

# information sheet

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## Legal Aid

20 December 2013

The Government proposes to further restrict access to legal aid in the New Year, despite the full effects of the changes to the legal aid regime brought into force in April 2013 not yet being felt. The introduction of the new contracts, coupled with the changes wrought by the *Legal Aid Sentencing and Punishment of Offenders Act 2012*, have combined to mean that lawyers are increasingly unable to provide legal aid services for deserving clients of low means, with meritorious cases. The exceptional funding scheme, introduced under the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* and supposedly a backstop to prevent important cases falling through the gaps, has proved cumbersome and slow. Grants of legal aid under this scheme are, to date, extremely rare<sup>1</sup>.

As legal aid lawyers struggle to operate within the strictures of the new scheme, the Government continues to press forwards with the erosion of access to justice for those who can least afford it. The most recent Ministry of Justice document on legal aid, "*Transforming Legal Aid: Next Steps*" contains proposals that would make it even more difficult for people to enforce basic rights to which they are entitled by law, compounding the effects of the proposed judicial review changes (as to which, see ILPA's Information Sheet: [Changes to Judicial Review](#)). The major changes of concern are outlined below.

### (1) Residence test

It is proposed that civil legal aid would for the first time be pegged to an immigration status requirement: lawful residence in the UK. This has far-reaching consequences, as it would apply across all areas of law, not just immigration. Legal aid would be refused outright unless an individual demonstrate that they meet a two-pronged residence test:

- (i) Lawful residence in the UK as at the date of application for civil legal aid; and
- (ii) Lawful residence in the UK for a continuous period of 12 months at some time prior to this date.

Although this requirement would apply to everyone, across all areas of civil law (e.g. family and housing law), migrants are likely to be affected adversely the most.

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<sup>1</sup> There have only been three successful grants of exceptional funding in immigration cases recorded as of December 2013– a success rate of less than 1%.

While those with an active asylum application would be exempted from the test, refugees are not. A refugee who has never previously been formally lawfully resident in the UK would need to wait for 12 months from the date on which they claimed asylum to be eligible for legal aid. This means that a person who is recognised promptly as a refugee may have to wait many months before being eligible for civil legal aid to enforce their rights, for example if they are being unlawfully denied housing or access to a child. Asylum seekers who have had their claims rejected would be denied legal aid along with everyone else who cannot satisfy (or prove that they can satisfy) the two-part test.

## **(2) Judicial Review**

The residence test outlined above would act as a barrier to judicial review, the primary means for individuals to seek redress for unlawful state action. In addition, the Government intends to remove legal aid from work done by lawyers to prepare a judicial review case at the early stages of proceedings (prior to getting 'permission' from the Court to bring the judicial review). The work would instead be "at risk", meaning the lawyer would only be paid if the case is ultimately successful in getting permission. What this means in practice is that individuals eligible for legal aid would be less likely to find a lawyer willing to take on their case, given the financial risks involved.

## **(3) Prisons**

It is proposed to deny legal assistance to everyone in the prison estate seeking challenge their conditions or treatment. This includes persons detained in a prison under immigration powers (i.e. not serving a criminal sentence). This is of particular concern, given the fact that the UK has frequently been found in breach of the European Convention on Human Rights for its treatment of foreign nationals in detention including, four times in the last two years for breaches of Article 3, the prohibition on torture, inhuman or degrading treatment.

## **(4) Borderline cases**

Currently, if a case is 'borderline', in that it has 50:50 prospects of success, it can still be granted legal aid, if it is of "overwhelming importance" to the client. This is defined to include cases concerning the life, liberty or physical safety of the individual, or where they are at risk of becoming homeless. The Government now proposes to remove this borderline category altogether. This would put individuals at risk in cases where the merits are not wholly clear at the outset, but where the case is of fundamental importance.

## **Overall**

Legal aid is designed to ensure that the poorest members of our society are able to enforce their rights. The proposed legal aid reforms would prevent an entire subset of individuals from access to justice based on nothing more than length of stay in the UK, no matter how serious the infringement of their rights. The Legal Aid proposals, together with the intended new restrictions on Judicial Review, would combine to insulate public decision-making from effective legal scrutiny and undermine the rule of law.

No-one will feel the effects of these changes more than migrants with precarious status in the UK. Already by definition a group who are open to exploitation, in future these individuals face having their rights trampled on, without any means of redress.