ILPA Briefing on the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014 (the "residence test")

The Immigration Law Practitioners' Association (ILPA) is a registered charity and 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 numerous government committees, including Home Office, and other consultative and advisory groups.

> "*Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection.*"[1]

By this order, laid before Parliament on 31 March 2014, the Lord Chancellor intends to introduce a test of lawful residence for eligibility for civil legal aid.[2] 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 aims behind the introduction of this test are stated as follows:

> *"The primary objective of the reform package is to bear down on the cost of legal aid, ensuring that every aspect of expenditure is justified and that we are getting the best deal for the taxpayer. Unless the legal aid scheme is targeted at the persons and cases where funding is most needed, it will not command public confidence or be credible. Moreover, there are compelling reasons for seeking to reform legal aid in any event. Accordingly, the reforms seek to promote public confidence in the system by ensuring limited public resources are targeted at those cases which justify it and those people who need it, drive greater efficiency in the provider market and for the Legal Aid Agency, and support our wider efforts to transform the justice system."*[3]

The stated aims are not furthered by the residence test: it does not target legal aid resources at those persons who the Government has identified[4] 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.

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[1] *Per* Lord Scarman in *Khawaja v Secretary of State for the Home Department* (1984) 1 AC 74; cited with approval by Lord Bingham in *A & Ors v Secretary of State for the Home Department* [2002] UKHL 56

[2] The order purports to achieve this in the exercise of the power in section 9(2)(b) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to "*vary or omit services*" listed in Schedule 1 of the Act as being those services for which civil legal aid remains available.

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

[4] Under the Legal Aid Sentencing and Punishmetn of Offenders act 2012 and in the course of the *Transforming Legal Aid* and *Transforming Legal Aid: Next Steps* consultations.

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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;[5] 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.[6]

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[7] and refugees (whether resettled[8] or recognised via the asylum system[9]), serving members of the armed forces[10] and their immediate family members[11]. Small babies less than 12 months old[12] 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[13] and related judicial reviews[14], certain cases brought by trafficked persons[15] (but, importantly, not judicial reviews of a decision which fails to identify someone as a trafficked person), survivors of domestic violence[16] (again, only certain cases and with legal aid for judicial reviews not exempt from the test), certain protection of children cases[17] (but not related judicial reviews), certain deprivation of liberty cases[18], cases before the Special Immigration Appeals Commission[19] and

[5] Paragraph 19(2)(a) introduced by regulation 2 of the order.
[6] 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).
[7] Paragraph 19(6) of Part 2 of Sch 1 to LASPO, introduced by regulation 2 of the order.
[8] Paragraph 19(8) & (12) of Part 2 of Sch 1 to LASPO, introduced by regulation 2 of the order.
[9] Paragraph 19(5) & (7) of Part 2 of Sch 1 to LASPO, introduced by regulation 2 of the order.
[10] Their entitlement will cease the day they leave the service, at which point they will have to accrue 12 months residence in the UK to be able to access legal aid. Paragraph 19(9)(a) of Part 2 of Sch 1 to LASPO, introduced by regulation 2 of the order.
[11] Defined as their spouse, civil partner, cohabiting partner or child: paragraph 19(9)(b) & (14) introduced by regulation 2 of the order.
[12] Paragraph 19(3) of Part 2 of Sch 1 to LASPO, introduced by regulation 2 of the order.
[13] Paragraphs 25(2) and 26(2) of Part 1 of Sch 1 to LASPO, introduced by regulation 3 of the order.
[14] Paragraph 19(2A)(a) of Part 1 of Sch 1 to LASPO, introduced by regulation 3 of the order.
[15] Paragraph 32 of Part 1 of Sch 1 to LASPO, introduced by regulation 3 of the order.
[16] Paragraphs 28(2) and 29(2) of Part 1 of Sch 1 to LASPO, introduced by regulation 3 of the order.
[17] Abuse cases: paragraph 5(2A) of Part 1 to Sch. 1 of LASPO, introduced by regulation 3 of the order, community care services under the Children Act 1989: paragraph 6(2A) of Part 1 to Sch. 1 of LASPO, introduced by regulation 3 of the order, and the cases covered in paragraphs 1 (some child protection matters), 10 (unlawful removal of children), 13 (abuse cases), 15 (where a child is a party to family proceedings), 16 (forced marriage) and 17 (EU cases involving children including Hague Convention cases) of Part 1 of Sch 1 to LASPO.
[18] Habeas corpus applications to the high court: paragraph 20(3) of Part 1 of Sch 1 to LASPO, introduced by regulation 3 of the order, vulnerable adults cases under the exercise of the inherent jurisdiction of the High Court: paragraph 9(2A)(b) of Part 1 of Sch 1 to LASPO, introduced by regulation 3 of the order.
[19] Paragraphs 24(3) and 19(2A)(b) of Part 1 of Sch 1 to LASPO, introduced by regulation 3 of the order.

judicial reviews of decisions in asylum cases which deny a right of appeal[20] or an in-country right of appeal[21]

Detailed criteria for the residence test and a full list of its inclusions and exclusions are set out in Appendices A and B.

