ILPA evidence to the Joint Committee on Human Rights' enquiry into the implications for access to justice of the Government's proposed legal aid changes

Executive summary

1. This response covers the matters described below.

2. Why exceptional funding is not an answer to the hard cases that will result from the proposals in the *Transforming Legal Aid* consultation. This is illustrated with case studies of refusals of such funding.

3. We set out why the residence test is incompatible with the European Convention on Human Rights. We then consider the persons affected by the test. We set out why we consider that the proposal for the test fails to respect the will of parliament. We consider particular difficulties associated with the requirements that the applicant be resident and be resident for 12 months. We consider the limitations of the exceptions to the test proposed in the original consultation as modified in *Transforming legal aid: Next steps,* examining the situation of members of the armed forces; asylum, refugees the stateless and other persons in need of international protection; babies under 12 months old; detention cases; trafficked persons; victims of domestic violence and forced marriage; those in detention; protection of children cases and cases before the Special Immigration appeals commission. We illustrate our discussion with case studies.

4. We invite the Committee to raise with the Government specific questions about how the proposals are intended to apply to stateless persons and persons given humanitarian protection and discretionary leave and persons who have claimed asylum who are granted leave on the basis that return would violate their rights under Article 8 of the European Convention on Human Rights. We also invite the Committee to ask the Government to clarify the ambit of the exceptions for judicial review of certificates in asylum cases.

5. We provide an overview of those affected by the residence test.

6. We examine briefly the effect of the cuts to legal aid for those in prisons.

7. We consider the proposals to change the funding for judicial review cases. We illustrate our discussion with case studies. We consider the modifications proposed in the Ministry of Justice consultation *Judicial Review proposals for further reform* published on 6 September.

8. We consider borderline cases and urge the Committee to ask the ministry of justice to provide it with more detailed information on these cases.

9. We summarise our conclusions briefly.

10. We set out in an annex links to ILPA's papers on this topic.

ILPA Response

11. The Immigration Law Practitioners' Association has produced many papers on the proposals that became the Legal Aid, Sentencing and Punishment of Offenders Act 2012, and on the Transforming Legal Aid consultation. Links to these are provided at the end of this response.

12. Access to justice to prevent violations of human rights is already denied because of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, in particular the removal of legal aid from immigration cases including those involving Article 8, the right to respect for private and family life. The result is breaches of those rights read alone and with Article 13, the right to an effective remedy. Auditing what has happened against what parliament was told would happen during the passage of the Legal Aid Sentencing and Punishment of Offenders act 2012 is essential for any proper evaluation of what parliament and the Joint Committee are told will happen if the "transforming legal aid" proposals become law.

Exceptional funding is no answer

> *Although narrowing the scope of legal aid, we intend to provide a safety net. The exceptional funding scheme established in the Bill will provide funding for an excluded case where failure to do so would amount to a breach of a person's right to legal aid under the Human Rights Act or European Union law.* Lord McNally[1]

13. Heavy reliance was placed during the passage of the bill that became the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on exceptional funding as the means by which access to justice would be preserved. Exceptional funding under section 10 of the Act has proven no answer at all. As of 1 July 2013, a mere six grants of exceptional funding had been made of which one was in immigration. None had been made to persons who were unrepresented. As of 6 September 2013, that figure was 11 grants, with no details of how many were in immigration. Also of concern, only 270 applications for exceptional funding had been made as of 1 July 2013. That would extrapolate to 1080 in the course of a year, far below the original estimate of 70,000. By 6 September, the number of applications had increased only to 624, which extrapolates to some 1497.

14. An application for exceptional funding involves completing three forms[2]: the usual "means" and "merits" forums and the exceptional cases form[3] which runs to 14 pages plus an 11-page *Exceptional Cases Funding – Provider Information Pack*[4].

15. Whether excluded cases receive exceptional funding under section 10 of the Act is related to the question of Article 6's having been held not to cover immigration proceedings[5]. The Lord Chancellor's Exceptional Funding guidance does contemplate exceptional funding where not to fund would be a breach of Articles 8 (and by extrapolation other articles) or 13 but says of immigration:

> *59. Proceedings relating to the immigration status of immigrants and decisions relating to the entry, stay and deportation of immigrants do not involve the determination of civil rights and obligations [footnote: Maaouia v France (2001) 33 EHRR 42; Eskelinen v Finland (2007) 45 EHRR 43 13.]*

[1] HL Report, 21 Nov 2011: Column 821. See also HL Report 5 Mar 2012 : Column 1570.
[2] Form CIV ECF 1.See http://www.justice.gov.uk/legal-aid/funding/exceptional-cases-funding
[3] Available at http://www.justice.gov.uk/downloads/forms/legal-aid/civil-forms/ecf1.pdf
[4] Available at http://www.justice.gov.uk/downloads/legal-aid/funding-code/ecf-provider-pack.pdf
[5] *Maouiaa v France* Application 39652/98 [2000] ECHR 455 (5 October 2000).

60. The Lord Chancellor does not consider that there is anything in the current case law that would put the State under a legal obligation to provide legal aid in immigration proceedings… to meet the procedural requirements of Article 8 ECHR.

16. Therefore, for the Lord Chancellor, not only is no obligation to fund immigration cases derived from Article 6, no obligation derives from the procedural requirements either.

17. While *Airey v Ireland*[6] and *P, C and S v United Kingdom*[7] were both family law cases, there is nothing in the case law that suggests that a different approach to rights other than rights under Article 6 should be taken in immigration cases. Rights must be rendered not "theoretical and illusory", but "practical and effective"[8].

18. The cases being refused funding engage human rights.

Case A (from meeting with Exceptional Cases Team of 1 July)
Applicant lacked capacity in the technical sense. There was no one to instruct the litigation friend. The official solicitor had given instructions for an application for exceptional funding to be made. This was refused. The refusal of funding suggested that the applicant (and official solicitor) read the exceptional funding guidance with care.

Case 2 (from meeting with exceptional cases team of 1 July)
The applicant was blind and suffering from dementia, at imminent risk of street homelessness. Exceptional funding refused.

Case of N
Appellant is a seven year old child with autism. Born in the UK and has lived all his life here. He is here with mother, neither have any status. Her appeal was dismissed but solicitors managed to pursue his appeal to the Upper Tribunal Immigration and Asylum Chamber before the Legal Aid, Sentencing and Punishment of Offenders act 2013 came into force (at which point it would not have received funding. The appeal was dismissed by the Upper Tribunal but permission was granted permission to appeal to the Court of Appeal. The case was then remitted to the Upper Tribunal but by then there was no legal aid for the case. The application for exceptional funding was refused. The not for profit organisation dealing with the case applied for a review. The Tribunal refused an adjournment and suggested that the not for profit represent for free or that he pays privately (his mother is in receipt of asylum support). On the eve of the hearing, the Home Office granted leave. Meanwhile the Legal Aid Agency reviewed its decision on exceptional funding and upheld the refusal.

Case of O
A 17 year old, in care in the UK since he was a young child and facing deportation. In the end this case was funded by the local authority subsequent to a letter threatening judicial review if they did not fund.

Case of G
Family reunification case. Child in care. Applying to be reunited with a child she had had when very young as a result of rape. Application for exceptional funding refused. Such cases involve commissioning and arranging DNA tests. The child remains overseas, no application having yet been made to bring them to the UK.

Case of C
C is a schizophrenic, detained in an immigration removal centre. He has two British citizen children with whom he has supervised contact. He faces deportation. Exceptional funding refused. Subsequently counsel was instructed through the Bar Pro Bono Unit and discretionary leave granted.

[6] (1979-80) 2 EHRR 305.
[7] (2002) 35 EHRR 31.
[8] See for example, *Airey v Ireland* Series A, No.32,(1979-80) (1979) 2 EHRR 305.

Trafficking cases (x two)
Both cases had been referred to the Home Office as the "competent authority" under the National Referral Mechanism to determine whether there were reasonable grounds for thinking that the applicants had been trafficked. No reasonable grounds decision has been made in either case – delays continue for many months. Therefore applications for exceptional funding were made as advice would not wait. Both applications were refused. The reason given was that the case is outside the scope of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

19. Cases in areas that parliament fought to keep in scope such as domestic violence and trafficking cases are in practice cases where it is difficult to find representation funded by legal aid because the legal aid contracts that came into force on 1 April 2013 dramatically limited the number of initial cases (applications to the Home Office and appeals to the First-tier Tribunal) that lawyers could bring. Most lawyers in Manchester, London, and Birmingham have an allocation of c.100 cases. These tend to get used for complex asylum cases involving a large volume of work[9] and are thus not available for trafficked persons and survivors of domestic violence save where practices specialise in these types of cases. These are cases that engage Articles 3, 4, 5 and/or 8 of the Convention.

