome) and unjust (as they are discriminatory). While the specific examples we recount below relate to our experience working with asylum seekers, refugees and irregular migrants, our key objection to the consultation centres on its potential to compromise access to justice, accountability and the rule of law for all those in the UK.
11. In addition, these proposals will not save the government money as they will likely result in an increase in litigants in person, as well as satellite litigation and challenges in the European Court of Human Rights, not to mention costs that are displaced from the Ministry of Justice to other government departments forced to pick up the pieces of lives ruined by the arbitrary exercise of State power.
12. Finally, these proposals come in the wake of very serious cuts to legal aid provision. Over the past eight years Refugee Action has noticed a significant reduction in the availability of publicly funded legal representation for asylum seekers, particularly at the end of the asylum process. Our clients struggle to find solicitors to take cases involving a challenge to the refusal of support or the presentation of a fresh claim for asylum. We believe that these proposals will impact on the availability of legal representation more generally as law firms opt not to bid for legal aid contracts.



## Question 4: Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK?

13. Refugee Action objects to the residence test proposed in question four of the consultation. While we welcome the exception to allow asylum seekers to be exempt from the residence test, we are alarmed that refused asylum seekers and any foreign national who cannot meet the residence test, including visa overstayers, and resettled or newly granted refugees, will be unable to challenge any serious infringements of their basic civil rights.
14. Legal aid is an essential safeguard to ensure that those who cannot afford to pay for legal advice can still access justice. In our experience civil proceedings often relate to unlawful refusal of healthcare, provision of inappropriate accommodation by the Home Office (for example which does not take into account any disability/mobility need), breach of the European Convention on Human Rights for example Article 8 (specifically refusal to house families together) or even issues relating to liberty from inappropriate immigration detention. These issues are not 'frivolous' in the words of the Secretary of State for Justice, but in fact relate to the life and liberty of the individual and the abuse of power by the State. If they do not have access to legal aid, destitute people who fail the residence test will not be able to afford to pay for their legal representation and so the challenge will not be taken, regardless of the prospect of success or the lack of other avenues for redress. That is not equality before the law.
15. Establishing 'lawful residence' can be a complex matter and is often the subject of the litigation itself, for example in relation to eligibility for housing and homelessness assistance. This could create the absurd situation of the applicant being obliged to resolve the issue for which s/he is seeking legal aid, in order to establish entitlement to that legal aid. Furthermore, non-immigration specialists will be expected to make an assessment of whether the applicant meets the residency test or not and we can be confident that errors will be made. It is quite likely that legal representatives who are unfamiliar with immigration legislation will wrongly assess lawful residency and refuse to apply for legal aid and there will be no way to challenge that decision.
16. The residence test is entirely at odds with the pursuit of an immigration and asylum system that seeks to deliver sustainable and fair outcomes for applicants. Those who fail the residence test, including irregular migrants and refused asylum seekers, will be unable to access legal aid and will be unable to afford to pay for quality legal advice for the purpose of regularising their status or to make an informed decision about their options, including voluntary return.
17. Never before has the government attempted to exclude a whole class of persons without reference to the particulars of the case or the merits of the issue. Such a proposal constitutes the creation of a State sponsored underclass. It is hard to see how such a proposal ingenerates any credibility in the justice system.
18. To demonstrate how the proposals would impact on a significant proportion of our client base we have drawn case studies from three of our advice services: the One Stop Service, the Choices Assisted Voluntary Return Service, and the Gateway Protection Programme.



## Impact of the residence test on access to support for refused asylum seekers

### What is One Stop asylum advice?

19. For over ten years, Refugee Action has been delivering the One Stop advice service (OSS) to asylum seekers, refused asylum seekers and recently granted refugees. We provide high quality and non-directive advice on matters including asylum support, health services, community care support, access to legal representation, transition to mainstream benefits, access to education and employment, destitution, domestic violence, and racial harassment. We do not provide legal advice related to the asylum claim but we do provide holistic briefings that help to inform asylum applicants about the process, what to expect and what is expected of them.
20. Last year refugees and asylum seekers contacted our One Stop Service approximately 21,000 times across four offices in the South West, North West and East Midlands. The vast majority of our casework is delivered to destitute refused asylum seekers and concerns access to financial support and accommodation: in 2012, 30% of our casework sessions related to an application for section 4 support, while 23% of our casework dealt with issues connected to destitution. Very often these issues will only be resolved through referral to a legal representative: during 2012, approximately 800 (9%) of our 9,000 in-depth casework sessions related to access to legal representation.
21. As the Home Office prevents asylum seekers from working<sup>2</sup>, asylum support is a necessary and important branch of the asylum system. The purpose of asylum support is to ensure that no one is left destitute<sup>3</sup> while waiting for an asylum application to be decided. This is based on the principle that no asylum applicant should find herself on the horns of a dilemma, forced to choose between abandoning her claim for asylum or pursuing it in a state of poverty or destitution. 'Section 4' is the name given to the very limited package of support and accommodation offered to refused asylum seekers who are cooperating with efforts to return to their country of origin and can demonstrate a temporary obstacle to return that it outside their control. It is also the principle form of support available to refused asylum seekers who believe they have a fresh claim for asylum, and are waiting for the Home Office to determine it as such.

