



**Freedom from Torture**

Medical Foundation for the Care of Victims of Torture

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## **Response of Freedom from Torture**

### **To the Ministry of Justice Consultation Paper CP14/2013: Transforming Legal Aid**

Freedom from Torture considers that these proposals directly affect fundamental rights of access to the courts, the ability to challenge wrongful decisions and abuse of power and the means of securing justice and fair treatment. Certain proposals may also be unlawful and potentially discriminatory in their operation. We are particularly concerned about the deleterious impact of the proposed changes to legal aid on survivors of torture as a particularly vulnerable group.

#### **Freedom from Torture**

Freedom from Torture, formerly known as the Medical Foundation for the Care of Victims of Torture, is a UK-based human rights organisation and one of the world's largest torture treatment centres. Since our foundation more than 25 years ago, we have assisted more than 50,000 people and we currently have centres in London, Manchester, Newcastle, Birmingham and Glasgow.

The organisation exists to enable survivors of torture and organised violence to engage in a healing process to assert their own human dignity and worth. Our concern for the health and well-being of torture survivors and their families is directed towards providing medical, psychiatric and psychological consultation, assessment and treatment, short and long term rehabilitation through social care, casework and counselling, psychotherapy, physiotherapy, complementary therapies, group and family work, as well as practical assistance with accommodation and welfare agencies.

Freedom from Torture also accepts instructions for the preparation of forensic medico-legal reports documenting torture and ill-treatment and the organisation prepares around 300-600 medico-legal reports per year. It is also our mission to educate decision-makers and the public about torture and its consequences, while our advocacy work strives to ensure that the UK and other states honour their international obligations with regard to torture.

#### **Introducing a residence test**

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

No.

The introduction of a test requiring one year of lawful residence before becoming eligible for legal aid is likely to be found unlawful:

- Article 16 of the 1951 Refugee Convention requires States Parties to enable refugees access to the courts and equality of treatment with nationals with regards to legal assistance.
- EU Directive 2004/83/EC (Refugee Qualification) guarantees to both refugees and those granted subsidiary protection equal access to health care, social assistance and other core rights that may require enforcement via the courts.
- Indirect discrimination on the basis of race, disability and other protected characteristics is likely, in contravention of the Equality Act 2010 and Article 14 of the European Convention on Human Rights in combination with Articles 2, 3, 6 and 8, through the inability of these groups to access the courts to secure their legal entitlements.

The residence test would have a deleterious impact on survivors of torture recognised as refugees or granted subsidiary protection:

- Freedom from Torture's forthcoming research study, examining the impact of poverty on survivors of torture in the UK and their capacity to engage effectively in rehabilitation, identifies the frequent occurrence of homelessness and destitution of survivors of torture during the transition from asylum support to mainstream welfare provision on account of administrative failings on the part of the Home Office and the lack of seamless transition between the two systems of support. **Under the proposals, survivors of torture would have no means of bringing legal challenges to delays in the provision of status papers or, in the year before the residence test is met, to otherwise secure access to their entitlements to welfare, housing and community care support. This should be of particular concern given the disabilities and other special needs of many torture survivors.** The level of destitution and homelessness for survivors of torture during this time would worsen, with a significant impact on survivors' short and long term rehabilitation from torture.

The residence test would have a deleterious impact on survivors of torture who need to make fresh asylum or human rights claims to secure their right to refugee status and protection:

- Freedom from Torture welcomes the exemption from the residence test for asylum seekers but is concerned that the proposals envisage that asylum seekers preparing fresh claims for asylum would be unable to access legal aid at that stage. Freedom from Torture provides services to many survivors of torture forced to prepare fresh claims after refusal of their initial protection claim. In the first quarter of 2013, 20% of the 127 cases referred by our treating clinicians to our in-house legal advisors (who help our clients to find appropriate legal representation) related to clients in therapy with us who are at that stage of the asylum process. Our medico-legal report service also receives a high volume of referrals from legal representatives preparing fresh claims for torture survivors (who may or may not be in treatment with us). It is frequently the case that documentation of the physical and psychological sequelae of torture will establish a fresh claim for asylum where medical evidence was either not submitted at an earlier stage or was inadequate, for example because a non-specialist was instructed who failed to properly address evidence of torture. This may result from non-specialist legal representation at an early stage and/or because the asylum system does not afford sufficient opportunity for survivors of torture to develop the relationship of trust that is often necessary to facilitate disclosure of

experiences of torture and sexual violence, which are experienced as degrading, humiliating and shameful.