20. Paragraphs 32(2) and (3) of Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2013 provides that trafficked persons seeking compensation in the civil courts and under employment law are eligible for legal aid. This is in line with Article 15(2) of the Council of European Convention on Action against Trafficking in Human Beings. However, under the Legal Aid Agency's Standard Civil Contract[10] these cases can only be brought using the "Miscellaneous" allocation of cases. Each organisation with a legal aid contract can bring no more than five cases in the miscellaneous category: across all the cases, not just trafficking cases, which can be funded under "miscellaneous". Thus in practice it is very difficult for trafficked persons to find someone to represent them in such cases.

Subsequent to the Government response to the consultation

21. Given the exceptional funding situation as described, it is reasonable to conclude that in the overwhelming majority of cases, if a case is not within the scope of legal aid it will not be funded. The *Civil Credibility Impact Assessment* (in connection with the removal of funding for borderline cases) identifies that the following assumption was made in the *Transforming Legal Aid* consultation:

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

22. Those who can afford to pay privately are not eligible for legal aid. As to the rest, the assumption, for which no evidence is provided nor argument proffered, is that legal aid makes no difference; that legal representation makes no difference. That is not compatible with judgments of the European Court of Human Rights in cases such as *Airey v Ireland*[11] and *P, C and S v United Kingdom*[12] .

[9] If the work on a case exceeds three times the nominal number of hours represented by the fixed fee, it is paid at an hourly rate. This is known as reaching the "escape" threshold.
[10] See *Category Definitions* therein.
[11] (1979-80) 2 EHRR 305.
[12] (2002) 35 EHRR 31.

23. The *Transforming Legal Aid: next steps* Government response to the consultation shows that the Government has moved in various areas highlighted by ILPA in its response to the *Transforming Legal Aid* consultation. However, much of this movement appears grudging, it gives a minimum and in many cases not enough to address the problem with access to justice identified. This we develop below.

The residence test

Incompatible with the European Convention on Human Rights

24. The residence test purports to limit legal aid to those with a "strong connection" with the UK. The test is whether a person is lawfully resident and can show 12 months continuous[13] lawful residence at some stage in the past. Entitlement to legal aid and access to justice is made dependent upon where a person is in the world and on their personal status, regardless of their means and of the strength of their case. This risks denying the protection of the European Convention on Human Rights to persons within the jurisdiction.

25. The rationale for the changes in scope brought about by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, and for the areas of work left in scope, was that only the most serious cases, for example involving life, liberty, homelessness and abuse of power by the state, would be eligible for legal aid.[14] These are the very cases that will be affected by the residence test.

26. The Government said in the 2011 consultation paper *Proposals for the reform of legal aid in England and Wales*

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

27. The residence test will deny many who have lost their entitlements to legal aid following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 access to this backstop protection.

28. The challenge to a refusal of funding is by way of judicial review, which itself would also be subject to the residence test. Thus justice would be hermetically sealed against those subject to the test giving rise to a risk of breaches of Article 13 read with the rights in question.

29. In cases that involve the implementation of European Union law the residence test risks violating Article 47 of the Charter of Fundamental Rights of the European Union, which provides that legal aid shall be made available to those who lack sufficient resources to ensure effective access to justice in the implementation of EU law. Article 21prohibits discrimination, Article 21(2) making specific reference to discrimination on the grounds of nationality.

30. Persons outside the UK fail the residence test. Many of the cases affected involve allegations of breaches of Article 3, allegations of torture and ill-treatment by British forces abroad. It is

[13] See *Transforming Legal Aid: next steps,* Ministry of Justice, 5 September 2013, paragraph 2.16, breaks of up to 30 days, at a time or in aggregate, will be permitted.
[14] Ministry of Justice Consultation, *Proposals for the Reform of Legal Aid in England and Wales*, November 2010, at paragraphs 4.7-4.29.

central to respect for the UK's obligations under the Convention that cases such as those brought by the family of Baha Mousa[15] and by Binyam Mohamed can be heard.

31. There are also risks of breaches of Articles 2 and 3 and of other rights if claims for wrongful removal or assault in the course of removal cannot be brought. We have seen the wrongful removal of British citizens and others with a right of abode because their status has not been recognised, cases where persons have been wrongly removed and faced persecution on return and cases where it has taken over a year to effect the return of a person wrongfully removed[16]. In one case a British citizen was removed to Pakistan, whither he had never been, because his nationality was not understood. We have seen a British citizen with learning disabilities removed although he had in his possession evidence that demonstrated his nationality, because he failed to produce it and no one else sought it. We recall the statement of the Court of Appeal in *R (Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710:

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

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

33. There is a risk of breaches of Articles 8 and 6. Applications for leave to enter the UK to have contact with a child depend on either agreed contact or on a court order. There are also occasions when applicants seek to enter the UK on a limited basis to progress an application for a contact or residence order. In cases where there is no order or agreement in place the immigration application by the absent party will fail unless the proceedings have already commenced. In those circumstances, the absence of funded representation may make the commencement or progressing of proceedings impossible. Similarly with cases of persons tricked into leaving the UK by partners who then report to the Home Office that the relationship has broken down, leaving them stranded and separated from children. Differing levels of wealth in different countries mean that litigation in the UK may be prohibitively expensive for some outside the UK.

34. As to persons in the UK, if a person has no or limited entitlements to particular treatment or a particular service etc. because of their immigration status then they will fail the merits test for legal aid in any event. The residence test would deny them the right to challenge a failure to treat them in the way in which they are entitled to be treated under UK law. Where the failure is in respect of a right protected under the Convention this amounts to a breach of Articles 13 and 14 read with the substantive right in question for a person and may amount to a breach of the substantive right.

35. In Annexe K to the Transforming Legal aid consultation it is stated:

> *Where we have identified a risk of disproportionate impact, we consider that such treatment constitutes a proportionate means of achieving a legitimate aim for the reasons set out above and in the paragraphs below.*[17]

[15] *Al-Skeini and others v Secretary of State for Defence* [2007] UKHL 26.
[16] See e.g. *D v SSHD* [2010] EWHC 2110 (Admin). D was returned to the UK and subsequently won his application to be allowed to stay. He gave evidence for the Crown in a trial in which a gang leader was convicted for murder.
[17] Annexe K, paragraph 4.1.

36. This uses the language of Article 19(2) of the Equality Act 2010. But it does not use the language of the Convention. Article 14 states

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

37. The approach taken fails to deal with non-derogable rights or rights such as Article 5 to which only limited exceptions are permitted. The statement is presented as a catch-all, regardless of the particular impact in question. The detailed shadow impact assessments prepared by the No Resource to Public Funds network[18] demonstrate the extent to which the proposals give rise to risks of breaches of Article 14 read with the other rights of the Convention.

38. We recall the statement of Lord Nicholls of Birkenhead in the House of Lords case of *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 (21 June 2004):

> *Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced.*

39. The residence test should be rejected in its entirety as incompatible with human rights.

Those affected by the test

40. The purported justification for the test is worthy of comment. The test excludes persons who would be identified by the proper application of human rights law as having a "strong connection" to the UK[19].

41. Immigration cases carry a particular risk because an error in determining someone's immigration status may cut them out of defending or asserting other rights and entitlements, but the residence test bites on all areas of law that remain within the scope of legal aid. Thus, although the European Court of Human Rights has held that immigration cases are outwith the scope of Article 6[20] of the Convention, the residence test carries with it the risk of breaches of Article 6 in respect of rights that persons who fail the test seek to defend.

42. Those denied legal aid as a result of the residence test will include British citizens, settled persons and other immigrants because they cannot evidence their status[21]. Some will be turned away because non-immigration specialists are unable to satisfy themselves of the person's eligibility. The *Transforming Legal Aid* consultation paper is simplistic[22]: the Home Office guidance for employers on preventing illegal working runs to some seven documents[23], the

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[18] No Recourse to Public Funds Network: *Shadow Impact Assessment and Shadow Financial Impact Assessment*, with Annexes, available at http://www.nrpfnetwork.org.uk/policy/Pages/default.aspx

[19] See *Boultif v. Switzerland* (no. 54273/00); *Maslov v. Austria* (application no. 1638/03). *Moustaquim v Belgium* (Application no. 12313/86).

[20] *Maouiaa v France* Application 39652/98 [2000] ECHR 455 (5 October 2000).

[21] British and EEA passports are not stamped on entry to or exit from the UK. A person who has made an application to the Home Office for an extension of leave before their leave expired but who has not received a decision on that application before the date on which their leave would otherwise have expired will benefit from leave under s 3C of the Immigration Act 1971. Such persons may be able to show nothing but a copy of a document that appears to confirm that their leave has run out. The Home Affairs Select Committee's March 2013 report *Work of the UK Border Agency*, HC 792, identified that some 55,000 applications had not been put onto the Home Office database which would thus not yield an accurate answer about status were it possible to check it.