### How do people using the One Stop Service currently use legal aid?

#### To challenge a refusal of asylum support

22. Unfortunately, the asylum support system is deeply flawed and legal intervention is often the only way to ensure a just outcome. Support decision making is often of a poor quality and refused asylum seekers are wrongly denied support<sup>4</sup> and are left in a state of destitution and street homelessness. While the Asylum Support Tribunal (AST) offers an opportunity to appeal against a wrongful refusal of support, if the AST also refuses support then the only avenue left to challenge the decision is judicial review as there is no appeal to the Upper Tribunal.

<sup>2</sup> An asylum seeker may only apply for permission to work if she is yet to receive an initial decision after one year. Even if permission to work is granted, she may only apply to work in a profession prescribed within the Shortage Occupation List.

<sup>3</sup> An asylum seeker is defined as destitute if they do not have adequate accommodation, or any means of obtaining it, or if they cannot meet their "other essential living needs".

<sup>4</sup> Asylum Support Appeals Project (ASAP), 'No Credibility: UKBA decision-making and section 4 support'. 2011



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Fidelis (not his real name) first visited Refugee Action in mid-April 2013 to complete a section 4 application. Fidelis had presented further submissions in person to the Home Office and had received an acknowledgement from the Reporting Centre. Fidelis had been provided with three nights emergency accommodation by the British Red Cross but was facing imminent street homelessness, so his support application was flagged as a priority case. Refugee Action contacted the Older Live Cases Unit at the Home Office as they were responsible for considering Fidelis' section 4 application, and requested that his application be given urgent consideration. In response, the Home Office refused his section 4 application on the grounds that they did not accept that he was destitute. The Home Office also argued that Fidelis did not meet the eligibility criteria under Regulation 3(2) (e) on the grounds that he had not presented further submissions. As explained above, his further submissions had been presented to his local Reporting Centre. However, the Reporting Centre had subsequently returned the submissions to Fidelis' legal representative explaining that further submissions for legacy cases should be made in person to the Liverpool Further Submissions Unit (a policy introduced in October 2009). Refugee Action completed an appeal application to the Asylum Support Tribunal and contacted a local solicitor with a view to judicially review the refusal using legal aid. The next day, the solicitor confirmed that a Letter Before Action was being sent to the Home Office that afternoon.

The following day, there had been no response from the Home Office and so the solicitor began the application for a JR. Fidelis spent another night on the streets and returned to the solicitor the next day to find out about the court's decision. The court ordered that Fidelis be granted access to IA while the appeal at the AST was pending. Fidelis was street homeless throughout this process and would have remained so, as well as unable to challenge the behaviour of the Home Office, if he had not benefited from a legal aid-funded intervention.

Kidane (not his real name) is from Eritrea and left his country to avoid compulsory conscription to the army. Kidane's asylum claim was refused and he became appeal rights exhausted. Kidane then applied for voluntary return and has been taking all reasonable steps to return to Eritrea. However, when he applied for section 4 support on these grounds, the Home Office denied him support.

Kidane's repeated efforts to obtain a valid travel document through the Eritrean Embassy had proven unsuccessful as he did not have any ID or witnesses to vouch for his identity. He appealed to the Asylum Support Tribunal and, while the Judge accepted that "*there is no way of obtaining a travel document*" and described Kidane as being "*stuck in a loop*", he concluded that Kidane did not demonstrate that he is taking steps which might progress his application for voluntary return.

Relying on legal aid, Kidane's solicitors decided to JR the decision of the AST on the basis that Kidane has consistently and credibly maintained his desire to voluntarily return, has approached every material conceivable organisation that could possibly assist him in doing so and none have been able to assist or to make any meaningful suggestion as to what additional steps he could take that he has not already taken.

The judicial review is on-going on this case.



23. Refused asylum seekers who cannot leave the UK will not be eligible for legal aid to fund a challenge against unlawful action by the Home Office in relation to the decision or delivery of asylum support. Those who have had their support appeals dismissed will not be able to challenge through judicial review if decisions are made unlawfully, and so there will be no effective oversight of the AST.

