

ILPA Briefing on the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2004 (the “residence test”)**SUMMARY BRIEFING**

The residence test involves a near-blanket exclusion from legal aid for anyone who cannot prove lawful residence in the UK, as defined. Access to justice is thus made dependent upon where a person is the world and on their personal status, regardless of their means and the strength of their case. ILPA considers that the test offends against basic principles of justice and urges Parliamentarians not to accept the proposed changes.

The Government states that its aim is to target legal aid provision at the “*persons and cases where funding is most needed*”¹ This aim is not furthered by the residence test: it does not target legal aid resources at those persons who the Government has identified² as most in need, nor does it ensure the most deserving cases are funded. The residence test serves to hinder and undermine those very aims.

The residence test: criteria

The residence test creates a new exclusion from legal aid for anyone who cannot demonstrate that on the day of applying for legal aid that s/he is:

- lawfully resident in the UK;³ and
- has lived in the UK for a consecutive period of at least 12 months at some point prior to the day of applying for legal aid.⁴

There are a limited number of narrow exemptions from the test, some based on the type of person applying for legal aid, some based on the type of case.

- **Exemptions for individuals:** Asylum seekers and refugees (whether resettled or recognised via the asylum system), serving members of the armed forces and their immediate family members. Small babies less than 12 months old are exempt from the second part of the test (something which would be impossible for them to satisfy in any event).
- **Exemptions for cases:** a limited number of types of case are exempted: immigration detention cases and related judicial reviews, certain cases brought by trafficked persons (but, importantly, not judicial reviews of a decision which fails to identify someone as a trafficked person), survivors of domestic violence (again, only certain cases and with legal aid for judicial reviews not exempt from the test), certain protection of children cases (but not related judicial reviews), certain deprivation of liberty cases, cases before the Special Immigration Appeals Commission and judicial reviews of certain decisions in asylum cases which deny a right of appeal.

¹ Ministry of Justice, *Transforming Legal Aid: Next Steps*, 05 September 2013 Annex B para 6.3

² Under LAPSO and in the course of the *Transforming Legal Aid* and *Transforming Legal Aid: Next Steps* consultations.

³ Paragraph 19(2)(a) introduced by regulation 2 of the order.

⁴ Paragraph 19(4)(a) introduced by regulation 2 of the order. Total days absence from the UK during the relevant period must be no more than 30 days in total: paragraph 19(4)(b).

Objections: overview

There are numerous objections to the residence test on grounds of fairness, equality and common law rights of access to justice. Full details of these objections may be found in our full Briefing document, available on our website: <http://www.ilpa.org.uk/pages/briefings.html>

- **Ultra vires:** The order purports to amend primary legislation in ways not permitted by the order-making power.
- **Denial of justice in matters of especial gravity:** the test will prevent individuals from bringing cases in areas which Government has identified as “*of the highest priority.*”⁵
- **Unjust and unconstitutional discrimination:** the test would introduce a formally sanctioned element of inequity in our legal system by rendering access to justice dependent upon immigration status and length of residence (with disproportionate impact upon non-nationals and those of minority ethnicity).
- **A shield for unlawful conduct by Government:** the test has the effect that unlawful decision-making by Government which removes someone from the jurisdiction, or denies their right of residence, would simultaneously deny them the means of redress for the unlawful act, shielding the Government from challenge.
- **Breach of trust:** The test would introduce significant further cuts to legal aid, contrary to assurances offered by the Government when seeking Parliament’s assent to what is now the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
- **Errors, oversights and impracticalities:** the test would be impractical to enforce, and would by its operation exclude many of the people who in fact meet its terms. There is likely to be a chilling effect which would widen the scope of the test beyond its intended effect.
- **No evidence base for alleged financial savings:** the financial case for this test has not been made out; there is a lack of data to underpin the Government’s assertions of financial gain.
- **Inappropriate timing:** the full effects of the April 2013 cuts to legal aid provision have yet to be felt; the residence test risks amplifying the effect of the latter changes before their impact on access to justice can be fully understood.

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⁵ Hansard HL, 16 Jan 2012: Column 349.