[22] See Footnote 30 in the consultation paper.

[23] Available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/

longest of which is 89 pages long[24] and which are supported by a helpline. Still employers rely on lawyers to help them interpret it.

Failure to respect the will of parliament

43. Many immigration, as opposed to asylum, cases have already been removed from the scope of legal aid by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Those that remain do so because they were considered to be of particular importance. The Government expressly preserved legal aid for challenges to immigration detention[25], cases before the Special Immigration Appeals Commission[26] and domestic violence in family cases, while it was parliament that ensured that legal aid was retained for persons under immigration control subject to domestic violence[27] and for trafficked persons[28].

44. The proposal for a residence test only nine days after the bill became law casts doubt on the Lord McNally's statement[29], made when reflecting on the amendment in the names of the Lords Pannick, Woolf, Faulks and Hart of Chilton that would have placed the Lord Chancellor under a duty to secure access to justice, that "…the Bill is honest about what it does".

45. The Government's proposed exemptions from the residence test in its response to the Transforming Legal Aid consultation *Transforming legal aid: next steps for reform* privileges those categories for which it had chosen to retain legal aid over those where it was forced to do so by parliament. This suggests that those parts of the Bill that did not come from the Government stable are being treated as less the expression of the will of parliament than those that did.

Residence

46. It appears from the *Transforming Legal Aid* consultation papers that persons on temporary admission are not to be treated as resident. How long a person spends on temporary admission is a matter of how the Home Office allocates its resources and of its efficiency, it is not something under the control of the migrant. The Government is thus in a position to keep individuals from eligibility for legal aid, including for challenges to its own actions.

For 12 months

47. Within the UK, the one year wait to be eligible for legal aid puts people outside the time limit for bringing claims under the Human Rights Act (one year less one day from the incident giving rise to the claim[30]) which may have the effect of denying a remedy for breach of a right protected under the European Convention on Human Rights, in violation of Article 13 of that Convention which enshrines the right to an effective remedy.

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

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[24] *Comprehensive guidance for employers on preventing illegal working*, June 2012.
[25] The Legal Aid, Sentencing and Punishment of Offenders Act, Sched 1, Part 1, paragraphs 25 to 27.
[26] The Legal Aid, Sentencing and Punishment of Offenders Act, Sched 1, Part 1, paragraph 24.
[27] The Legal Aid, Sentencing and Punishment of Offenders Act, Sched 1, Part 1, paragraphs 28 to 29.
[28] The Legal Aid, Sentencing and Punishment of Offenders Act, Schedule 1, Part 1, paragraph 32.
[29] HL Report, 5 Mar 2012: Columns 1569-1572. See also HL Report 27 Mar 2012: Column 1253.
[30] Human Rights Act 1998, s 7(5).

Particular groups

49. The government response to the consultation, *Transforming Legal Aid: next Steps* identified that the residence test would not apply to categories of case which broadly relate to an individual's liberty, where the individual is particularly vulnerable or where the case relates to the protection of children[31].

50. As described above, a law that denies a person with a strong case the right to bring a case on the grounds of personal status or geographical location within the jurisdiction is inimical to human rights law. The exceptions cannot cure this fundamental flaw in the residence test. However, we address them here because they provide an opportunity to highlight the iniquities of the residence test. There are two types of modification. The first looks to a type of legal challenge, the second to a type of litigant.

Serving members of the armed forces

51. Serving members of Her Majesty's UK armed forces and their immediate families are not subject to the residence test. This dates from the original *Transforming Legal Aid* paper[32]. But the moment a person leaves the armed forces they and their immediate family members will cease to be eligible for legal aid. We assume that this will be the case if a person ceases to be the immediate family member of a member of the armed forces whatever the reason for the relationship breakdown.

Asylum, refugees, the stateless and persons in need of international protection

52. The initial consultation proposed an exception to the residence test for persons seeking asylum and the Government has clarified in Annexe B to the consultation response[33] that that the exception from the residence test for persons seeking asylum will extend to their getting help with preparing and submitting a fresh claim. Where the Home Office decides that their further submissions do not amount to a fresh claim, legal aid would continue to be available in respect of a judicial review of that decision (subject to means and merits tests). It is unclear whether such persons will be eligible for legal aid for their fresh claim only or whether, like other persons seeking asylum, they will be eligible for legal aid for any legal matter remaining in scope. This could usefully be clarified. Person with no lawful status are reliant on basic entitlements and fundamental rights and it is vital that they be able to enforce these.

53. Problems remain for those recognised as being in need of international protection. The original proposal was that once an asylum seeker is granted leave, they would no longer qualify under the exception for asylum seekers. ILPA argued that this was contrary to the 1951 UN Convention Relating to the Status of Refugees which provides:

> *Article 16*
>
> …
>
> *2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance….*

54. We have met with partial success. "Successful asylum seekers" will be eligible for legal aid after 12 months from the date of the claim for asylum instead of, as originally proposed, the date of

[31] In the limited sense described below.
[32] At paragraph 3.55.
[33] Paragraph 118.

recognition as a refugee[34] . However, it remains the case that a person with an overwhelmingly strong case for recognition as a refugee, recognised almost immediately, would be kept out of their rights under Article 16 for nearly a year subsequent to recognition, whereas a person who succeeds after numerous appeals might never cease to be eligible for legal aid.

55. In April 2013 the UK introduced immigration rules whereby a person can be granted leave to remain in the UK on the basis of their status as a stateless person[35]. Article 16 of the 1954 UN Convention Relating to the Status of Stateless Persons is in the same terms as Article 16 of the Refugee Convention. **The Committee could usefully bring this to the attention of the Home Office and ask for the same approach to be applied to stateless persons as is to be applied to refugees.**

56. It is unclear whether a "successful asylum seeker" includes a person granted humanitarian protection or discretionary leave following a claim for asylum. Conditions for both grants include identification of a risk of a breach of a person's human rights. Similar questions arise if the person is granted leave on the basis of a risk of a breach of Article 8 of the European Convention on Human Rights. **Again this is a matter the Committee could usefully clarify with the Home Office.**

57. At paragraph 12 of Annexe B the Government goes on to say:

> *126.We will also make limited exceptions for certain judicial review cases for individuals to continue to access legal aid to judicially review certifications by the Home Office under sections 94* [Appeal from within the United Kingdom: unfounded asylum or human rights claim] *and 96* [Earlier right of appeal] *of the Nationality, Immigration and Asylum Act 2002*

58. Section 94 deals with those whose claim is certified as "clearly unfounded" denying them a suspensive (i.e. prior to removal to the country fled) appeal. It includes cases where a whole country is designated as generally safe. In *JB* (Jamaica) v SSHD [2013] EWCA Civ 666 (12 June 2013) the Court of Appeal rejected the designation of Jamaica as a safe country given the treatment of gay men and lesbians there. The case is now proceeding toward the Supreme Court. Challenges to such certificates by way of judicial review are generally brought on the basis that the out of country appeal is not a sufficient remedy because the person will face persecution or breaches of their human rights if returned.

59. Section 96 deals with certification of matters that "could" have been raised at an earlier appeal, regardless of whether that appeal was ever lodged and regardless of whether legal aid was available for that appeal. The effect of a certificate is to deny any right of appeal. Challenges to such certificates by way of judicial review are generally brought on the basis that a right of appeal, on an in-country basis, is required by way of remedy because the person will face persecution or breaches of their human rights if returned.

60. **The Committee could usefully clarify the ambit of the exception under these sections.**

61. We draw particular attention to those individuals who fall within, or are treated as falling within, the Dublin Regulation[36] which allows them to be removed to another Member State of the European Union on the basis that that Member State should decide the claim for asylum. These claims are normally certified under Schedule 3 to the Asylum and Immigration

[34] Paragraph 2.15.
[35] HC 395, paragraphs 400ff.
[36] Regulation 2003/343/EC.

(Treatment of Claimants Act, etc.) Act 2004 preventing an in-country appeal on human rights grounds. Further, those who have previously been refused asylum in another Member State have been held to be failed asylum-seekers (as opposed to asylum-seekers)[37]. There is no right of appeal on the basis of risk of on-ward *refoulement* to a country outside the EU because the Secretary of State or any court of tribunal is bound by the 2004 Act to consider that the other Member State would not send the individual to a third country otherwise that in accordance with the *non-refoulement* provisions of the Refugee Convention and the provisions of the European Convention on Human Rights[38], although there is in principle a right of appeal out-of-country, where there has been a decision to certify a claim on human rights grounds in respect of the human rights matters (other than those arising by virtue of being sent to a third country)[39].