## To challenge delay in support decision making

24. In 2012, Refugee Action was involved as an independent intervener in a piece of strategic litigation that fundamentally changed asylum support policy and created case law that will help protect the right of refused asylum seekers not to be subject to inhuman and degrading treatment in the UK. Under the new proposals, this judicial review would not have been possible.
25. The MK & AH judicial review<sup>5</sup> sought to challenge the delay between a person submitting an application for section 4 support on the basis of further submissions and receiving a decision from the Home Office on whether they are entitled to support. There is no interim support during this period and, until a decision is made on the application, no right of appeal to the First-Tier Tribunal (Asylum Support).
26. The claimants were two destitute, refused asylum seekers who presented further submissions and applied for section 4 support. One, a Zimbabwean national with “painful” medical problems, had to wait 27 days for a decision on his section 4 application, during which time he was left destitute with limited food. He was eventually granted refugee status. The other, an Eritrean national, waited 36 days for a decision, during which time he spent two nights sleeping rough. At the time of the judgment he was still waiting for a decision on his fresh claim.
27. Refugee Action intervened in this JR in order to demonstrate to the court that the problem reached beyond the experience of the two claimants and to highlight the policy behind the delay. In October 2009, the UKBA (as it then was) had introduced a new policy instructing case owners to make a substantive decision on the further submissions before making a decision on support, unless there was a “justifiable delay” of 15 working days. In practice this meant that case owners were instructed to “shelve” the support application for 15 working days or 3 weeks. In many cases decisions would take much longer, leaving asylum seekers destitute for weeks or even months, without knowing when support might be granted.
28. Evidence submitted by Refugee Action and other advice agencies such as the Refugee Council, the Red Cross and the Northern Refugee Centre, showed that extensive delays were leading to widespread destitution and homelessness. Applicants, including some with mental and physical health problems, were forced to sleep rough in bus shelters, parks and on night buses while they waited for a decision on whether they were eligible for section 4 support.
29. The Court found that the policy leads to a ‘significant risk that the Article 3 rights of a significant number of applicants for Section 4 support will be breached’. The policy was also found to be in breach of the EU Reception Directive. The Judge instructed the Secretary of State to replace the policy with one that is lawful and the Home Office subsequently withdrew and re-drafted their section 4 policy instruction. This has had a positive impact on delays experienced by destitute refused asylum seekers seeking to make a fresh claim for asylum and reduced the likelihood of a breach of Article 3.

<sup>5</sup> MK & AH v SSHD, [2012] EWHC 1896 (Admin)

30. Both claimants were refused asylum seekers and, under these proposals, would not be eligible for legal aid to pursue this legal challenge. If the claimants had not taken the challenge, Refugee Action and others would not have been able to intervene, provide witness statements and demonstrate the wide reach and damaging impact of this unlawful policy. This case demonstrates how the proposal will stifle the development of crucial asylum support case law.

## To challenge refusal of community care support under the National Assistance Act 1948

31. Local authorities can use their powers and duties under community care statutes (National Assistance Act (NAA) 1948 s21) to provide accommodation and subsistence for destitute individuals who meet the criteria of requiring ‘care and attention’.
32. Refugee Action is very familiar with the needs of clients with various levels of mental and physical health problems, including depression, anxiety, post-traumatic stress disorder, limited mobility, blindness and HIV. Many such clients rely on intervention by statutory services to enable them to function in society, pursue their asylum claim and come to terms with the outcome.

Mr & Mrs Karimi (not their real name) are Iranian and claimed asylum in the UK in 2012. By the end of April 2013, they had been refused asylum and exhausted all appeal rights. Both Mr & Mrs Karimi have mental health problems; Mrs Karimi attempted suicide following the refusal of their claim and is described in medical evidence as having *‘developed a significant and severe depression with suicidal ideation needing... mental health services, medication and constant supervision’*.

Mr and Mrs Karimi were due to be evicted from their Home Office accommodation but the advice from Mrs Karimi’s GP was that she would be likely to try to kill herself if she were made destitute. Refugee Action made a referral to the local authority’s social services department a week before the couple were due to be evicted. Two days later, a social worker rang to tell Refugee Action that they couldn’t take it. Refugee Action spent a long time calling various teams within the local authority but no-one would take responsibility for the couple.

The refusal of the local authority to accept responsibility for the couple left Mr and Mrs Karimi in a state of limbo - they had managed to hang on in their Home Office accommodation but had received another instruction to leave. Refugee Action spoke again to the local authority, who advised that Mrs Karimi had no community care needs. Refugee Action requested that the mental health team do an assessment of Mrs Karimi but they refused to do so.

Refugee Action had run out of time, strategies and resources to resolve this case and the couple were about to be made street homeless. Refugee Action referred them to a local solicitor, who saw them the same day and, with legal aid, wrote to the local authority’s legal team. In response to this pre-action letter, the local authority agreed to accommodate the couple pending an assessment.

