ILPA response to the Transforming Legal Aid: Next Steps consultation

The Immigration Law Practitioners' Association (ILPA) is a professional membership association, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on the Immigration and Asylum Chambers of the Tribunals Presidents' Stakeholder Group, on the Legal Services Commission/Law Society Civil Contracts Consultative Group, on the Ministry of Justice Administrative Justice Advisory Group and on many other consultative and advisory groups.

ILPA responded to the *Transforming Legal Aid* consultation. While we have no comments in respect of the specific questions on criminal legal aid posed in the *Transforming Legal Aid: next steps Consultation* and no wish to repeat comments we made in our original response we did wish to comment on the modifications of the original proposals for civil legal aid set out in *Transforming Legal Aid: next steps* and we trust that these comments will be of use. We maintain our position as set out in the response to *Transforming Legal Aid* that, for all the reasons set out in that response, the proposals should not be implemented.

Exceptional funding

In what follows we proceed on the basis that the majority of those excluded from civil legal aid under the proposals in *Transforming Legal Aid* will not secure exceptional fundingunder section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on exceptional funding as the means by which access to justice would be preserved. As of 1 July 2013, only 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. 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.

The residence test

Particular groups

Across the original and "next steps" consultation, there are two types of exception to the residence test. The first looks to a type of legal challenge, the second to a type of litigant. We deal herein only with the exceptions newly identified in *Transforming Legal Aid: next steps.*

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

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[1] 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.**Personsseeking asylum have very basic entitlements and are reliant on these and fundamental rights; they need to be able to enforce them.

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….*

The *Next Steps* paper includes a change to the approach taken to refugees. It sets out that "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 recognition as a refugee[2] . However, it remains the case that a person with a strong case for recognition as a refugee, recognised in less than 12 months, would be kept out of their rights under Article 16 for up to nearly a year subsequent to recognition, whereas a person who succeeds after numerous appeals might never cease to be eligible for legal aid. We have discussed with the Home Office the risk that this could create an absurd situation where the Home Office is being asked to delay a decision on a case because, for example, the person has a case in the family court.

The point of transition between seeking asylum and being recognised as a refugee is, as we set out in our response to *Transforming Legal Aid*, a particularly difficult time. A person is moving from one set of rights and entitlements to another and it is not infrequent that things go wrong. It is thus a particularly dangerous time to leave a refugee with no means of enforcing their rights. Persons recently recognised as refugees may take time to find a job, having been out of the labour market while seeking asylum. They have nowhere else to go.**We continue to ask that refugees be eligible for legal aid from the point of recognition as a refugee, as we proposed in our response to *Transforming Legal Aid*.**

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[3]. 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 situation of stateless persons has not yet been addressed. Persons are only recognised as stateless persons in the UK if they have nowhere else to go[4]. We**recommend**

[1] Paragraph 118.
[2] Paragraph 2.15.
[3] HC 395, paragraphs 400ff.
[4] HC 395, paragraph 403(c).

that given the similarity in our international obligations toward the two groups, stateless persons be treatedin the same way as refugees, i.e. as per the paragraph above, be eligible for legal aid from the point of recognition as a stateless person.

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, these are people who cannot be expected to leave the UK. **We suggest that in both types of case it would be appropriate to treat the person as a "successful asylum-seeker", i.e. as eligible for legal aid on the same terms as a refugee.**

Paragraph 12 of Annexe B to the *Next Steps* paper says:

> *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*

We should be grateful for further information about these exceptions, which we welcome.

We draw particular attention to those individuals who fall within, or are treated as falling within, the Dublin Regulation[5] 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 (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)[6]. 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[7], 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)[8].

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[9]. We suggest that it should. These cases involve a risk of the denial of an effective remedy under Article 13 of the European Convention on Human Rights. As regards matters falling within the scope of EU law (such as returns under the Dublin Regulation); they involve a risk of a breach of Article 47 of the Charter of Fundamental Rights of the European Union.

[5]Regulation 2003/343/EC.
[6]*MB et ors v Secretary of State* [2013] EWHC 123 (Admin).
[7]Asylum and Immigration (Treatment of Claimants Act, etc.) Act 2004, sched 3, Part 2, paragraph 3.
[8]Asylum and Immigration (Treatment of Claimants Act, etc.) Act 2004, sched 3, Part 2, paragraph 5(4).
[9] See *MSS v Belgium and Greece*(Application no. 30696/09) 21 January 2011; see also *NS v Secretary of State* C-411/10 (CJEU).

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**. It would be helpful to make clear that challenges to "Dublin" removals will continue to be funded.**

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

C
C's age was disputed. She was pregnant as a result of rape by her trafficker and beinglooked after by a relative. It was proposed to remove her on third country grounds to thecountry into which she had been trafficked, separating her from the relative. The decisionthat there were not reasonable grounds for thinking that she had not been trafficked waschallenged and overturned but she then got a negative "conclusive" grounds decision. "Dublin" removal was again proposed. C lives with the same relative and has a small baby.