62. The only challenge is by way of judicial review. It is not clear whether the exception for persons seeking asylum covers Dublin returnees who seek to challenge their removal on the basis of a risk of onward *refoulement* from the EU Member State of return and/or on the basis of other breaches of human rights[40]. There is a risk of the denial of an effective remedy under Article 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union, which has direct effect for the purposes of UK law. As regards matters falling within the scope of EU law (such as returns under the Dublin Regulation), Article 47 of the Charter also includes the right to a fair hearing and the guarantee that legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

63. After 1 April 2013, the newly formed Legal Aid Agency refused funding in a number of in third country cases where the proposed challenge was to the third country certificate as well as to removal directions. The refusal of legal aid was based on the argument that the case was excluded under paragraph 19 (6) of Schedule 1, Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Legal Aid Agency faced judicial review and backed down. **The Committee could usefully clarify whether it is intended that challenges to "Dublin" removals continue to be funded.**

D

D was detained and subject to removal directions under the Dublin Regulation. She was held not to have been trafficked because of decisions about her credibility which were entirely based on a lack of understanding of trafficking indicators and patterns. She has now been accepted to be a trafficked person.

C

C's age was disputed. She was pregnant as a result of rape by her trafficker and being looked after by a relative. It was proposed to remove her on third country grounds to the country into which she had been trafficked, separating her from the relative. The decision that there were not reasonable grounds for thinking that she had not been trafficked was challenged and overturned but she then got a negative "conclusive" grounds decision. "Dublin" removal was again proposed even though she still lived with the relative and had a young baby.

64. Under section 83 of the Nationality, Immigration and Asylum Act 2002, *inter alia,* separated children, refused asylum and granted leave for less than 12 months have no right to appeal the refusal of recognition of a refugee. If the proposals are implemented then, although they may

[37] *MB et ors v Secretary of State* [2013] EWHC 123 (Admin).
[38] Asylum and Immigration (Treatment of Claimants Act, etc.) Act 2004, sched 3, Part 2, paragraph 3.
[39] Asylum and Immigration (Treatment of Claimants Act, etc.) Act 2004, sched 3, Part 2, paragraph 5(4).
[40] See *MSS v Belgium and Greece* (Application no. 30696/09) 21 January 2011; see also *NS v Secretary of State* C-411/10 (CJEU).

later be recognised as refugees, for 12 months from the grant of leave they will have no entitlement to legal aid. This was the subject of the Joint Committee's recommendation at paragraph 120 of its report *Human Rights of Separated Migrant Children and Young people in the UK*[41]

Babies under 12 months old

65. In the response to the consultation the Government has conceded that such babies will continue to be eligible for legal aid despite not having 12 months' lawful residence. However, they must be lawfully resident at the time of applying for legal aid.

66. Given that a 12 month residence requirement is impossible for a tiny baby to fulfil, it is likely to have been deemed unlawful in any event. Cases where such tiny babies could expect to be represented tend to be cases involving Articles 2, 3 and 8: care proceedings where the child was identified, even before birth, as being at risk of harm in the family. Other exemptions, discussed below may offer more protection than does this exception but they will not cover, for example, public law challenges that might also be brought against authorities that have failed the baby.

Detention cases

67. In the response to the consultation the Government conceded that cases that will not be subject to the residence test are those under the following paragraphs of Schedule 1, Part 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2013:

Paragraph 5:	Mental Capacity Act challenges
Paragraph 20:	habeas corpus applications
Paragraph 25:	challenges to immigration detention
Paragraph 26	challenges to refusals to grant temporary admission
Paragraph 27	challenges to conditions on release from detention
Paragraph 19	judicial review of the lawfulness of immigration detention

68. A striking omission from this list is paragraph 22: claims in tort or damages claims for breaches of the European Convention on Human Rights, This fails to respect Article 13, the right to an effective remedy, read with the right engaged the particular case (e.g. Article 5, Article 3).

69. Another omission is paragraph 21 of Part 1 of Schedule 1 which deals with claims for damages resulting from abuse by a public authority of its position or powers. These omissions will cause particular alarm following coverage in the Guardian and The Observer newspapers of allegations of rape, abuse and ill-treatment at Yarls Wood removal centre[42]. It was suggested in those cases that an attempt was made to remove the victims from the jurisdiction before they could being a case. Such allegations are not new. We recall for example the comments of Mr Justice Munby in *R (Karas and Miladinovic) v Secretary of State for the Home Department* [2006] EWHC 747 (Admin):

> *I am driven to conclude that the claimants' detention was deliberately planned with a view to what in my judgment was a collateral and improper purpose - the spiriting away of the claimants from the jurisdiction before there was likely to be time for them to obtain and act upon legal advice or apply to the court. That purpose was improper. It was unlawful. And in my judgment it renders the detention itself unlawful.*

[41] HL Paper 9, HC 196.Frist report of session 2012-2013, ordered to be printed 21 May 2013.
[42] *Yarl's Wood affair is a symptom, not the disease*, Nick Cohen, The Observer, 14 September 2013.

> *What the present case and others like it reveal, in my judgment, is at best an unacceptable disregard by the Home Office of the rule of law, at worst an unacceptable disdain by the Home Office for the rule law, which is as depressing as it ought to be concerning.*

70. A recent case revealed that the Home Office and its contractors had been operating an unlawful policy on the use of force on pregnant women and children in immigration detention[43]. Another recent case exposed "disturbing" evidence of systemic failures concerning the detention of survivors of torture[44].

71. We are very far from the 2010 consultation[45]:

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

Trafficked persons

72. In the response to the consultation the Government conceded that trafficked persons falling within paragraph 32 of Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will continue to benefit from legal aid. This will assist those trafficked persons falling within the scope of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. But as debated during the passage of that Act[46], not all trafficked persons do. For example, those who have just come to the attention of the authorities and are waiting for a decision on whether there are reasonable grounds to think that they have been trafficked. In the words of the Baroness Hamwee:

> *If legal aid is not available until there has been a reasonable-grounds decision, will the Border Agency put the immigration case on hold? In the meantime, what happens if the individual is in detention or is without housing and food?* [47]

73. Now these trafficked persons will be cut out of judicial review which is the only way to challenge a decision that there are not reasonable grounds for considering that a person has been trafficked as well as being used for challenges such as age disputes and failures to provide support.

74. The protection for trafficked persons extends to certain immigration and employment cases and actions against the trafficker but not to, for example, claim under paragraphs 21 and 22, as described under detention above, or for community care services under paragraph 22: claims in tort or damages claims for breaches of the European Convention on Human Rights. This fails to respect Article 13, the right to an effective remedy, read with the right engaged the particular case (e.g. Article 5, Article 3). There is a risk of a breach of the UK's obligations under Article 4 of the European Convention on Human Rights, including its positive

[43] *Chen and Others v SSHD* CO/1119/2013.
[44] *R (EO, RA, CE, OE and RAN) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin).
[45] *Op. cit.*
[46] See e.g. HL Report 7 Mar 2012 : Column 1798-1813, 27 Mar 2012 : Column 1291-2.
[47] HL Report 27 Mar 2012 : Column 1292.

obligations[48] and of a violation of Article 47 of the EU Charter of Fundamental Rights, including when read with the EU Directive on Trafficking in Human Beings[49]. The case of *OOO*, described below, would not be covered and OOO herself would fail the residence test.

***OOO & ors* [2011] EWHC 1246 (QB)**
The claimants succeeded in establishing that the police had violated their Article 4 rights by failing to investigate their allegations. At the time of the proceedings the claimants were a mixture of those who were still seeking asylum and one (OOO) who had been granted status by the time she applied for funding but who had had it for less than a year.[50]

W
W was accepted to meet all parts of the definition of trafficking definition, having been exploited for domestic servitude and forced prostitution, yet deemed not to be a victim because she had "moved on" by continuing to attend therapy.

F
F was trafficked for domestic servitude. Her visa expired in August 2012. Her traffickers (who had control of her passport, and her movements. made an in-time application for an extension of her visa. In November 2012 she escaped her traffickers, who wrote then to the Home Office in her name, withdrawing the application and saying that she wanted to return home. In response, the Home Office sent her application papers and her passport to her previous employers' address, in December 2012 - despite having been notified in writing that all correspondence should go to Kalayaan, a charity working with migrant domestic workers. Her Embassy was unable to obtain her passport from the previous employers. She was now working for a new employer - but unlawfully, since her application had been withdrawn with her knowledge or intention, as Kalayaan discovered when they made enquiries of the Home Office. A specialised organisation providing legal advice to trafficked persons helped her to pursue a claim against her traffickers in the Employment Tribunal, and an out of time application for further leave as a migrant domestic. This was granted because of compassionate circumstances. At no stage was F referred to eh National Referral Mechanism for a decision that she was a trafficked person. She preferred to be self-supporting since her family was dependent on her salary.