33. Unfortunately many of these cases are refused support by social services following an unsatisfactory community care assessment or a refusal to conduct an assessment of need. Under current arrangements, an individual who is incorrectly refused community care services may seek legal aid to JR the decision. We have seen many cases where a JR was crucial due to the urgency of the case or to clarify an important point of law.



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Sami (not his real name) arrived from Afghanistan as a child, and came to Refugee Action for advice and assistance in making an asylum support application. Sami appeared to be very young, was destitute and highly distressed, and had no idea whether or not he had an outstanding asylum claim. He also said that he was considering returning to Afghanistan. Fortunately, Sami had a legal representative who explained that Sami had a credible asylum claim, and stated that he would be very concerned about Sami applying to return. Subsequent visits by Sami to Refugee Action revealed that, in fact, he did not want to return.

Refugee Action discovered that Sami had gone missing while he was in foster care and although his claim had been outstanding at the time, the Home Office had closed his file when he went missing. The Home Office agreed to re-consider his case but, as they were not able to find his file his case remained 'inconclusive'.

Sami displayed indicators of serious mental health problems and the Home Office agreed, exceptionally, to accommodate Sami in an emergency hostel in another city, but Sami abandoned this accommodation and returned to Refugee Action. It was clear that Sami needed to be in the care of social services, due to his evident mental health issues, but social services would not act until they had done a mental health assessment. Eventually, social services had agreed to provide Sami with accommodation but his community care assessment had been repeatedly delayed.

Based on his psychiatric assessment, Sami's social worker informed Refugee Action that he does have mental capacity, and should obtain support from the Home Office. By this time, Sami had begun missing appointments with his solicitor, repeatedly made contradictory statements about his desire to return, often had no memory of previous visits, failed to report to the Home Office and had stopped eating and sleeping. He also had suspected tuberculosis but had been missing appointments at the TB clinic. Refugee Action believed that the social services mental health assessment was deeply flawed as it focused on Sami's physical personal care needs, rather than addressing the assistance he required to access vital services, obtain social and emotional support, and make essential decisions about his life.

While in social services Sami was receiving no emotional, social or mental health support and was extremely isolated. He needed to be in a safe environment, with a comprehensive support plan, until his mental health improved and he could begin to rationally consider longer term plans and decisions. This was not being provided by social services so Sami's community care solicitor, funded through legal aid, prepared a case for JR. Before the case came to court, social services agreed to provide food vouchers so that Sami can buy his own food. The social services team are also now referring him back to the local authority that was originally responsible for him when he first absconded as an unaccompanied child, and, as Sami is still under 21, he will be entitled to leaving care support from that local authority.

As a young man with 'inconclusive' immigration status, Sami would not, under the new proposals, benefit from legal aid to pay for the advice and assistance that he received from his community care solicitor and that secured him appropriate social services support. There is little doubt that, without legal aid, this poor community care assessment would have gone unchallenged, and Sami would either have remained destitute and with insecure status, or have returned unsafely to a country in which he faces persecution.



34. Under the new proposal, refused asylum seekers in need of care and attention will not have access to funding to challenge a refusal of support under the National Assistance Act 1948.

## To challenge a refusal of support under the Children's Act (CA)1989

35. Child unaccompanied asylum seekers are exclusively the responsibility of local authorities under CA 1989 Part 3 and are eligible for ongoing leaving care support. In the case of families with dependent children who find themselves destitute as a result of a withdrawal of asylum support, the children may become eligible for assistance under CA 1989 Part 3 and s17, and this can and should include assistance for the whole family.

36. Unfortunately Refugee Action has dealt with a number of cases where the local authority has conducted a poor age assessment and therefore denied support for the child, or has failed to deliver leaving care support as the child transitioned into adulthood. Such situations present significant safeguarding concerns and risk subjecting a child to exploitation and abuse.

Fazil (not his real name) is from Afghanistan and arrived in the UK as an unaccompanied child at the age of 13. Fazil's age was not believed by social services who assessed him as 16 based on his physical demeanour and very little else. Fazil explained to Refugee Action that when he turned '18' (according to social services' assessment) he was instructed to leave his accommodation, which he did. He remained in the area for a couple of years with no official source of support, and not able to attend school or access further education. Eventually he went to an immigration solicitor who, accepting the original age assessment performed by social services, submitted a new claim for asylum as an adult. Fazil, unsure whether to trust the solicitor, did not dispute the solicitor's actions or his acceptance of the incorrect age assessment.

