REFUGEE COUNCIL | Asylum Aid Protection from Persecution | Medical Justice seeking basic rights for detainees | THE DETENTION FORUM | ASAP ASYLUM SUPPORT APPEALS PROJECT DEFENDING ASYLUM SEEKERS LEGAL RIGHTS TO FOOD AND SHELTER

Briefing Paper for Backbench Business Debate on legal aid: 27.06.13

Introduction:

In the wider debate about legal aid the focus is often in relation to the criminal law and therefore the impact on asylum seekers and refugees has received less scrutiny. However, the proposals will dramatically reduce the access to justice of those seeking asylum and, for the first year after their successful claim, those who have been granted asylum in the UK. This debate is an ideal opportunity to raise these concerns.

Overarching issues

❖ Lack of legislative scrutiny:

The government is, through the proposed reforms to legal aid in "Transforming Legal Aid: delivering a more credible and efficient system", proposing to make wholesale changes to an individual's ability to access justice through secondary legislation. It is not appropriate to make these changes without parliamentary scrutiny. Furthermore, the consultation paper was issued a week after the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO Act 2012). During the passage of the Bill that was to become the LASPO Act 2012, the government stated in Parliament that legal aid would be retained for matters of 'the utmost priority' such as those seeking asylum.

❖ Negligible financial savings:

Both the introduction to the consultation document and the Ministerial foreword cite financial savings as a motivation for these proposals. The impact assessment included as an annex to the consultation document assesses that in the two proposals listed in this paper (the residence test and the limit to judicial review funding) the financial impact will be negligible or very small. We are therefore concerned that the reasons for introducing these proposals may be at best confused and at worst, misrepresented.

Specific issues

❖ Judicial review and the question of 'merit'

The consultation proposes 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).

- Given the precarious situation in which legal aid providers find themselves, even individuals with meritorious cases are likely to experience severe difficulties in accessing representation given that legal aid providers will, under these proposals, not be paid for any of their work unless and until permission if granted. Such work is "at risk" and therefore poses a direct liability to the legal aid provider who is likely to be constrained as to the cases that they are willing to take.[i] Work to research, prepare and present a

judicial review is often substantial, especially to address concerns in the handling of the most complex asylum claims. This proposal would act as a disincentive for providers to undertake judicial review work even where merits are established, as any work prior to permission being granted by the court would have to be undertaken pro bono. This will make it very difficult for people facing destitution to access JR, particularly to apply for urgent injunctions[ii]. This is likely to increase the number of people facing destitution, with an increased cost to society.

- The rationale given by the Ministry of Justice for this proposal is to reduce the cost of legal aid, but we do not feel that there is a strong enough financial argument to justify this proposal. In the 'Case for Reform' (3.61), the consultation paper states that 'legal aid is being used to fund a significant number of weak cases which are found by the Court to be unarguable and have little effect other than to incur unnecessary costs for public authorities and the legal aid scheme'. Yet the Impact Assessment report (IA No: MoJ194, para 30) states that it would make a saving of only £1 million. £1 million is equivalent of 0.45% of the total savings that the Ministry of Justice intends to make per year by 2018/19. Given the small saving it makes, we believe this proposed change will bring an entirely disproportionate impact on individuals and should be dropped.

  Indeed, it is somewhat difficult to establish from the statistical information provided in paragraphs 3.63 to 3.68 of the consultation document that there are significant number of weak cases for which legal aid for judicial review was obtained. At best, only 13%, a small minority of those cases for which legal aid for judicial review related work was sought in 2011-12, could fall into this category. This is in sharp contrast to the general impression that has been engineered by the Lord Chancellor in the media recently that the vast majority of judicial review challenges are unmeritorious and made in bad faith, and that the reason for further changes to the legal aid system is to close this loophole[iii].

- Clients of many refugee assisting NGOs are frequently wrongly denied their legal rights. Common issues affecting them include:

  - Unlawful decisions made as to a child's age or eligibility for services under the Children Act 1989.
  - Refugees wrongly denied access to public services such as housing, social services assistance under community care law and state benefits.
  - Delays from the government in issuing status documents.
  - Failure by the government to adhere to its own guidance or to case law.
  - Unlawful detention or issuing of removal directions.

  NGOs and other advocates do not turn to judicial review lightly. Individual advocacy would always be the first port of call. However, when such intervention is not successful, a legal representative's assistance is a necessary part of the action that has to be taken to challenge the decision made by a statutory authority. In order for the work to take place it has to be funded. In our opinion the proposed change would result in an increase in unlawful decisions relating to access to services with disastrous effects on the individual and/or an increase in the number of individuals who seek to ask the court to intervene without the assistance of a properly qualified representative. This is not in the interests of justice.