Had she gone to her lawyers after 1 April 2014, to get legal aid she would have to have been referred to the National Referral Mechanism which would have delayed her application for a visa by possibly several months. Meanwhile she would have remained unlawfully in the UK, and lost an opportunity to remain self-supporting by work. Delay would also have prejudiced the visa application. If the residence test were implemented then were she to receive a negative 'reasonable grounds' decision, she would have no way of challenging that by way of judicial review, because the residence test would kick in.

A
A is a trafficked person. He fled his country during a family feud which cost the life of his brother and saw him violently attacked. The agent who helped him to flee in 2009 took his passport and he was made to undertake forced labour for the next five years in a restaurant, working seven days a week. He slept on a mattress on the floor of the food store room and was never paid more than £60 a week. He was threatened that immigration would remove him. He met his partner at a the restaurant and went to live with her. They have two children and expect a third. She and the children have recently been granted settlement. His case is complex because he escaped trafficking some time ago. He needs advice on his options. Even if he were to claim asylum there is currently no legal aid for his claim based on Article 8. An application for exceptional funding was made to obtain evidence in support of his Article 8 claim while the decision under the National Referral Mechanism is awaited and make the appropriate applications insofar as these were not asylum cases and thus out of scope. Exceptional funding was refused and this was upheld on review. An

[48] (*C.N. v. the United Kingdom*, (Application no. 4239/08) e.g. paragraph 66; *Siliadin v. France*, (Application no. 73316/01) e.g. paragraph 112; and *C.N. and V. v. France*, Application no. 67724/09) e.g. paragraph 105.
[49] Directive 2011/36/EU.
[50] OOO has confirmed that she is happy to be used as an example. A court order remains in place to protect her identity.

application for judicial review of the Legal Aid Agency was prepared. The Agency maintains its decision. After several attempts, emergency legal aid funding to challenge the Legal Aid Agency's refusal of exceptional funding was obtained; the case is pending. It has taken almost six months to get his case for access to legal aid before a judge - although Article 12 of Directive 2011/36/EU, the Directive of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims states that victims of trafficking are entitled to 'early legal advice'. The residence test would make it impossible to bring the challenge to the refusal of funding.

Lydia

Lydia was referred to her representatives in March 2013 by Kalayaan, a charity assisting migrant domestic workers. She had been trafficked to the UK from the Philippines for the purposes of domestic servitude and forced to work up to 15 hours a day, 7 days a week. Lydia's passport was taken from her and she was not allowed to leave the house unaccompanied. She was paid £139 per month paid into an account in her home country. In late 2011, when the traffickers travelled abroad Lydia escaped. She obtained new employment but her new employer similarly exploited her. Complaints met with threats of denunciation to the police and other authorities, as an illegal worker. When she sought to leave she was subjected to both verbal and physical abuse and imprisoned. When two days later the door was unlocked so that the employer could go to work Lydia, having taken employers' children to school, fled.

Lydia issue breach of contracted and protection from harassment proceedings against her second employer, these complaints to be heard in mid-2014. Under the post 1 April 2013 funding regime Lydia would not receive legal aid as only complaints raised directly against the trafficker will be funded. If the proposals were implemented Lydia would thus also not benefit from the exemption from the residence test.

Victims of domestic violence and forced marriage

75. Victims of domestic violence and forced marriage will be entitled to legal aid under the following paragraphs of Part 1of schedule 1:

Paragraph 11	Non-molestation orders, injunctions, inherent jurisdiction of the High Court to protect an adult
Paragraph 12	Family law matters where a person is or has been a victim or at risk of being a victim of domestic violence
Paragraph 13	Family law orders for an adult where a child is at risk of abuse from another adult
Paragraph 16	Forced marriage protection orders
Paragraph 28	Immigration applications under the domestic violence rule
Paragraph 29	EU Free movement law matters where the applicant is a survivor of domestic violence

76. The situation is analogous to that of trafficked persons described above. This will assist those survivors of violence persons falling within the scope of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. But as debated during the passage of that Act[51], not all survivors of violence do. The need to provide evidence of domestic violence is proving a barrier in practice with many GPs not providing letters in support, partly because, it has been suggested[52] the Legal Aid Agency is asking them to warrant more than they feel able to say as to the cause of injuries. Other GPs are imposing charges: plans to ensure adequate communications and agreement prior to the coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2013 not having resulted in these problems being averted[53].

[51] See e.g. HC Report 17 Apr 2012 : Column 218-252.
[52] Law Society Legal Aid Agency Civil Contracts Consultative Group 9 September 2013.
[53] *Ibid.*

77. Persons under immigration control who are not applying under the domestic violence rule, such as wives of refugees whose relationships break down because of domestic violence, are not entitled to legal aid. The difference the proposals will make to them is that they will no longer be able to obtain legal aid for judicial review. This will affect, *inter alia,* their ability to challenge refusals of support under the destitute domestic violence scheme which aims to give survivors of domestic violence access to welfare benefits while their situation is sorted out. Many persons who flee domestic violence so carrying nothing and those without family or support networks may be destitute. Legal aid may be denied to persons at risk of violation of rights under Articles 2, 3 and 8 of the European Convention on Human Rights, read alone and with Article 13.

Protection of children cases

78. This[54] will preserve legal aid under the following paragraphs of Part 1of schedule 1:

Paragraph 1	care proceedings
Paragraph 3	civil actions relating to abuse that took place when a person was a child
Paragraph 9	proceedings involving the inherent jurisdiction of the High Court in relation to children (wardship etc.)
Paragraph 10	Cases involving child abduction
Paragraph 15	Children who are parties to family proceedings and
Paragraph 23	Cases involving clinical negligence & severely disabled children

79. This is very far from a comprehensive system of legal aid for children and does not in any way address the concerns ILPA raised in its response to the Joint Committee's Enquiry into the human rights of migrant children and young people in the UK. For all the reasons set out in that response, ILPA continues to urge the Joint Committee to ask the Government to make use of its powers under section 9(2) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to bring immigration cases of separated children back into scope. There is no legal aid for cases under section 17 of the Children Act 1989[55]. There is no legal aid for age disputes. There is no legal aid for other public law challenges to the treatment of child by authorities with responsibility for them. Meanwhile, those who have not yet spent 12 months in the UK, whatever their immigration status, cannot bring housing, special educational needs, or community care cases.

80. In *P, C and S v United Kingdom* (App.No.56547/00) (2002) 35 EHRR 31 the European Court of Human Rights recalled that:

> *Whilst Article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8*[56].

81. Nothing in that statement limits it to care proceedings. In the cases of children, understanding of Article 8 is informed by consideration of the 1989 UN Convention on the Rights of the Child. The residence test is not compatible with Articles 3 and 12 of the UN Convention on the Rights of the Child. The Supreme Court in *ZH (Tanzania) v Secretary of State* [2011] UKSC 4 drew express attention to the obligations on those deciding cases involving children to ensure that Article 12 of the UN Convention on the Rights of the Child, the right of the child

[54] *Transforming Legal Aid: Next steps*, Annex B: Response to consultation, paragraphs 125-126.
[55] See *R (KA) v Essex County Council* [2013] 1 WLR 1163, *R* (*Clue*) *v. Birmingham City Council* [2011] 1 WLR 99.
[56] Paragraph 119 of the judgment.

to be heard, is respected[57]. The UN Committee on the Rights of the Child's *General Comment No. 6 on Treatment of Unaccompanied and Separated Children Outside their Country of Origin* (2005) says that when such children are involved in administrative or judicial proceedings they should be given legal representation.[58] Similarly, the Committee of Ministers of the Council of Europe have produced guidelines on child-friendly justice which include:

> *3.7 Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.*
>
> *3.8 Children should have access to free legal aid, under the same or more lenient conditions as adults.*[59]

Special Immigration Appeals Commissions

82. Legal aid has been preserved for these cases (paragraph 24 of Schedule 1 Part 1).

Summary of the effects of the residence test

83. Within the UK, those who will be excluded by the residence test include the following. They will not be eligible for legal aid in any area of law:
    - persons brought to the UK as children, some still children, some in their 50s or 60s and unaware that their country of origin's independence from the British empire affects their immigration status;
    - those whose claims for asylum have failed, but who cannot be removed;
    - British citizens resident abroad who flee to the UK to escape domestic violence;
    - persons who fall ill with a mental illness while in the UK and are detained under Mental Health Act powers and confined in hospital;
    - those who made a clandestine entry or whose leave has expired, who are unknown to the authorities, including those facing removal or deportation.
    - those in the UK without lawful leave who have come to the attention of the authorities including those facing removal or deportation. This class will include persons who have lived in the UK all or most of their lives, and persons with British citizen spouses and children. Those partners and children would be able to bring a human rights claim in the country court under section seven of the Human Rights Act 1998 where their rights are affected by the treatment of the person under immigration control;
    - those in the first year of their visa or with leave for less than one year. This includes persons who fully anticipate remaining in the UK for the rest of their lives and taking British nationality (e.g. spouses and partners, children joining parents). One affected group would be those whose claims for asylum have been refused but who have been given limited leave of less than one year, for example separated children as described above [60];
    - EEA nationals in their first year of living in the UK;
    - trafficked persons prior to a decision that there are reasonable grounds for thinking that they have been trafficked;

[57] Paragraphs 34 to 36 of the judgment. See also the Lord Chancellor's comments HC Report 21 May 2013, col 1042.
[58] CRC/GC/2005/6 1 September 2005, paragraph 36.
[59] Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, adopted 17 November 2010 at the 1098th Meeting of the Ministers' Deputies.
[60] Nationality Immigration and Asylum Act 2002, s 83. See above.