Refugee Action was immediately struck by how young Fazil appeared. Refugee Action referred him to a community care solicitor who is applying for legal aid to begin the process of requesting a new age assessment from social services, to secure accommodation and support pending the assessment and to threaten judicial review if social services do not comply. However, the first step will be to liaise with Fazil's immigration solicitor to withdraw the new asylum claim as an adult. If this happens, Fazil will no longer be an asylum seeker. Under the new proposals, Fazil will not be able to access legal aid to challenge the age assessment, secure accommodation and support and hold social services to account for the treatment they have shown him.

37. Refused asylum seeking families with children, child unaccompanied asylum seekers leaving social services care or people who have been wrongly age assessed will no longer be eligible for legal aid to pay for representation to challenge decisions by local authorities to refuse them support under CA 1989. This will leave some of the most vulnerable at risk of destitution and exploitation, and is at odds with UK's obligation under CA 1989 to safeguard and promote the welfare of children.

## To prepare further submissions for a fresh claim for asylum

38. Refused asylum seekers with new evidence demonstrating a fear of persecution can currently access legal aid in order to prepare further submissions purporting to be a fresh claim for asylum. If those further submissions are not accepted as a fresh claim, the applicant can currently access legal aid in order to challenge the refusal



through JR. In both cases, the applicant can apply for section 4 support. For a large number of our clients, this is the point at which they rise out of destitution and begin to engage with the asylum process in a positive way.

39. Since 14 October 2009 (as of 20 April 2012) a total of 64,916 further submissions had been made to UKBA. 9,981 were still to be decided at 20<sup>th</sup> April 2012. Of the 54,935 that had been decided 7,705 (14%) met the test for a fresh claim for asylum or were granted leave to remain in the UK. Many of the submissions rejected as being a fresh claim are challenged by way of judicial review. As of 16<sup>th</sup> April 2012, 808 people were in receipt of section 4 on the basis of having presented further submissions. This constitutes 45% of the total section 4 caseload at that time.<sup>6</sup>
40. Under the new proposals, refused asylum seekers will not be eligible for legal aid to cover preparation of further submission, or to challenge to their refusal. If the further submissions are accepted as a fresh claim then the applicant will become an asylum seeker again and will be eligible for legal aid but this concession is worthless if she cannot get legal advice to prepare her submission in the first place.
41. This change in eligibility will affect most of our OSS clients, and will deny them the opportunity to pursue to their claim for asylum and to escape destitution.

Adam (not his real name) is from Zimbabwe, arrived in the UK in 2004 and claimed asylum in 2010. Although he had previously been working, Adam was now destitute and had been relying on friends to support him until he accessed section 95 support. Adam is married and was living with his wife who also had a separate asylum claim. Adam's claim was refused in January 2011 and his support ended in February of that year. His wife was granted indefinite leave to remain, but Adam could not join her in her accommodation as her landlord had advised that she would be in breach of her tenancy agreement if he did so. So Adam then relied on his local church community to support him and, when that was no longer available, his wife was able to provide limited support for a short period of time, until Refugee Action submitted an application for Section 4 in February 2012. Adam was able to make this claim for support as he had just presented further submissions.

Adam swiftly received a refusal of his section 4 application on the basis that his further submissions had been rejected. Shortly after, Adam's solicitor issued a pre-action letter to the Home Office challenging their decision not to accept the submissions as a fresh claim for asylum. Within a matter of days, the Home Office had withdrawn their decision on the further submissions and agreed to reconsider them. Adam then reapplied for section 4 but, after some delay, he learned that his section 4 application had been refused as his further submissions had been accepted as a fresh claim but that the asylum claim had been rejected. Adam again contacted his solicitor who submitted an appeal and so Adam was able to apply for section 95 support which was approved in November 2012. Adam was finally granted Refugee Status in March 2013. Adam had been in and out of destitution for two years as the Home Office attempted to resolve his claim. Without the assistance of his legal aid-funded representative, Adam would not have been able to prepare his further submissions, challenge the refusal of his further submissions by the Home Office, and ultimately gain status in the UK so that he can continue his life with his wife.



<sup>6</sup> Witness statement from Simon Bentley to the Court in MK & AH v SSHD

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Mr Hanafy (not his real name) is an Iranian national who claimed asylum in 2009. His asylum claim was refused and soon he became appeal rights exhausted. Mr Hanafy has been suffering with serious mental health issues including PTSD and self-harm. He was receiving on-going counselling and was taking antidepressant and antipsychotic medication in order to control the re-experiencing and hyper-arousal symptoms. It did not help his recovery that he was destitute for an extended period.

Mr Hanafy submitted further representations on the grounds that he will be at great risk if he goes back to Iran due to his religious belief (he converted to Christianity). Mr Hanafy was represented by a legal aid solicitor who helped him to lodge his further representations and as result he was granted refugee status in 2011.