- **Freedom from Torture is highly concerned that imposing the residence test on torture survivors preparing fresh claims would make it impossible for many to secure legal representation which would, in turn, expose them to a very serious risk of removal to torture and other forms of persecution. In this regard we urge the Ministry of Justice to consider carefully the UK's international obligations under the Refugee Convention, Article 3 of the European Convention on Human Rights and Article 3 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.**
- Not only would survivors of torture be unable to access the legal advice required to prepare a fresh claim to prevent removal to situations where they may face torture, but **the proposals would also mean that the preparation of medical evidence in support of fresh claims would also not be publicly funded. Freedom from Torture is a charity and we would be unable to meet the costs of providing medico-legal reports if all applicants at this stage were ineligible for legal aid.**

The residence test would have a deleterious impact on survivors of torture at the end of the asylum process:

- **The proposals would exacerbate vulnerabilities for torture survivors at the end of the process who would be denied legal aid to challenge abuses of their rights, whether relating to access to support under the Children Act 1989 to protect the welfare of children or wrongful detention,** with consequent and obvious damaging effects. In the first quarter of 2013, 12% of the 127 cases referred by our treating clinicians to our in-house legal advisors related to clients in therapy with us who were appeal rights exhausted.
- Access to legal advice is relevant at each stage of the asylum process. For example, the Home Office Guidance on the removal of families, introduced to promote and ensure the welfare of the child during this process under s.55 Borders, Citizenship and Immigration Act, provides for a Family Returns Conference during which the family should be advised that if they wish to submit further submissions or legal challenges with regards to their departure, they should seek legal advice immediately and submit representations as soon as possible, and contact details of legal representatives will be provided. The lack of legal aid at this stage undermines the intention to ensure that removals of families with children are conducted in accordance with the law.

The residence test would also be unworkable:

- Lawful residence is a complex area of immigration law and it is clear that many legal practitioners who do not specialise in this area would be unable to accurately assess eligibility for the purposes of advising in relation to other areas of law including entitlements to essential services. It is highly likely, therefore, that survivors of torture who do meet the requirements of the residence test would face difficulty accessing legal services.
- Torture survivors and other applicants who submit their documents to the Home Office with applications to extend their leave to remain will also be left with no documentation to demonstrate eligibility for legal aid to assist with other legal matters that may arise.

### **Paying for permission work in judicial review cases**

*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.*

No.

Freedom from Torture is extremely concerned that the effect of this proposal will be to reduce the availability of legal advice and representation with regard to judicial review across many areas of decision-making by public authorities affecting survivors of torture.

It will be clear from the examples given above that judicial review provides torture survivors with an important legal safeguard against poor quality decision-making by the Home Office, local authorities (especially in relation to social services and housing departments) and a range of other public authorities. Our treating clinicians refer approximately 15 cases per month to our in-house legal advisors for advice in relation to judicial review matters. Typical examples of flawed decisions by public authorities concerning our clients include failure to consider fresh representations as a fresh asylum claim, delays in deciding asylum claims (in some cases for three years or more), errors of law by the Asylum and Immigration Chamber of the Upper Tribunal, failure to properly assess eligibility for entitlements including community care support, and failure to comply with policy concessions relating to torture survivors (for example with respect to the frequency of reporting).

**Our in-house legal advisors are already experiencing difficulty in identifying legal practitioners with capacity to represent our clients in judicial review actions. Freedom from Torture is concerned that placing applications for judicial review ‘at risk’ will restrict legal practitioners’ capacity further, reducing the availability of legal advice and representation to our vulnerable clients.**

### **Civil merits test – removing legal aid for borderline cases**

*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.*

No.

Merits in asylum cases are difficult to assess as country situations often change more quickly than case law or country specific information and policies giving guidance on the factual human rights situation in specific countries or in respect of specific groups. The accounts of individual applicants escaping torture and persecution may provide evidence that has not yet come to light and challenges existing knowledge and case law with regards to situations of torture.