- survivors of domestic violence who do not fall within the domestic violence rule or the provisions made for EEA nationals in the Legal Aid Sentencing and Punishment of Offenders Act 2012. Immigration applications under the domestic violence rule can only be made by a person with limited ("probationary") leave as a spouse, thus the rule is generally used by persons who have been in the UK for a limited period;
- those who are British citizens but have never spent a continuous period of 12 months in the UK or cannot prove that they have.

The residence test will deny legal aid for, *inter alia*:

- immigration cases including challenges to unlawful refusals to transfer from one immigration category to another. These may result in the person's having to leave the UK and in breaches of Article 8 of the European convention on Human Rights;
- housing and community care cases, including homelessness, support for persons who have been trafficked, support for those whose claims for asylum have failed but who cannot be removed, and community care cases about support for children and families[61]. These may result in breaches of Articles 3, 6 and 8. Often in such cases the very issue to be decided is whether the person has an immigration status that renders them eligible for assistance. Where persons claim a status that arises by operation of law, such as a parent from a non-EEA state who cares for a British citizen child (such a parent may derive a right of residence directly from EU law)[62] there is a risk of persons being unable to produce a document proving their right of residence that would enable them to secure funding to challenge a denial of access to social assistance by a local authority that also (wrongly) does not recognise an automatic right of residence;
- claims for damages for false imprisonment. These may result in breaches of Article 3 read with Article 13;
- cases of mistreatment by the police, escorts or others. These may result in breaches of Article 3 read with Article 13;
- age dispute cases and other challenges to local authorities brought by separated children whose asylum claim has finally been determined[63]
- public law cases;
- family law cases;
- actions against the Home Office for misfeasance in public office, etc.

Restrictions on legal aid for those in prisons

84. Those held in prisons are not limited to persons on remand or serving a sentence. They include persons held under Immigration Act powers at the end of a sentence. Their detention is without limit of time and without any oversight of the courts; the detainee only appears before a court or tribunal if s/he is able to instigate this. Such persons are not infrequently held for years[64].

[61] See e.g. *R (Clue) v Birmingham CC [2010] EWCA Civ 460.*
[62] See e.g. *Pryce v LB of Southwark [2012] EWCA Civ 1572.*
[63] See e.g. *R (J) v Secretary of State for the Home Department [2011] EWHC 3073 (Admin), R (N) v LB of Barnet [2011] EWHC 2019, AAM v Secretary of State for the Home Department [2012] EWHC 2567, Durani v SSHD [2013] EWCHC 284 (Admin). On the difficulties separated children face, see Navigating the System: Advice provision for young refugees and migrants,* Coram Children's Legal Centre, 2012.
[64] See *The effectiveness and impact of immigration detention casework: A joint thematic review,* Her Majesty's Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration, December 2012, available at http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/thematic-reports-and-research-publications/immigration-detention-casework-2012.pdf (accessed 28 May 2013).

85. The absence of legal aid for such persons to challenge prison conditions gives rise to a risk of breaches of Article 3, the prohibition of torture or inhuman or degrading treatment or punishment. The Government has four times in two years been found guilty of breaches of Article 3 of the European Convention on Human Rights for its treatment of foreign national ex-offenders with mental health problems, although to date the worst problems have consistently occurred in immigration removal centres rather than within the prison estate[65]. Mentally ill persons held under Immigration Act powers are at risk in prisons if there is no legal aid to bring cases about prison conditions, including failure to secure the services of an interpreter to communicate with them. As described above, we have examples of their being refused exceptional funding and none of their being granted such funding. These cases can also give rise to a breach of Article 1 of the Charter of Fundamental Rights of the European Union, the right to respect for human dignity. We recall the statement of the then Chief Inspector of Prisons, Dame Anne Owers*:*

> *The third essential building block of provision is to ensure that all foreign nationals are prepared for their eventual removal or release. All of them need to know, as early as possible in sentence, whether or not it is proposed to deport or remove them. They need to have access to appropriate regimes: not only to reduce the risk of reoffending, wherever they are released, but also because safety, security and decency within prisons depend upon prisoners having access to purposeful activity*[66].

86. There are also risks of breaches of Article 5. The proposals would cut legal aid for matters such as categorisation, segregation, dangerous and severe personality disorder referrals and assessments, and resettlement. These matters are all of relevance to the outcome of any parole hearing: it avails little that parole remains in scope if the evidence relevant to consideration of release is not there to put before the Parole Board. Home Office concerns about the risk of absconding affect prison categorisation of foreign nationals. Access to rehabilitation programmes[67] and/or planning for release are affected by presumptions that the person will be removed or deported at the end of the sentence, whatever the strength of human rights and other arguments against such removal and deportation. Legal aid is currently only available for 'treatment' cases where it is 'practically impossible' for the prisoner to use the prison complaints system[68] and we understand that in 2011, prior authority was granted in only 11 cases. The Legal Aid Agency must give prior authority in such cases. Thus these are cases where there is a real risk of breaches of Article 5 alone or read with Article 14. The risk of breaches of Article 14 is high given that Ministry of Justice research indicates that persons with disabilities are over-represented in the prison population[69], as are persons with learning disabilities[70] and, again as indicated by Ministry of Justice research[71], members of ethnic minorities. The statement at paragraph 5.1.1

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

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[65] See for example *R (BA) v Secretary of State for Home Department* [2011] EWHC 2748 (Admin) and *R (S) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin).

[66] *Foreign National Prisoners: A thematic review* Her Majesty's Inspectorate of Prisons, July 2006.

[67] See Bail for Immigration Detainees' February 2013 submission to the Ministry of Justice consultation *Transforming rehabilitation: a revolution in the way in which we manage offenders 2013*, available at http://www.biduk.org/154/consultation-responses-and-submissions/bid-consultation-responses-and-submissions.html (accessed 28 May 2013).

[68] See Annexe B to the *Transforming Legal Aid* consultation paper.

[69] *Estimating the prevalence of disability amongst prisoners: results from the Surveying Prisoner Crime Reduction (SPCR) survey, Research Summary 4/12*, March 2012.

[70] Loucks, N. (2007) *No One Knows: Offenders with Learning Difficulties and Learning Disabilities. Review of prevalence and associated needs*, London: Prison Reform Trust.

[71] *Statistics on Race and the Criminal Justice System 2010 report*, Ministry of Justice, 26 March 2012.

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

87. Family members, for example of those whose claims for asylum have failed, who are likely to be subsisting on non-cash support under section 4 of the Immigration and Asylum Act 1999, have no cash for travel and have difficulties in visiting at all, increasingly the likelihood that the location of the detained person will interfere with rights under Article 8 of the Convention[72].

Judicial Review

88. The Preamble to the European Convention on Human Rights talks about the "effective recognition and observance" of human rights. In its 2010 consultation *Proposals for the Reform of Legal Aid in England and Wales* the Government said:

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

89. Yet first the residence test would bar legal aid for applications for judicial review as it would bar legal aid for all other applications. The residence test must be seen as being among the primary barriers erected against an effective judicial remedy by way of an application for judicial review and this among the primary barriers to a vindication of human rights.

90. Second it was proposed in the *Transforming Legal Aid* consultation that that work done for the permission stage of a judicial review, the initial filter whereby the courts decide which cases should proceed, would only be paid if permission were granted. A poor applicant would have to find lawyers willing to take risk of not being paid for work between issuing proceedings and the grant of permission.