Bernadette (not her real name) claimed asylum in 2009 and she soon became appeal rights exhausted. Bernadette is from Zimbabwe and she came to UK in 2002. She has two children who grew up in the UK and they have never lived in Zimbabwe. One of her children has just finished her GCSEs and wants to apply for a part time job like every teenager in UK while she is pursuing her higher education.

Refugee Action referred her to a legal aid solicitor to help her put together her further submissions on the basis of the right to private life of her daughters as they have never lived in Zimbabwe and it is in the best interest of the children to carry on living in the UK. The Home Office accepted her further submissions as a fresh claim and granted her and her two daughters discretionary leave to remain.

Sayid (not his real name) is Eritrean and he claimed asylum in in the UK in 2008. Sayid was refused asylum and was due to be removed to Italy where he had previously claimed asylum. With the help of his legal aid lawyer, Sayid prepared further submissions on the grounds that he cannot be returned to Italy as the Italian authority's conduct towards asylum seekers had been condemned by international organisations including UNHCR, Human Rights Watch and Amnesty International.

Sayid's legal representative submitted a claim on his behalf stating that Sayid would be exposed to degrading treatment as an asylum seeker without any state support or realistic resource to charitable assistance if he was to be returned to Italy.

Sayid's further submissions were accepted as a fresh claim and he was granted refugee status in 2012. Sayid's case was urgent and complex and required the expert advice of a specialist legal representative relying on complex case law which Sayid - who understood very little English - would certainly not be able to interpret himself. Without a legal aid representative Sayid would not have been able to make further submissions on his own.

## Impact of the residence test proposal on destitute refused asylum seekers

42. Refused asylum seekers will fail the residence test and so will no longer be able to access legal aid in order to get representation for the purpose of pursuing their case to remain in the UK or to challenge an infringement of their rights by a statutory authority. As a consequence, these people will be left destitute when they should be in receipt of the support to which they would otherwise be entitled.



43. In our experience, it is extremely hard to enforce the rights of refused asylum seekers without the intervention of a legal representative. Refugee Action frequently advocates on behalf of our clients with the Home Office, Asylum Support Tribunal and local authorities, who quite often ignore our interventions and evade their responsibility. It is very often only the cases to which we are able to dedicate significant resources that achieve a positive outcome, and this may well be at the expense of other clients who require advice and support. Increasing demand from unrepresented clients will place a strain on our advice services, which are already under pressure from repeated funding cuts by the Home Office.
44. For refused asylum seekers to access Home Office asylum support they must, by definition, be destitute. Were legal aid to be withdrawn from this group, there is no possibility that they could afford to pay for legal assistance. We are very concerned that we would see an increase in infringements which although minor in terms of legal cost, may have a major impact on a family's or an individual's wellbeing.

## The impact of the residence test on families wishing to return to their country of origin

### What is Assisted Voluntary Return (AVR)?

45. Refugee Action has been advising people about assisted voluntary return for 12 years and since 2011 has been responsible for operating the UK's AVR scheme.<sup>7</sup>
46. The UK's AVR programme exists to support those with no legal basis to remain in the UK and who wish to return to their country of origin to do so in a supportive, dignified and sustainable manner. Participants in the programme can benefit from pre-return and post-return advice and counselling and in some cases financial assistance to enable them to reintegrate into their country of origin. Refugee Action's role is to provide independent, confidential and non-directive advice to enable people to make informed choices about their options. Where an individual wishes to return Refugee Action will facilitate a sustainable return through the provision of advice, counselling and planning services in the UK and in the country of return through a network of subcontracted local development organisations.
47. As a consequence of delivering the AVR service, Refugee Action has direct experience of service delivery to a diverse group of migrants who are exploring the option of leaving the UK and returning home. Through this we have identified a specific consequence of the proposals in this consultation which would introduce a further barrier for families trying to leave the UK.

### How do families considering AVR currently use legal aid?

48. Refugee Action believes that the proposal to introduce a residence test for civil legal aid will have a negative impact on a specific subsection of our AVR client group. We have supported families who have wished to leave the UK and return home but are unable to do so until they are able to resolve outstanding family issues through the UK court system. The most common examples are of cases where one parent must apply to the court in order for permission to remove the children from the UK. Without access to legal aid we believe these families would be stuck in the UK, unable to return to their country of origin despite their best attempts to

<sup>7</sup> Funded by the European Returns Fund and the Home Office. See [www.choices-avr.org.uk](http://www.choices-avr.org.uk) for details.



do so, because of the effect of the proposals in this consultation.

Grace (not her real name) is from Nigeria, and she applied to return home with her two children after becoming a visa overstayer. She had previously separated from her partner due to domestic violence and he was now living in another country. At the request of our client we contacted the father to request his consent for her to return to Nigeria with the children, however the father refused to provide this consent. In order to return home with her children our client was required to access legal aid in order to receive permission from the court to remove her children from the UK.