- Contributors to this paper have been involved in a number of successful challenges to government decisions that have required courts to tell the statutory authority that the decision in question was not in line with the law. There are a number of other cases where judicial review proceedings are initiated but the case does not reach the final stage because the statutory authority withdraws the decision in question. We have no doubt that in most cases this is as a result of judicial review proceedings having been initiated. **The conclusion drawn in the consultation document that 'these are likely to be cases that would not be considered by the Court to be arguable in any case' is flawed; it fails to take into account the large number of cases that do not reach this stage because once proceedings have been initiated, the statutory authority withdraws its decision.**

- Judicial review has historically acted as a counterbalance with regard to decisions either made in error or without the introduction of all information pertaining to the case. Mistakes and omissions such as these are inevitable in any decision making process, no matter how well-developed. Without legal aid, the ability for individuals to check whether these decisions were correct will be severely limited.

❖ *The Residency Test*

The proposal is that in order to be eligible for legal aid an individual would have to have been [legally] resident in the country for twelve months prior to the application.

- This erodes the support that refugees need to fully integrate into the UK. Refugees will not have access to legal aid for housing, child law or any other matter for the first year of their residence in the UK. Article 16 of the 1951 Refugee Convention enjoins States to provide refugees with access to courts and legal assistance on a par with the treatment granted to nationals of that host country. We strongly urge the Ministry of Justice to remove the proposed residence test for refugees and allow access to legal aid for new claims arising immediately after recognition or resettlement to the UK.

- The wide scope of this proposal is a cause for alarm. For example, all new-born children will automatically be ineligible for legal aid if passed, thus putting the UK in violation of its obligatory protection of children under, *inter alia*, the United Nations Convention on Rights of the Child (UNCRC)[iv]. Further, children who have either been refused asylum, or have recently been granted asylum, will be refused aid for representation, effectively making it impossible for children to challenge age assessments, educational entitlements and provision of age-appropriate accommodation[v], thus raising further questions as to whether the UK is adhering to is commitments under international law.

- The rationale behind the residency test is to ensure those applying for legal aid have a 'strong connection' to the UK prior to bringing a case. However, as has been maintained by organisations such as the UNHCR, ILPA and the Asylum Support Appeals Project (ASAP), many immigrants – particularly undocumented children born in the UK of established asylum seekers – have strong connections to the UK prior to their claim for asylum, often having been resident for years prior to their respective applications. Research carried out in 2010 by ASAP revealed that out of 54 cases all but one person had been in the UK more than a year by the time they assisted them. 67% had been in the UK for over 5 years and in 10 cases for over 10 years. In that time they had forged

ties to this country. Most had close family here and 23 children were included as dependents in their applications[vi].

- A person may not have been continuously lawfully resident for 12 months yet have a strong connection to the UK, for example a person whose entire family lives in this country or a young person whose formative years have been spent in the UK. We acknowledge that people with an extant claim for asylum will be exempt from the residence test and the reasons given for this are entirely appropriate. However, we are concerned that asylum seekers whose claim has been refused and where they have no outstanding appeal will fall outside of this exemption, when s/he may remain in need of advice and representation. The main group that would be affected by this measure are those who, following a refusal of asylum claim and dismissal of appeal (or those who have not exercised their right of appeal, including those who were not able to get legal aid to fund their advice and representation at this stage), have sufficient evidence to make a fresh claim for asylum. We are gravely concerned that people who have a strong case may be unable to present this adequately because they will not have access to legal aid to fund the preparation of their case and/or independent evidence to corroborate their claim. Those with such strong claims will include survivors of sexual violence, people whose individual circumstances have changed since their initial asylum claim and those who were refused but where case law subsequently indicates that their asylum claim and appeal were wrongly dismissed. It is likely that the effect will be particularly felt by women making claims based on gender specific persecution, as it is widely accepted that historically, decision making on these types of claims has been poor.

- Asylum-seekers often have their initial cases refused, and then have this decision overturned subsequent to a fresh claim. Under the new proposals, research prior to the filing of any fresh claim will be ineligible for funding; as many of those entering the system now find themselves under the auspices of an abbreviated regime – where cases are heard in a matter of days – fresh claims often offer the best opportunity for individuals to have their cases properly researched.