Babies under 12 months old

The *Next Steps* paper says that 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.

Cases where such tiny babies could expect to be represented tend to be cases such as 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.**We recommend that babies under 12 months old be exempt from the residence test altogether.**

Detention cases

In the Next Steps paper it was set out 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

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.

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[10]. It was suggested in those cases that an attempt was made to remove the victims from the jurisdiction before they could bring 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.*
>
> > *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.*

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[11]. Another recent case exposed "disturbing" evidence of systemic failures concerning the detention of survivors of torture[12].

We recall the statement in the 2010 consultation[13]:

> *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…*

This paragraph does not attempt to disguise that some of those bringing such claims will be particularly vulnerable, whether to the original abuse or to subsequent intimidation and that many cases will not be suitable for conditional fee arrangements. This is for a number of reasons. There is no costs protection for the claimant as insurance premiums cannot be recovered. A conditional fee arrangement does not assist with meeting disbursements. These could include interpreters, medical reports and court fees. The abolition of success fees means that there is no real incentive for insurers to protect against adverse costs risks.Qualified one-way costs' shifting is only available in personal injury cases. Human rights claims may not have a personal injury element at all, while other cases injury may be only part of the claim. For all these reasons, **we ask that the omission of these two categories of detained cases be reconsidered.**

Trafficked persons

In the next steps paper it is stated 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.

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[10] *Yarl's Wood affair is a symptom, not the disease*, Nick Cohen, The Observer, 14 September 2013.
[11] *Chen and Others v SSHD* CO/1119/2013.
[12] *R (EO, RA, CE, OE and RAN) v Secretary of State for the Home Department*[2013] EWHC 1236 (Admin).
[13] *Op. cit.*

As we understand this, it will mean that there is no exception to the residence test for trafficked persons in respect of judicial review because no reference is made in the exception to paragraph 19 of Schedule 1 to the Act. We doubt that this achieves the Government's intention to protect trafficked persons. Under paragraph 32 of Part 1 of Schedule 1a person qualifies for legal aid if s/he has satisfied the "reasonable grounds" test, if there are reasonable grounds for considering that s/he is a person who has been trafficked. There is no appeal against a decision that there are not reasonable grounds for regarding the person as a trafficked person. The only challenge is by way of judicial review. But the current proposals would mean that there was no funding for that judicial review. Similarly if a person who had received a positive "reasonable grounds" decision was then refused at the "conclusive grounds" stage where, again, there is no right of appeal.

The exception will not assist those trafficked persons falling outside the scope of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. These include, as debated during the passage of that Act[14], 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?* [15]

In these circumstances not only is judicial review the only way to challenge a decision that there are not reasonable grounds for considering that a person has been trafficked; it is the way to challenge age disputes and failures to provide support which may arise during this period.

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. 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 obligations[16] 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[17]. The case of *OOO*, described below, would not be covered and OOO herself would fail the residence test.**We urge that the exemption from the residence test for trafficked persons be broadened to cover judicial review and the application for recognition as a person whom there are reasonable grounds to believe has been trafficked.**

W

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

F

[14] See e.g. HL Report 7 Mar 2012: Column 1798-1813, 27 Mar 2012: Column 1291-2.
[15] HL Report 27 Mar 2012: Column 1292.
[16] (*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.
[17] Directive 2011/36/EU.

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 worker. This was granted because of compassionate circumstances. At no stage was F referred to the 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 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 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 victimsstates 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

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

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[18], 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[19] 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[20].

We urge that the exemption from the residence test for survivors of domestic violence be broadened to cover judicial review and the initial task of proving that one is a victim of such violence.

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. **We urge that the exemption from the residence test for survivors of domestic violence be broadened to cover all such victims.**

Protection of children cases

This[21] 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

[18] See e.g. HC Report 17 Apr 2012: Column 218-252.
[19] Law Society Legal Aid Agency Civil Contracts Consultative Group 9 September 2013.
[20] *Ibid*.
[21] *Transforming Legal Aid: Next steps*, Annex B: Response to consultation, paragraphs 125-126.

	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

This is very far from a comprehensive system of legal aid for children. ILPA continues to urge 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. Under the proposals in the *Next Steps* paper there is no legal aid for cases under section 17 of the Children Act 1989[22]. 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. **We urge that all children be exempt from the residence test.**

Judicial Review

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 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.

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.

[22] See *R (KA) v Essex County Council* [2013] 1 WLR 1163, *R (Clue) v. Birmingham City Council* [2011] 1 WLR 99.

***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. 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 lawyer 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 "on-going 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 arrangements came into force.

On the 6 September 2013 Ministry of Justice published its consultation *Judicial Review proposals for further reform*

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. We do not consider that the proposal for discretionary awards of costs addresses the principle mischief of the proposals which is that, for fear that they will not get paid at the end of the day; the lawyer will not take the case in the first place.

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. **See our response to the consultation on judicial review.**

ILPA
31 October 2013