Objections: overview

There are numerous objections to the order on grounds of fairness, equality and common law rights of access to justice. These objections may be encapsulated within the following headings:

- **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*.[22]"

- **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.

[20] Paragraph 19(2A)(c) of Part 1 of Sch 1 to LASPO, introduced by regulation 3 of the order.
[21] Also were an in country right of appeal is denied in human rights cases. Paragraph 19(2A)(d) of Part 1 of Sch 1 to LASPO, introduced by regulation 3 of the order.
[22] Hansard HL, 16 Jan 2012: Column 349.

Impact of the Civil Legal Aid (Procedure) (Amendment) (No.2) Regulations 2014 – matters of evidence

The draft regulations on the residence test must be read together with those that will affect its operation in practice. The Civil Legal Aid (Procedure) (Amendment) (No.2) Regulations 2014[23] are intended to come into force at the same time as the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014. At the time of writing, the evidence regulations are still in draft form and full draft guidance on the evidence requirements for the residence test has not yet been published. However the policy statement[24] and draft regulations indicate how problematic these evidence requirements will be in practice. They make for confusing reading, even to specialist immigration practitioners. The policy statement on evidence runs to 11 pages and this is not the final guidance.

The test would be impractical to enforce, and would by its operation exclude many people of the people who in fact meet its terms. British and EEA passports are not stamped on entry to, or exit from, the UK, making it difficult to use them to evidence length of residence in the UK. Many British citizens do not have passports of their own. People can be lawfully present in the UK without documents.

The draft evidence regulations state that a birth certificate showing the Applicant's birth in the UK with a parents name can be provided, along with a "relevant information document", to satisfy the residence test. This information document is defined as a document issued by a person who employs or has employed the applicant or a government agency.[25] What if the applicant is a child and has no such document from an employer or government agency?

The family member of an EEA national who is exercising rights under the European Treaties is in the UK lawfully without any documentation at all. If that person has no Embassy of their own in the UK from which to obtain a renewed national identity document they may also have no valid document showing their nationality let alone their residence status in the UK. But they are not in the UK unlawfully and may lawfully work and access public funds. There is no provision in the regulations to take account of this, for example, by stating that an applicant can provide proof of their relationship to an EEA national who is exercising treaty rights.

These requirements place a higher burden on applicants for legal aid than is required of other Government departments such as the Department for Work and Pensions[26]

What about discretion from the Legal Aid Agency when someone doesn't have documents required? We are not persuaded that the safeguard in the regulations is enough. The evidence regulations state that the Director of Legal Aid Casework may determine that an applicant is lawfully residence if their personal circumstances make it impracticable to provide evidence required and the director is satisfied that lawful residence is likely.[27]

[23] https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/supporting_documents/draftprocedureregs.pdf
[24] http://www.legislation.gov.uk/ukdsi/2014/9780111113073/pdfs/ukdspn_9780111113073_en.pdf
[25] Draft Civil Legal Aid (Procedure) (Amendment) Regulations 2014 reg 2 (re 15A(h) and 15J)
[26] Draft Civil Legal Aid (Procedure) (Amendment) Regulations 2014 reg 2 (re 15A(b)-(d))
[27] Draft Civil Legal Aid (Procedure) (Amendment) Regulations 2014 reg 2 (re: 15B(4))

"Personal circumstances" are defined to include homelessness, age and disability but nothing else[28]. This does not help, for example, persons who want to challenge a decision under the National Referral Mechanism that they have not been trafficked who are often unlikely to have lawful residence in the first place. It also does not help an advisor who must decide whether they can take the risk that someone presenting without documents, such as a survivor of domestic violence who has fled their home with no papers but who is accommodated by a women's refuge, is likely to have had lawful residence, and that the Director of Legal Aid Casework will agree with the advisor's decision on this point.