The asylum and human rights protection cases of survivors of torture are frequently highly complex. Evidence in the case may develop over time. Survivors of torture may be traumatised by their experience and need time and the development of a relationship of trust in order to be able to give a full account of their experiences of torture.

Freedom from Torture is concerned that the civil legal aid funding system incentivises legal practitioners, especially those who are less experienced, to avoid taking on complex cases, with the risk that survivors of torture are unable to challenge decisions refusing protection

and placing them at risk of removal to situations where they face torture and other forms of persecution.

**The current funding regime allows legal aid to be provided in cases considered to be borderline if the life, liberty and physical safety of an individual is affected, if they are at risk of homelessness or if the case would involve a breach of human rights protected by the European Convention on Human Rights. Freedom from Torture considers that these safeguards are an essential means of ensuring that deserving cases including those involving torture survivors, often involving risk to life and physical safety, are brought before the courts.**

### **Reforming fees in civil legal aid**

*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.*

*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.*

No.

Freedom from Torture is concerned at the potential impact of these proposals on the availability of legal advice and representation to survivors of torture.

It is already increasingly difficult for Freedom from Torture's clients to secure legal representation from specialist immigration law practitioners. As discussed, the asylum and human rights protection cases of survivors of torture are complex and the additional case preparation required to properly represent survivors of torture is frequently not covered by the fixed fee under legal aid, with legal aid practitioners absorbing the costs of this work.

The situation is exacerbated by the fact that many high quality practitioners and firms – including the two largest providers in this sector, Refugee and Migrant Justice and Immigration Advisory Service – have been forced to leave the sector or close due to funding difficulties or payment problems in this area, a situation we expect to deteriorate significantly in the wake of the entry into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on 1 April 2013. Freedom from Torture fears that further cuts will make legal advice and representation in the area of asylum not viable for practitioners, with high quality legal representatives leaving the sector or undertaking a greater proportion of private work, both of which will restrict the availability of legal advice to survivors of torture.

### **Expert fees in civil, family, and criminal proceedings**

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

No.

Freedom from Torture's medico-legal report (MLR) service (still known as the Medical Foundation Medico Legal Report Service) prepares 300-600 MLRs each year, for use mainly in UK asylum proceedings. The reports are prepared by specialist clinicians according to their duties to the court and the standards set out in the UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (known as the Istanbul Protocol).

These reports play a crucial role in the asylum system, by documenting the physical and psychological consequences of torture and placing these in the context of an individual's particular history. Our expertise in preparing MLRs for victims of torture is such that the Home Office has adopted a specific policy, the Asylum Policy Instruction (API) on the Medical Foundation, for cases in which we are instructed to prepare an MLR (the Home Office also applies this policy to MLRs prepared by the Helen Bamber Foundation).<sup>1</sup> Under this policy, case owners are required to place the asylum decision 'on hold' whilst our MLR is being prepared so that the MLR may be considered before a decision on the asylum claim is taken. The high value placed by the Home Office on our MLRs is further reflected in guidance stressing that our MLRs should be 'understood fully and given proper weight in the consideration process' and that where our MLR supports an allegation of torture 'the fact that the claimant has been tortured should be accepted unless there are significant reasons for rejecting that conclusion despite the content of the report'.<sup>2</sup>

Freedom from Torture currently charges £900 for the provision of a medico-legal report and this charge is generally met by the legal practitioner through legal aid. **Freedom from Torture does not make any money from our medico-legal reports and, in fact, we heavily subsidise this service using charitable funds. Any further reduction in disbursement fees for expert reports would have potentially very serious implications for the viability of our world-renowned medico-legal report service.**

### **Equalities impact**

*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.*

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

No.

Freedom from Torture considers that the analysis of the potential equalities impacts is cursory and lacking in detail. Whilst the consultation paper acknowledges that users of civil legal aid are disproportionately likely to be women, members of Black and Ethnic Minority communities and ill or disabled, no solutions are put forward to address the discriminatory impact that the proposed changes to legal aid are likely to have.

Freedom from Torture is particularly concerned about the impact of the proposals on torture survivors, as outlined above.

For further information, please contact:

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1 Available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/medicalfoundation.pdf?view=Binary>

2 *Ibid*, section 2.6