91. This is not about lawyers' pay. Good lawyers can find work in a wide range of different areas of law, and can undertake private client work. Ceasing to do legal aid work is likely to mean a lawyer is paid more, not less. Instead, this is about whether lawyers continue to do certain types of case, cases challenging the exercise of executive power on behalf of poor clients, and thus whether such clients have access to justice and protection for breaches of their human rights. Whether the lawyer votes with their feet for doing different work or is closed down having failed to make legal aid pay makes no difference to the client.

92. Even where a lawyer is willing to bring an application on this basis, this approach will affect the amount of judicial review a solicitor or a barrister can do at any one time, because the work is "at risk."

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

[72] And breaches of the Home Office duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of the child, whether the detainee's child be a person under immigration control, settled or a British citizen.

94. In case after case judicial review has been the means by which human rights have been asserted and protected. The Committee is unlikely to recognise the stated rationale for this proposal which is that there are currently too many unmeritorious judicial review claims brought with legal aid funding. This is no surprise: the Government's own statistics in the *Transforming Legal Aid* consultation paper[73]do not bear it out. We have explained this in detail in our response to that consultation but in summary, contrary to how success rates were characterised in the consultation paper, what the figures in the consultation paper show is that legal aid providers secured successful outcomes (up to and including the permission stage) to some degree in up to 87% of the 4074 cohort[74]. There is no evidence in the consultation paper that legal aid is being used to fund 'a significant number of weak cases'[75].

95. ILPA has a particular interest here. It has long been the case that the majority of all judicial reviews, those brought with and without legal aid, concern immigration and/or asylum. The Secretary of State responsible for the erstwhile UK Border Agency, the Rt. Hon. Theresa May MP, described the agency as 'closed, secretive and defensive' in announcing to Parliament on 26th March 2013[76] her intention to abolish the Agency. Her description continues to fit that part of the Home Office dealing with immigration and asylum cases today:

> *..The agency struggles with the volume of its casework, which has led to historical backlogs running into the hundreds of thousands; the number of illegal immigrants removed does not keep up with the number of people who are here illegally…the agency has been a troubled organisation since it was formed in 2008, and its performance is not good enough.*
>
> *…it has conflicting cultures and all too often focuses on the crisis in hand at the expense of other important work; the second is its lack of transparency and accountability; the third is its inadequate IT systems; and the fourth is the policy and legal framework within which it has to operate. … IT systems are often incompatible and are not reliable enough. They require manual data entry instead of automated data collection, and they often involve paper files instead of modern electronic case management. …*
>
> *The agency is often caught up in a vicious cycle of complex law and poor enforcement of its own policies, which makes it harder to remove people who are here illegally. …*
>
> *UKBA has been a troubled organisation for so many years. It has poor IT systems, and it operates within a complicated legal framework that often works against it. All those things mean that it will take many years to clear the backlogs and fix the system ...*

96. The Joint Committee's reports, pertaining to immigration, asylum and trafficking but also to implementation of human rights judgments and legislative scrutiny bear out that analysis. The work of the Joint Committee is particularly in point because of the gravity of matters with which it is concerned.

97. It should not be the case that it is necessary to issue judicial proceedings to get the Home Office to reply to a letter, let alone to make a decision. But it is. There have been countless delay cases where there has been no reply to chasing and pre-action letters and where there is no real defence. It should not be necessary to do so in cases where a woman who is seven months pregnant is sleeping on park bench pending a decision on an "urgent" application for asylum support. But it is. It should not be the case that it is necessary to issue proceedings to

[73] Paragraphs 3.65 – 3.68.
[74] Consultation paper: paragraph 3.73 at page 32.
[75] Consultation paper: paragraph 3.77 at page 33.
[76] HC Report 26 March 2013, col 1500ff.

ensure that the Home Office follows the decision of the higher courts in a case that is similar in all material respects. But it is. Reported case after reported case describes earlier efforts at resolution, all to no avail.

98. The examples below are cases where costs were recovered from the Home Office. But would the lawyers have been prepared to take the risk of issuing if the proposed funding model were adopted? We suggest that it is incompatible with human rights to take the risk that such cases would not be brought.

Case of D
D arrived as a child, had Discretionary Leave and applied in-time on form HPDL [Humanitarian Protection/Discretionary Leave, a form which does not carry a fee] for an extension. Six years later the Home Office rejected his application as invalid. Solicitors wrote chasing letters and eventually a pre-action protocol letter to no avail and lodged an application for judicial review on the basis that their own policy said they were roughly five and three quarter years out of time to reject the application as invalid. The Home Office lodged summary grounds asserting that he should still re-apply because they were entitled to be paid a fee for the application because it should have been made on FLR (O) [Further Leave to Remain (Other) – form for which a fee is payable]. The case was listed for hearing. It was argued that back in 2006 when the application was made there was no fee for the application that the Home Office said he should have made and they conceded before the hearing. In that case costs were paid.

Case of R
The application was rejected as invalid as invalid for use of the wrong form after more than three months. The Home Office website had directed the claimant to the form which the Home Office later said was invalid. The Home Office did not back down until proceedings were issued. They paid the claimants' costs.

***R(S) v SSHD* [2011] EWHC 2120 (Admin)** (05 August 2011)
In this case the detention of a mentally ill man was found to be unlawful, in breach of Article 5 of, and to breach Article 3 of, the European Convention on human rights. S was held in immigration detention at the end of his criminal sentence (all of which he had served on remand). Copious medical reports had been produced and he had been transferred to hospital. He was identified as a suicide risk and subject to hourly observations. Following a transfer to hospital a request for temporary admission was refused. Judicial review proceedings were issued, a permission hearing was expedited. The judge observed "Even Dr Ahmed's report of 24 June failed to lead UKBA to bring the matter to a resolution until another 5-6 weeks had passed and the order of this Court had been obtained on 28 July….In my judgment, the circumstances of S's detention passed the high threshold required for a violation of Article 3 and amounted to inhuman or degrading treatment. I find that there here was a breach of both the negative and positive aspects of Article 3".

***R(HA) (Nigeria), v SSHD (Rev 1)* [2012] EWHC 979 (Admin)** (17 April 2012)
HA was also mentally ill and because of this was transferred to hospital. Lawyers issued a judicial review challenging the lawfulness of his detention and asking for confirmation that he would not be transferred back to prison. No substantive response was provided before the application for judicial review was lodged on 28 October 2010. Then came a letter maintaining detention and he was indeed transferred back to detention. On 5 November On 15 December 2010 bail was granted unopposed. His detention from 1 February to 5 July 2010 and from 5 November to 15 December 2010 was held to be in breach of Article 3 of the European Convention on Human Rights. The Judge held "The length of time that it took to secure the Claimant's transfer to hospital between 1 February and 5 July 2010 was manifestly unreasonable and unlawful."

In the case below there was no order as to costs.

F
F was a young woman from Eritrea who had been recognised as a refugee. The Local Authority stopped the support that had been provided to her as a Former Relevant Child under the Children (Leaving Care)

Act 2000. – refugee status granted. Her then legal representatives missed the deadline for judicial review. She had to drop out of education. She applied for and got Job Seekers Allowance. She made what her current lawyers describes as "literally hundreds of job applications" but got nowhere as she had no experience and English was not great. She wanted support from the Local Authority to start to study again and gain the skills to make her employable. Her current legal representatives took on the case a year after the deadline for judicial review from the date her support stopped had passed, but arguing that the failure to support her was an "ongoing failure" and as such that deadline did not apply. Permission was refused, but the application was renewed and succeeded. The case was settled the case shortly thereafter with no order as to costs on the basis that she got a very good package of support, greatly increasing her chances of employability in the future. Her lawyer observes that although the underlying case was good the risks were high because of the delay and it would not be taken on if the proposed funding arrangmeents came into force.

99. Where a case is brought under the proposed new funding regime, what will happen? The Government department challenged will be well aware, when it receives the pre-action protocol letter, that the work involved in issuing proceedings and between issuing and permission will not be paid if the case is issued but settles before permission is granted. The temptation will be to starve the lawyers out: to settle nothing in the hope that proceedings will not be issued. If a lawyer does issue proceedings, s/he will have every incentive to proceed as rapidly as possible to the permission stage rather than explore settlement.

100. The contents of the *Transforming Legal Aid* consultation paper itself demonstrate how costs risk being transferred to Her Majesty's Courts and Tribunals Service by these proposals[77]. Costs may be recoverable from the defendant, even if permission is not granted. A defendant who makes an offer of settlement is not automatically obliged to pay the claimant's costs in these circumstances, and the question of costs often comes before the court. We recall that Lord Justice Jackson had proposed that one way costs shifting be introduced in judicial review cases was that where a defendant settled the case after the claim had been issued then, subject to the claimant having complied with the pre-action protocol, the defendant should normally pay the claimant's costs[78].