Surita (not her real name) is a Sri Lankan national who began divorce proceedings with her partner due to domestic violence. Following this separation she wished to return home with her daughter. Her daughter's biological father was deceased however her (estranged) husband was named on the birth certificate. Refugee Action requested that he take a DNA test in order to provide evidence of his paternity, however this was refused. In order to return home with her child our client was required to access legal aid in order to receive permission from the court to remove her child from the UK.

## How will the residence test impact on families considering AVR?

49. Under the current legal aid rules AVR clients are eligible for assistance and as a consequence able to find legal aid funded representation in order to progress their cases in the UK courts with the eventual aim of returning home.
50. Refugee Action is concerned that under these proposals such clients will no longer be eligible for assistance on the basis that they will not be able to demonstrate 12 months lawful residency. This ineligibility has a number of consequences:
- Families with outstanding issues pertaining to parental responsibility or child custody issues and with a genuine desire to leave the UK and return home will be unfairly prevented from doing so. Such families will often remain in a legal limbo often with no formal status or entitlement to remain in the UK, but unable to leave and return home with their children.
  - A family with no legal status in the UK and no entitlement to support will often be at risk of destitution. By virtue of their destitution, an application may be made for the local authority to provide support under Section 17 of CA 1989. As explained above, should this application be unlawfully refused they will not be able to challenge this decision. In this scenario the suggested reforms will not only prevent the family from leaving the UK but will frustrate the statutory purpose of the CA 1989 to safeguard and promote the welfare of the children and lead to a greater likelihood of them becoming street homeless.
  - Where a family is entitled to state funded support they will remain in a legal limbo unable to leave and representing an additional burden on the tax payer. Not only is this an unsatisfactory outcome for the family and the government, but it also represents an additional (unnecessary) expenditure of state funds and in doing so runs counter to the fiscal context of the consultation and the stated aim to deliver savings of £220 million per year by 2018/2019.



## Impact of the residence test on resettled refugees and those granted status in the UK

### What is refugee resettlement?

51. In partnership with local authorities in Greater Manchester, Refugee Action provides a reception and integration support service for refugees being resettled in the UK through the Gateway Protection Programme.<sup>8</sup> While living in refugee camps or urban settings overseas, refugees who have demonstrated they can never return home, have no prospect of integrating locally and meet one of a set of vulnerability criteria (such as ‘survivors of torture’ or ‘women at risk’) can apply for resettlement. The UK resettles 750 refugees through the scheme per year and Refugee Action currently supports 470 per year. The refugees are granted refugee status and indefinite leave at the moment they enter the UK. The Home Office and European Refugee Fund III funds ‘integration support’ for the refugees first 12 months in the UK. This includes help settling in, planning how they will integrate and support with accessing services, like legal aid.

### How do Gateway refugees currently use legal aid?

52. The needs of Gateway refugees can be highly diverse and some require legal aid funded advice and representation regardless of their length of time in the UK.

Berhane (not her real name) arrived in the UK through the Gateway Programme with her husband and children. Following an incident of domestic violence, she left the marital home with her children. Berhane disclosed to Refugee Action that she and her children had experienced domestic violence from her husband for a number of years but that she had not acted on this previously because she worried it would impact on her application for resettlement. Berhane and children could not remain in the place they were staying as they were overcrowding the accommodation and jeopardising the tenancy. Refugee Action helped Berhane to access legal aid advice on housing and divorce and she was advised that she and her children could regain their tenancy and access to their accommodation. An injunction was made against her husband compelling him to leave the accommodation in order for her and her children to be safe there. She could not speak English and her solicitor was able to use legal aid funded interpreters in order for them to communicate. Her husband’s Refugee Action caseworker also assisted him to access legal aid funded advice.

As a result of legal aid funded advice, this vulnerable woman and children were able to escape a violent relationship and regain access to their accommodation. Legal issues relating to the separation, including access to the children, were resolved. Had they been required to wait 12 months before accessing legal aid, there would have been a corresponding delay during which time they would have remained at risk of violence from the husband. Furthermore, after 12 months, they would not have had access to integration support through the Gateway Programme to assist them with accessing legal aid advice anyway.



<sup>8</sup> [http://www.refugee-action.org.uk/about/what\\_we\\_do/483\\_the\\_gateway\\_protection\\_programme](http://www.refugee-action.org.uk/about/what_we_do/483_the_gateway_protection_programme)

## Impact of the residence test proposal on refugees

53. Under the proposals in this consultation, resettled refugees and those who have been recognised within the UK would have to wait 12 months before being eligible for legal aid for civil law matters. Ironically, resettled refugees currently receive 12 months' funded integration support. This means that the point at which they will become eligible for legal aid will also be the point at which they no longer have access to a service that can help them to understand and access it. In our view the consultation proposals are at odds with the Gateway Programme and have the potential to work against the Programme's long term resettlement objectives.
54. These proposals will deny access to legal representation for newly granted refugees who, based on our casework experience, may need legal aid within the first 12 months of their status in order to challenge a refusal by the local authority to provide housing under homelessness law, or a refusal of assistance from social services if they are in need of care and attention or have children in need.

