

ILPA information sheet

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Legal aid 18: The Residence Test

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Entitlement to civil¹ legal aid in England and Wales is to be made subject to a new eligibility requirement of lawful residence in the UK. This is termed the 'residence test' and is being brought in by way of a Statutory Instrument², which was laid before Parliament on 31 March 2014. Individuals who have a case which is still within the scope of legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will in future face the additional hurdle of having to prove that they satisfy the residence test. This affects all civil legal aid: not just those immigration matters which remain within the of scope legal aid following the 2012 Act. The test is due to come into force on 4 August 2014, subject to Parliamentary approval.

This latest change to the rules of legal aid eligibility will add a new barrier to access to justice for those of low means, whose rights to legal assistance have already been curtailed by a series of measures in the recent past.

Background

The UK has a long history of legal aid provision – that is, government-funded legal assistance for those who cannot afford to pay. The budget for legal aid provision has been subjected to large and wide-ranging cuts by government in recent years. These cuts have been implemented in two ways: changes to the eligibility rules (with the result that fewer people are entitled to legal aid), and lowering the rates paid to legal aid lawyers (with the result that legal aid work is less financially viable for lawyers reducing the number willing to take on this kind of work). Both of these strategies for reducing the legal aid budget have combined to mean that large numbers of people who were previously able to enforce their rights before the law now cannot do so. The residence test, another eligibility-based cut, is the latest in this line of cuts, but the first to restrict access to legal aid on the basis of a person's status alone, regardless of the strength of their case or their ability to find representation.

¹ That is, all non-criminal matters: for example immigration, housing, family law, etc.

² A copy can be found on the members' section of ILPA's website here:

<http://www.ilpa.org.uk/resources.php/26084/civil-legal-aid-residence-test-statutory-instrument-31-march-2014>

What is the Test?

The residence test involves two stages. A person must prove:

- (i) That they are lawfully resident in the United Kingdom³ at the date of their application for legal aid; and
- (ii) That at some point in the past, they were lawfully resident in the UK for a period of 12 consecutive months⁴.

Are there any exemptions?

There are some limited exemptions: some are based on the type of person and some are based on the type of case.

- **Exemptions for individuals:** Asylum seekers and new refugees (whether resettled under the Gateway Programme⁵, or recognised via the asylum system) are exempted from the residence test, as are serving members of the armed forces and their immediate family members are also exempted. 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:** certain types of case are exempted from the residence test. These include: detention cases and judicial reviews of detention, certain cases brought by victims of trafficking (but not judicial reviews), domestic violence victims (again, only certain cases), certain protection of children cases and cases before the Special Immigration Appeals Commission.

What is the likely impact of the test?

There is little room for doubt that the impact of the test will be to reduce the number of persons who are eligible for legal aid – this is its stated purpose – however the government is unable to give any clear figures on this as currently the residence status of applicants for legal aid is not recorded. The test will affect everyone: every applicant for civil legal aid will be required to prove (by documentation or otherwise) that they meet the test. However its greatest impact will be upon migrants, who are a category of individuals less likely to be able to meet the test. Other groups, such as travellers and gypsies, and the homeless, are also likely to be disproportionately affected due to problems evidencing their lawful residence; this gives rise to concerns about fairness and equality before the law.

A legal challenge to the residence test, brought by the Public Law Project, and based in part upon these kinds of discriminatory impacts, is currently awaiting a decision from the High Court.

³ Or a British overseas territory

⁴ During those 12 months, they may have been outside the UK for no more than 30 days in total.

⁵ See further ILPA's information Sheet: [Gateway Protection Programme](#)