- Asylum seekers have the right to seek representation under legal aid whilst their case is underway; as such, individuals will possess the right to counsel whilst their particular asylum cases are being decided. **They will then effectively lose the right to legal aid for one year upon any outcome, whether positive or negative.** This has serious implications for people's access to justice. The list below, which is by no means exhaustive, provides some examples of those who could be denied access to justice under the proposals:

    - Refused asylum seekers who need to prepare a fresh asylum application because of new evidence or other changes in circumstances, who could otherwise be returned to their country of origin to experience further persecution
    - Survivors of domestic violence who have not lawfully lived in the UK for 12 months but who need to engage family court proceedings to secure custody of children or for divorce
    - A migrant child who has not lived in the UK lawfully for 12 months, is destitute but whom the local authority unlawfully refuses to support

- The Detention Forum is particularly concerned about the catastrophic impact the proposed test will have on the vast majority of people in immigration detention, who are incarcerated for administrative reasons. Since the main purpose of immigration detention is for removal or deportation (or to establish the individual's identity), almost by definition, these people have irregular immigration status and will not meet the proposed residence test. Typical cases include, amongst others, bail applications, unlawful detention and habeas corpus. It will also affect a considerable number of people. In 2012, a total of 28,909 people entered detention, the highest since the Coalition Government came into power in May 2010. On any given date, more than 2,000 people are held in immigration removal centres: at the end of 2012, there were 2,685 people detained in immigration removal centres, of which 1,676 (62%) were people who have claimed asylum at some point. Although it is not possible to establish exactly how many of these have pending asylum claims and would be exempt from the proposed residence test, from our experience most are refused asylum seekers or irregular migrants who will not benefit from the exemption. We are particularly concerned that the proposed change will annul the reassurances that were given before and during the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Parliament was told repeatedly that for those serious cases where a person's life or liberty is at state, civil legal aid would continue to be available. People in detention belong to this category and it was and continues to be of utmost importance that these individuals can access civil legal aid.

- In all of the above examples, the state will continue to be represented by trained professionals (at the public expense), whereas those who have, for instance, been detained through immigration powers for lengthy periods will have no recourse but to prepare their case and appear in person. This situation, as noted by the No Recourse to Public Funds (NRPF) Network, is contrary to the rule of law – whereby all individuals are guaranteed equal/fair representation. Further, it stands apart from the UK's obligations under a variety of legal instruments, most notably under Article 6 (right to fair trial) of the European Convention on Human Rights (ECHR), as well as well-established tenets of the common law – particularly prevalent in cases of detention (where there is no upper limit with regard to immigration powers) – apposite to *habeas corpus*; these individuals often include those with serious mental health problems, trafficking victims, survivors of torture, survivors of gender based violence and a host of other human rights violations[vii]. The residence test will create a certain category of people in the UK against whom the state can potentially act with impunity, because their inability to pay for legal advice and representation means the state feels no threat of legal action. People with irregular immigration status are not allowed to work, so it is illogical to expect them to have money to be able to pay for legal advice and representation. This undermines the rule of law, which must apply universally to every individual, the government and other bodies, for it to have any meaning.

This briefing combines points raised by a number of charities working with refugees and asylum seekers.

You can contact them for their full 'transforming legal aid' consultation response for more detailed information ahead of the debate:

- Asylum Aid: russellh@asylumaid.org.uk
- Asylum Support Appeals Project: Hazel@asaproject.org.uk
- The Detention Forum: detentionforum@gmail.com
- Medical Justice: e.mlotshwa@medicaljustice.org.uk

For more information on this briefing, or for the full Refugee Council consultation response, please contact Jane Cox at parliamentary@refugeecouncil.org.uk

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[i] Amnesty International UK (AIUK) response to the Ministry of Justice public consultation on "transforming legal aid: delivering a more credible and efficient system"

[ii] Asylum Aid's submission to Transforming Legal Aid (Ministry of Justice) 4 June 2013

[iii] See the Public Law Project's analysis of the Secretary of the State's interview on The Today Programme on 23 April 2013 http://www.publiclawproject.org.uk/documents/PLPResponseChrisGrayling.pdf from The Detention Forum response to the Ministry of Justice consultation paper: 'Transforming legal aid: delivering a more credible and efficient system'

[iv] Office of the Children's Commissioner's response to the Ministry of Justice consultation: Transforming legal aid: Delivering a more credible and efficient system

[v] Ibid

[vi] 3 ASAP, *No Credibility: UKBA Decision making and Section 4 support* (April 2011)

[vii] The Detention Forum response to the Ministry of Justice consultation paper: 'Transforming legal aid: delivering a more credible and efficient system'