101. The Home Office normally requires that when persons are being removed by charter flight then before it will stay a removal[79] an injunction must be obtained from the court, including in cases stayed behind a test case, for example a case testing the safety of return to a particular country. An injunction is also sometimes required in other cases as well. Proceedings must be issued to obtain injunctive relief, although if the test case settled it is extremely likely that the case will not proceed to a permission hearing. Test cases have been seen as efficient case management by the courts that designate them as such. They can keep court costs down. But if there is no prospect of being paid in a case that will be stayed behind a test case, despite having done work on an injunction, then it is unlikely that legal representatives will agree to act in these cases. This entails a risk of breaches of Articles 2 and 3 if persons are wrongfully removed. In other areas of law, for example community care or housing cases , injunctive relief may take the form of accommodating a person or providing services. The Court will order injunctive relief if satisfied that a strong prima facie case is made out[80], a higher test that the arguability threshold that applies in permission applications. For this reason, where injunctive relief is ordered, the Home Office or local authority will frequently change its mind about the initial decision. Such cases will not proceed to a permission hearing because there is nothing

[77] See *Transforming Legal Aid* paragraphs 3.75 and 3.76.
[78] *Review of Civil Litigation Costs,: final report,* Lord Justice Jackson, December 2009, Chapter 30, paragraph 5.1.
[79] UK Border Agency Enforcement Instructions and Guidance, Chapter 60: **2**.4 Charter Flights Claimants being removed by charter flight (with special arrangements) who wish to legally challenge their removal are normally required to seek injunctive relief as a JR application will not usually result in deferral of removal.
[80] *De Falco v Crawley BC* [1981] 1 QB 406.

left about which to argue except costs. If costs are awarded, this will be at *inter partes* rates. Costs awarded by a court may be higher than those agreed between the parties where the case settles.

102. On the 6 September 2013 Ministry of Justice published its consultation *Judicial Review proposals for further reform* which is concerned with ensuring that the irresponsible exercise of State power goes unchecked through changes to the rules on *inter alia* standing and costs. It is inimical to a culture of respect for human rights that the exercise of State power be insulated from challenge and **we urge the Committee**, tired as it must be, **to turn its attention to that consultation next.**

103. The 6 September 2013 consultation includes one proposed modification to the legal aid proposals, to introduce discretion to permit the Legal Aid Agency to pay lawyers in certain cases concluding prior to a permission decision without a costs order or agreement. This will only cover cases where proceedings have been issued. There is little reason to think lawyers will be more sanguine about the Legal Aid Agency's exercise of discretion in their favour (and see the discussion of exceptional cases above) than they are about getting costs as part of a settlement or from the court.

Borderline cases

104. The cases funded where the prospects of success are borderline are a very particular class of case, cases of particular importance, which are likely to involve substantial injustice or suffering[81]. In immigration they are specifically identified as cases involving a breach of rights under the European Convention on Human Rights[82].

105. The interpretation paragraph[83] of the *Civil Legal Aid* (*Merits* Criteria) *Regulations 2013* defines "case with overwhelming importance to the individual" as follows:

> *"case with overwhelming importance to the individual" means a case which is not primarily a claim for damages or other sum of money and which relates to one or more of the following–*
>
> *a. the life, liberty or physical safety of the individual or a member of that individual's family (an individual is a member of another individual's family if the requirements of section 10(6) are met); or*
>
> b. *the immediate risk that the individual may become homeless*;

106. Other cases are:

- cases of significant wider public interest/ of overwhelming importance to the individual and in immigration, cases involving a breach of rights under the European Convention on Human Rights[84];
- investigative help in public law cases[85];
- housing possession cases[86];
- public law children cases[87];

[81] *Civil Legal Aid* (*Merits* Criteria) *Regulations 2013, SI 2013/104.*
[82] *Ibid*., regulations 43 and 60.
[83] Paragraph 2.
[84] *Ibid*., regulations 43 and 60.
[85] *Ibid*., regulation 56.
[86] *Ibid*., regulation 61.
[87] *Ibid*., regulation 66.

- domestic violence family cases[88];
- cases involving breaches of international treaties relating to children[89].

107. It is frequently impossible fairly to judge the merits of a case before it has been prepared, which is why the borderline category is important. Problems in immigration and asylum are exacerbated by the "country guidance" cases in the Upper Tribunal that, purporting to judge of the factual situation in a country, go out of date in a way that legal precedents do not. The low standard of proof in asylum cases[90] makes it difficult to use examples from other areas of the law as to whether a case is borderline.

108. In such cases and in cases generally, the State has an obligation to ensure that appropriate evidence should be made available, see for example *RC v Sweden*, Application no. 41827/07 in the European Court of Human Rights[91], where the European Court of Human Rights said the court should have ensured that a report on scars was obtained to support the appellant's case.

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

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

111. There are no figures whatsoever in the *Transforming Legal A*id consultation paper that look at the success rates in these cases. **We suggest that the Committee the Ministry of Justice to provide these figures.**

Summary

112. The Lord Chancellor, after a reference to exceptional funding said "I do not think that it is unreasonable to say that if someone is going to come to this country and access public support, they should have been here for a period of time and paid taxes before they do so[92]."

113. Human rights law provides a different answer: that a person transported to the UK and held as a slave or in servitude, alone in the UK as a child, or having fled a violent and abusive relationship, should receive public support where it is needed to protect and enforce their rights.

Adrian Berry, Chair ILPA, 30 September 2013

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[88] *Ibid*., regulation 67.
[89] *Ibid*., regulation 68.
[90] *R v Secretary of State for the Home Department, ex p Sivakumaran* [1988] AC 958).
[91] 9 March 2010, at paragraph 53.
[92] Hansard HC report 21 May 2013 column 1041.

ANNEX: ILPA publications on legal aid

The Committee is referred to the following:

ILPA Summary of the Government's conclusions on the Transforming Legal Aid consultation, 5 September 2013, available at http://www.ilpa.org.uk/resource/20909/ilpa-summary-of-the-governments-conclusions-on-the-transforming-legal-aid-consultation-5-september-2

House of Lords' debate on the Motion to regret the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, 17 July 2013, available at http://www.ilpa.org.uk/resources.php/18389/briefing-for-the-house-of-lords-debate-on-the-motion-to-regret-the-civil-legal-aid-financial-resourc

ILPA briefing for House of Lords debate *Effect of cuts in legal aid funding on the justice system in England and Wales* , 11 July 2013***, available at http://www.ilpa.org.uk/resources.php/18321/ilpa-briefing-for-the-house-of-lords-debate-effect-of-cuts-in-legal-aid-funding-on-the-justice-syste

ILPA briefing for the backbench debate on legal aid in the names of Sarah Teather MP, David Lamy MP and David Davis MP, 27 June 2013, http://www.ilpa.org.uk/resource/18202/ilpa-briefing-for-house-of-commons-backbench-debate-on-legal-aid-27-june-2013?action=resource&id=18202

Transforming legal aid: delivering a more credible and efficient system, Ministry, ILPA final submission to the Ministry of Justice., 3 June 2013, available at http://www.ilpa.org.uk/resources.php/18039/transforming-legal-aid-ilpas-response-as-submitted-to-the-ministry-of-justice-on-3-june-2013

ILPA Submission to the Low Commission on the future of advice and legal support in response to its context paper on asylum and immigration, 30 May 2013 available at http://www.ilpa.org.uk/resources.php/18002/ilpas-submission-in-response-to-the-low-commissions-context-paper-on-asylum-and-immigration-30-may-2

Transforming legal aid: delivering a more credible and efficient system, Ministry of Justice, ILPA's initial comments 29 April 2013, available at http://www.ilpa.org.uk/resource/17792/transforming-legal-aid-delivering-a-more-credible-and-efficient-system-ministry-of-justice-ilpas-ini

ILPA briefings on the Legal Aid, Sentencing and Punishment of Offenders Bill 2011, available at http://www.ilpa.org.uk/pages/legal-aid-sentencing-and-punishment-of-offenders-bill-2011.html

ILPA Submission to Justice Select Committee (access to justice) 24 January 2011, with Annexes (A) initial response to MoJ consultation, (B) briefing on legal aid proposed cuts, (C) initial submission to Justice Select Committee, (D) remuneration rates and (E) case studies, 24 January 2011, available at http://www.ilpa.org.uk/data/resources/14742/11.01.24-ILPA-to-Justice-Committee-Access-to-Justice-2.pdf

ILPA response the Ministry of Justice consultation (Proposals for reform of Legal Aid in England and Wales) with Annexes: 1 Case studies, 2 Compendium of higher court Article 8 cases, 3 Remuneration rates, 14 February 2011, available at http://www.ilpa.org.uk/data/resources/4121/11.02.503.pdf