We have had sight of correspondence from the Ministry of Justice stating that if documents are with the Home Office, for example, while an extension of leave application is being processed, then applicants will not be able to pass the residence test as original documents must be provided.

If an application to extend leave to remain has been made before that leave runs out, or an appeal is pending against a refusal of leave then leave is extended on the same terms and conditions until such time as the Home Office has made its decision. Home Office decision-making is routinely subject to lengthy delays and inefficient administration: in March 2013 the Home Affairs Select Committee reported that some 55,000 outstanding immigration applications had not been put onto the Home Office's database, which would make it impossible for anyone wishing to check the status of such applications to get an accurate answer.

Such examples suggest that a strict attitude will be taken toward residence. The introduction of evidence requirements that place an onerous burden on advisors and applicants for legal aid have already been shown to be a barrier to access to justice in the context of evidence requirements for legal aid in family cases where there is domestic violence. Research by from Rights of Women, Women's Aid and Welsh Women's Aid in March 2014 showed that nearly 50 per cent of women survivors were not able to access legal aid after the implementation of evidence requirements under Legal Aid Sentencing and Punishment of Offenders act 2012 because they did not have the documents needed.[29] The Government was forced to introduce regulations widening the requirement in April 2014. [30]

The wide range of terminology and the complex web of exceptions will make it almost impossible for legal aid practitioners, particularly those with no immigration knowledge, to understand the practical implication of the test. It is inevitable that people will be turned away by non-immigration specialists if those advisors cannot satisfy themselves of the person's eligibility, a matter outwith their legal expertise.

This is likely to reduce take up by advisors of important cases for people with rights that need protection, as we have seen with the operation of the exceptional funding scheme, as providers will be reluctant to risk claims for payment being rejected. This in turn could lead to a public perception that legal aid is not available for migrants, as seen with the low take up of cases after the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

[28] Draft Civil Legal Aid (Procedure) (Amendment) Regulations 2014 reg 2 (re: 15J)
[29] Rights of Women, Women's Aid, Welsh Women's Aid, Evidencing domestic violence: a year on, March 2014 http://www.rightsofwomen.org.uk/pdfs/Policy/Evidencing_domestic_violence_III.pdf
[30] Draft Civil Legal Aid (Procedure) (Amendment) Regulations 2014

Specific Concerns

We turn now to address our specific concerns, as outlined above.

Ultra vires

The order is stated to be made under section 9(2)(b) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. That provision permits the Lord Chancellor to amend the Act so as to omit or vary the services listed in Part 1 of Schedule 2 to the Act for which legal aid is available. This may be done by amendment to Part 1, or any of the remaining three Parts to Schedule 2. However, the order does not vary the services for which legal aid is to be made available. Rather, it changes the eligibility criteria for receipt of legal aid so as to exclude a class of persons from legal aid for those self-same services. In short, the Lord Chancellor is seeking by this order to do something that he has not been granted power to do by Parliament. We consider that the order is thus ultra vires and unlawful[31].

Denial of justice in matters of especial gravity

Appendix B lists in full the types of cases persons would not be given legal aid to pursue if the residence test becomes law.

Appendix C lists examples of cases where individuals would be denied the ability to access justice, including children living in destitution or with special educational needs, trafficking victims and people who are homeless.

In April 2013 legal aid provision was narrowly restricted to specified[32] matters which, in the Government's assessment, are of "*the highest priority*"[33] and "target legal aid to those who need it most".[34] The Government at that time acknowledged legal aid to be "*a vital part of the system of justice*".[35] However the residence test cuts a swathe through this group of priority cases, denying access to justice to a significant subset of the group. In so doing it contradicts the Government's express statements as to the importance of the cases for which access to legal aid was preserved under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. For example, the removal of the right of trafficked persons and victims of slavery to challenge a Home Office refusal to recognise their status is at odds with the Government's stated aim of protecting these victims, as most recently expressed in connection with the draft Modern Slavery Bill.

The residence test will impede access to justice in a whole range of cases engaging *inter alia* fundamental human rights. See Annex C for examples of cases which would fail to meet the test and involve serious breaches of rights and risks of harm.

Unjust and unconstitutional discrimination

[31] This is a central plank of an ongoing legal challenge to the lawfulness of the residence test. A judicial review was granted permission and heard in the High Court on 3 and 4 April 2014. Judgment is awaited.
[32] Listed in Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012
[33] *Hansard* HL, 16 Jan : 2012 : Column 349
[34] *Reform of legal aid in England and Wales: the Government's response* (Cm 8072), June 2011 Ministerial Foreword, p.3
[35] *ibid*, Ministerial Foreword, p3

The order offends constitutional principles that stretch back to Magna Carta. That charter included that "*To no one will we sell, to no one deny or delay right or justice.*" A rule that denies a person with a strong case the means to pursue it on grounds of personal status or geographical location is inimical to these basic notions of justice.

