Transforming Legal Aid Consultation

Statement from local authority perspective

The Association of Directors for Children's Services, the Local Government Association and the NRPF Network are concerned about the impact of the proposed changes to legal aid on local authorities and communities. We are concerned that the savings to the public purse envisaged by the proposals may in fact be wiped out by increased costs to other statutory services.

We would like to warmly invite the Ministry of Justice to meet with representatives from our organisations to discuss these proposals in more detail.

We are concerned that:

1. These proposals have been made before the impact of the legal aid changes implemented by LASPO (which only came into effect from April 2013) can be measured or effectively understood.

2. The proposed residence test will be ruled unlawful on the basis of unlawful discrimination, since it will:

    a) Disproportionately affect migrants and therefore indirectly discriminate against race/nationality in contravention of the Equality Act 2010 and Article 14 ECHR (when taken with the Article 6 right to fair trial).
    b) Disproportionately disadvantage refugees when compared to British nationals in the equivalent position, in contravention of Article 16 of the Refugee Convention 1951.[1]
    c) Indirectly discriminate against other groups, for example in domestic violence cases against women (again in contravention of the Equality Act 2010 and Article 14 ECHR potentially alongside Articles 2, 3, 6 and 8, as well as Articles 1 and 15 of the Convention on the Elimination of all forms of Discrimination against Women).[2]
    d) Fail to promote equality and the best interests of children, since it will discriminate against all children who are under a year old.
    e) Indirectly discriminate against EEA nationals, who will disproportionately be more likely to be affected than British nationals, which may contravene Community Treaty obligations, since the European Courts will treat legal aid as a social advantage.

[1] For example, refugees would have no access to legal aid when a rogue landlord made them homeless when they have an extremely strong connection to the UK and the vast majority of British nationals could seek legal aid in the same position.
[2] C.f the case of Opuz v Turkey (App.No.33401/02) (2009)

3. The proposed residence test will be struck down by the courts as incompatible with human rights:

    a) In categories/types of case where there the European Court of Human Rights has found that the Article 6 right to fair trial requires legal aid in civil proceedings, such as legal aid for children and family members in Care Proceedings.[3] Indeed from a local authority perspective there is absolutely no public interest in applying a residence test to legal aid in Care Proceedings, which would instead cause great harm to the public interest.
    b) The European Convention of Human Rights requires states to guarantee not rights that are theoretical or illusory but rights that are practical and effective.[4] A residence test in cases where legal proceedings are the only way to effectively safeguard other human rights may be unlawful.
    c) For example, with no national guidance on social services obligations to migrants with no recourse to public funds, judicial review proceedings are the primary safeguard to ensure a local authority does not breach Article 3 (prohibition on inhuman and degrading treatment) by unlawfully refusing support and forcing a family into destitution.[5]
    d) Without immediate access to judicial review in urgent cases and effective access in cases where a family may otherwise be left homeless and without any subsistence, the UK will be in breach of Article 3 and, in a severe case where a family face starvation, Article 2 (right to life).
    e) The residence test is inconsistent with Articles 3 and 12 of the Convention on the Rights of the Child, which is used to interpret children's human rights in domestic case law.[6]

4. The exceptional funding scheme designed to safeguard Convention rights and EEA rights under s.10 LASPO will be inadequate for cases caught by the proposed residence test:

    a) A refusal to grant legal funding by the Legal Aid Agency comes with no right of appeal. A refusal to grant legal aid to someone otherwise caught by the residence test could only be challenged by way of judicial review, which would also be subject to the residence test. This hugely weakens the effective safeguard of Convention rights in the UK and is far less likely to be accepted by the courts than the scheme established by LASPO.
    b) The exceptional funding scheme requires separate applications in each case, which will then be considered individually for exceptional funding. There are whole classes of case, such as Care Proceedings, Homelessness cases, Detention cases/Habeas Corpus, Trafficking cases, Domestic Violence civil cases and Domestic Violence Rule applications where human rights case law may require a presumption in favour of legal aid: the current scheme is not set up to cope with this and this does not seem like a cost effective approach.