**Question 5: 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)?**

55. Refugee Action objects to the proposal to put costs at risk until permission is granted in a judicial review claim as this will increase the risk that those who cannot pay for representation will be denied the opportunity to seek redress for arbitrary or abusive treatment through judicial review.
56. The consultation document appears to assume that a JR application that does not make it to permission stage or which is refused permission is, by its very nature, weak. However, in Refugee Action's experience these applications do not progress further not because they are weak, but because the process of pre-action correspondence and JR preparation often delivers the result required. Pre-action letters submitted to local authorities on community care assessments or age assessments, or to the Home Office on a refused asylum claim, can often give that public body an opportunity to revisit their decision and render the claim academic. Under these proposals, lawyers will bear the cost of such successful legal advocacy.

Mr Barre (not his real name) is from Somalia and submitted a fresh claim which was refused. His solicitor wrote a pre-action letter to the Home Office and received a swift response requesting more time to reconsider their original decision. No further response was received and the judicial review claim was issued. Mr Barre's support was terminated, but he appealed to the Asylum Support Tribunal which accepted his appeal on the basis that his support should not be terminated while a JR application is pending. Mr Barre's legal aid funded representative has been able to do the work on the pre-action letter and the JR claim in the knowledge that his time will be paid for. Hopefully it will not be necessary to pursue a JR but, while an application is pending, Mr Barre will be able to access support which means that he is not subjected to destitution. Without legal aid to cover his costs, it is unlikely that Mr Barre's solicitor would be able to provide this considerable work 'at risk'.



57. In order to avoid incurring these unaffordable costs, lawyers may seek permission at a much earlier stage and not wait for the public body to change their position. This will fundamentally change the manner in which litigation is conducted and will result in more initial and satellite litigation and the seeking of *inter partes* costs.
58. It is likely that this proposal will result in an increase in JR claimants presenting as litigants in person with the associated costs and delays. Such claimants will face a government department which enjoys expert legal representation, demonstrating how this proposal contributes to the inequality of arms created by this reform. Of course, the most vulnerable amongst our beneficiaries will not have the resources, skills or confidence to represent themselves and consequently will not be able to seek redress for the abuse they have suffered at the hands of a public body.
59. Assisting clients who have been refused legal aid is already having an impact on Refugee Action's services. Until March 2012 our Family Key Worker pilot, based in Liverpool, provided an enhanced casework service for selected families. The service provided information and advice to families from the start of the asylum process and a key worker was assigned to each family to provide intensive support. Such a model allowed us to help some of the clients who found themselves without legal representation by assisting them to pull together their evidence. This project is no longer in operation as Refugee Action is unable to fund such a level of casework. However the demand remains, and our advisers struggle to find a legal aid representative to whom we can refer clients. If clients are unable to find a representative, our advisers must help them to deal with the consequences: destitution, street homelessness and confusion regarding their immigration status.

Chisomo (not her real name) is from Malawi. She and her child left Malawi due to the fear that she would be killed if she refused to marry the man that her family had chosen for her. Chisomo had also been raped and subjected to witchcraft. Unfortunately Chisomo was refused asylum and she became appeal rights exhausted. Her legal aid solicitor applied for JR of the refusal and the tribunal granted permission. In the middle of this process Chisomo's solicitor went into administration and she was forced to look for a new solicitor. Another legal aid solicitor agreed to represent her at the JR hearing; however when the tribunal refused her appeal this solicitor decided to drop her case stating that her case failed the merits test. Chisomo decided to appeal against the decision and because she was on the Family Key Worker Pilot her case worker at Refugee Action helped her to put a statement bundle together. Chisomo represented herself at the hearing and, based on the evidence submitted, the judge allowed the appeal on Article 8 grounds.

60. These are areas of law affecting fundamental rights, they are complex and require expert legal advice. Destitute individuals are poorly served by a justice system that obliges them to seek advice and assistance from non-specialist lawyers, non-legal advice providers or to face the Court unrepresented.
61. The legal aid providers on whom Refugee Action relies are already stretched to their limit and cannot take on any more financial risk in their business. This proposal will not just affect our beneficiaries, but will severely impact on the development of public law in general as it is likely that it will not be economically viable for law firms to continue to do this type of work. There will cease to be any legal scrutiny on important areas of law concerning human rights and civil liberties hence removing a vital safeguard against arbitrary and abusive treatment.