The Government acknowledges that this test "may disproportionately impact on groups with protected characteristics namely non-British nationals, women and children"[36] but asserts that the modifications it has already made address those concerns. [37] We disagree and refer to the Annexes for the substantial list of individuals who will lose their right to access justice if this test is introduced.

The Minister for the Courts and Legal Aid, Mr Shailesh Vara, has said of the test to be introduced by this order:

> "We have made it absolutely clear that for the residence test it is important that they [persons eligible for legal aid] are *our people* – that they have some link to this country."[38] [emphasis added]

The idea that persons adjudged to be not "our people" should be left without the means to enforce the rights to which they are entitled under UK law on the basis of a rough yardstick of their lawful residence or geographical location is unjust.

A shield for unlawful conduct by Government

It is particularly concerning to us, as immigration lawyers, that the residence test effectively enshrines a reliance on Home Office decision making. If the Home Office has unlawfully failed to recognise or grant someone's lawful basis for stay in the UK – something that is all too common in what is a poorly-performing government department – this unlawful decision will have the ramification of cutting the affected person out of the means of redress for all other unlawful decision making in every other aspect of public life. The residence test thus has the indirect effect of pegging legal aid to Government decision-making and Home Office efficiency, a dangerous link to establish where fundamental rights are concerned. Persons on temporary admission in the UK will not be treated as resident for the purposes of the residence test; however how long a person spends in this category is entirely within the control of the Home Office. The Government is thus in a position to keep individuals from eligibility for legal aid, including for challenges to its own actions.

Where the Government unlawfully removes someone from the jurisdiction, in violation of their rights, that person will be doubly disadvantaged: the very unlawful act that removes them from the UK will also have the result of shutting them out of legal aid to get redress. We have seen the wrongful removal of British citizens from the UK because their status was misunderstood, or wrongly denied them. For example, in one case a British citizen was sent to Pakistan, a country to where he had never been, because his nationality was not understood by the Home Office. In another case, a British citizen with learning difficulties was removed from the country, despite having in his possession evidence that demonstrated his nationality. Were the residence case in force these men would never have been able to

[36] Ministry of Justice, *Transforming Legal Aid: Next Steps*, 05 September 2013 Annex B para 11.2.9
[37] Ministry of Justice, *Transforming Legal Aid: Next Steps*, 05 September 2013 Annex B para 11.2.13
[38] *Hansard* HC, 18 Mar 2014 : Column 624

get legal redress and be returned to their home in Britain.

The geographical limitation of the test should give great concern: anyone outside the UK (including British citizens) will fail the residence test and will be unable to enforce their rights with legal aid. Actions by the UK government abroad will be shielded from judicial scrutiny. For example, cases involving allegations of torture and ill-treatment by British forces abroad such as that of Baha Mousa[39] would not have been heard were the residence test in force. The test will thus provide a degree of impunity for unlawful State actions abroad.

Breach of trust

In 2010 when bringing forward what is now the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the Government promised an end to what it referred to as "*salami slicing*" of the legal aid budget.[40] It promised that, despite wholesale removal of some areas from the scope of legal aid, it would retain legal aid for "*the cases that most need it*", particularly identifying "*cases where people's life and liberty is at stake, where they are at risk of serious physical harm or immediate loss of their home, of where their children may be taken into care*".[41] At that time, the Government elected to generally remove immigration from the scope of legal aid, save for cases involving asylum / the most serious human rights, immigration detention, asylum support, certain cases concerning domestic violence or human trafficking, cases before the Special Immigration Appeals Commission and (with certain restrictions) immigration judicial review. During the passage of the Bill, the Government reiterated that legal aid would remain available in what it described as "*the highest priority cases*".[42] Moreover, in response to concerns that the Bill contained no statement of principle nor other guarantee that the Government would not after all return to legal aid to slice more and more from what many regarded as an already emaciated salami, the Government gave assurances that the Bill made clear "*for all to see*" what would continue to be funded by legal aid, stating that *"…the Bill is honest about what it does"*[43] .