[3] P, C and S v United Kingdom (App.No.56547/00) (2002) 35 EHRR 31
[4] Airey v Ireland Series A, No.32,(1979-80) 2 EHRR 305; para24
[5] C.f. R (Limbuela) v SSHD [2005] UKHL 66
[6] ZH (Tanzania) v SSHD [2011] UKSC 4; from paragraph 21 of Lady Hale's judgment.

c) It is doubtful whether the current scheme is robust enough to adequately safeguard rights in practice (for example the Lord Chancellor's guidance on the scheme includes only a single page on child applicants and makes no mention of children in care).[7]
d) Since s.10 LASPO refers to excluded matters, not classes of people it may be impossible for people caught by the residence test to even apply for exceptional funding without LASPO itself being amended.[8]

5. The proposed residence test is unworkable in practice:

a) In many cases the Home Office holds a client's passport and/or a person will still be lawfully resident because they made an in time application, but they will have no evidence of this. There is no immigration-checking service currently available to lawyers and, in our comprehensive experience, where local authorities have contacted Home Office centralised or local teams to ascertain a person's immigration status the initial answer is often inaccurate.
b) In some cases, for example where a person is a British national or has an enforceable EEA right of residence, they may have no evidence that they have been here lawfully for 12 months.
c) Even where a person has evidence of their status their position can still be far from clear. For example there is ongoing case law about the scope of certain EEA derived residence rights that apply to migrants from outside the EEA and it will only be possible to know for certain whether a person is lawfully resident after their case has been to the High Court. Will the Legal Aid Agency provide legal aid in cases where a person may be lawfully resident, but the law is unclear?
d) Only specialist immigration lawyers would be competent to assess a client under the proposed residence test, so lawyers in other areas of law (such as family law) will end up turning away clients due to a misunderstanding of their eligibility. This should be given strong consideration as part of the Equality Impact Assessment of this proposal, since it could later form a part of a public law legal challenge.
e) The current exceptions proposed (for asylum seekers and members of the armed forces) are insufficient. The NHS charging regulations for overseas visitors have tried to implement a not dissimilar residence requirement, but have had to include so many exceptions in order to comply with EEA, human rights and non-discrimination law[9] that they have been extremely poorly implemented and many hospitals have found them to be unworkable.
f) The residence test in relation to EEA nationals would need to take account of any periods of lawful residence in other EEA countries. At present the student finance rules are required to take account of residence in another EEA state and this has proved to be an extremely messy and unworkable system. This is the case even though Student Finance England is a centralised body, in a better position to run this type of system than individual lawyers would be.

[7] Available online at: http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf.
[8] For more information on this issue contact the Immigration Law Practitioners' Association: http://www.ilpa.org.uk/pages/contact-ilpa.html.
[9] C.f. the NHS guidance: https://www.gov.uk/government/publications/guidance-on-overseas-visitors-hospital-charging-regulations.

6. The proposed residence test will lead to a vast cost-shift to other services in the statutory and voluntary sectors, which will place a heavy burden on public spending:

    a) The proposed residence test would lead to a fearsome increase in costs for local authorities in relation to their own staff time and the cost of stepping in to secure necessary replacement services for children in care, care leavers, families with no recourse to public funds and adults with a need for care and attention.
    b) The proposed residence test leaves vulnerable people and children at risk in cases of domestic violence, abduction, or care proceedings. Local authorities, schools and the police have welfare, safeguarding and human rights obligations and the residence test would leave many people with nowhere else to turn. These agencies do not have the infrastructure of the civil justice system to obtain equivalent outcomes without incurring a much higher financial burden.
    c) Therefore in many cases (and perhaps overall) a residence test will cost the public purse more than it will save.

7. The proposal to only pay for permission stage applications in judicial review cases will damage the rule of law and jeopardise the lives of some of the most vulnerable people in the UK:

    a) Fewer lawyers will take on judicial review work if they are not paid for it, particularly fewer barristers, so it will be very difficult for people facing destitution to access judicial review to apply for urgent injunctions or test and develop the law.
    b) Weak cases are already refused permission to proceed, which protects the public purse and strikes a fair balance. In urgent cases the merits of the case will need to be kept under ongoing assessment, but the final decision on whether to grant legal aid rests with the Legal Aid Agency, not the provider.
    c) The proposal to no longer make legal aid available for applications for judicial review does not seem to be a proportionate or sensible way to save public money, since it is very difficult for litigants in person to access the High Court.
    d) We would be happy to explore cheaper alternatives to judicial review for certain types of case (for example where evaluative mediation might be effective), but this proposal would reduce the availability of an important remedy, with no alternative, which may do great harm to the rule of law and public interest.

8. The proposal to remove legal aid for borderline cases jeopardises the rule of law in a common law jurisdiction where extremely important principles of law are often only clarified by the courts and the outcome is uncertain beforehand. Without this robust legal system for testing the law we would anticipate a costly rise in applications to international courts alongside potentially serious damage to the UK legal system's reputation.

9. Restricting the scope of legal aid for prison law matters could leave children and young people in detention who require support from the local authority once they leave detention without the advocacy they need to make suitable arrangements. This could raise child protection concerns for children exiting detention and broader concerns about youth reoffending.

ADCS, LGA and NRPF Network, June 2013
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