The message from the Government then was clear, if, to many people, unwelcome and overly sanguine about the threat to access to justice entailed by what it was doing. That message was that the Government had made a global assessment of what justice required, was restricting civil legal aid to only the most serious of matters where justice could not be assured without the provision of legal aid and that Parliament, the public and the legal advice sector could clearly see the lie of the land with the future of the latter at least secure from the uncertainty and fragility that would result from further subjection of the legal aid salami to the knife. On that basis, Parliament was invited to assent to the Legal Aid, Sentencing and Punishment of Offenders Act 2012[44]. In relation to the specific power the Lord Chancellor now seeks to exercise in making the order containing the residence test, the Government had explained that the power would be used in a protection fashion: to make any future necessary amendments to the 2012 Act so as to ensure that its provisions for legal aid were

[39] *Al-Skeini and Ors v Secretary of State for Defence* [2007] UKHL 26.
[40] Hansard, 21 June 2011, column 989
[41] Hansard, 21 June 2011, column 167
[42] Hansard, 16 Jan 2012: Column 349
[43] Hansard, HL Report, 5 Mar 2012: Columns 1569-1572
[44] This was of especial importance in relation to the power the Lord Chancellor now purports to exercise, since it was directly in response to these assurances that the House of Lords finally assented to that particular measure, after extended debate on this issue.

not frustrated by a legislative change rendering Schedule 1 ineffective[45].

A mere nine days after the Bill became law proposals for the residence test were released in its consultation - *Transforming legal aid*.[46] This made a mockery of Government assurances to Parliament that the Bill should be taken on its face as a complete expression of the Government's reductions of legal aid. It transpired that the Act did not after all do 'what it says on the tin' in preserving legal aid for those areas expressly set out in Schedule 1. Instead the residence test would exclude legal aid for people in even these cases of the 'highest priority'. Parliament was invited to assent to LASPO on a clearly expressed basis of intent; a little more than a week after the Act became law, the goalposts were moved in clear breach of express assurances to Parliament.

Errors, oversights and impracticalities

The Government intends to introduce a set of regulations that will set out the evidence requirements for the residence test. It has made a policy statement on the evidence required, which was released in conjunction with the order on the parameters of the residence test. The two combined make for confusing reading, even to us as a body of specialist immigration practitioners.

The policy statement on evidence runs to 11 pages and this is not the final guidance. We are concerned that this document fails to make any mention of documents that show a person has "leave to remain" as an acceptable form of evidence of lawful residence, despite the order making provision for such persons within the residence test. The policy statement refers only to "indefinite leave to remain", EEA residence, British citizens and person with right of abode. Anyone with limited leave to remain, e.g. a refugee, would be excluded by a person relying on guidance drafted in line with this statement.

British and EEA passports are not stamped on entry to, or exit from, the UK, making it difficult to use them to evidence length of residence in the UK. Persons who have applied in time for an extension of their leave to the Home Office, but whose leave has expired before receiving a decision, are lawfully present, but if required to demonstrate this will only be able to produce a document which on its face appears to show that their leave has run out. Home Office decision-making is routinely subject to lengthy delays and inefficient administration: in March 2013 the Home Affairs Select Committee reported that some 55,000 outstanding immigration applications had not been put onto the Home Office's database, which would make it impossible for anyone wishing to check the status of such applications to get an accurate answer. We are concerned that the test would be impractical to enforce, and would by its operation exclude many people of the people who in fact meet its terms.

The large range of terminology and the complex web of exceptions will make it almost impossible for legal aid practitioners, particularly those with no immigration knowledge, to understand the practical implication of the test. It is inevitable that people will be turned

[45] The specific example given concerned paragraph 29 of Part 1 of Schedule 1 to the Act, which provides for legal aid in certain immigration cases concerning a survivor of domestic violence with entitlements under the Immigration (European Economic Area) Regulations 2006, SI 2006/1003. It was said that, if those regulations were required to be changed, the power in section 9(2) of the Act would be necessary to maintain the provision for legal aid. See Hansard HL, 27 Mar 2012: Column 1253.

[46] Consultation paper (CP 14/2013)

away by non-immigration specialists if they cannot satisfy themselves of the person's eligibility, a matter outwith their legal expertise. This is likely to lead to a "chilling effect" on the take up of important cases for people with rights that need protection, as we have seen with the operation of the exceptional funding scheme. This in turn could lead to a public perception that legal aid is not available for migrants, as seen with the low take up of cases after the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act in April 2013 in certain areas of law where only limited parts remain in scope for help. Overall the potential chilling effect is likely to mean the impact of the residence test is likely to be far wider than its already sweeping stretch.

No evidence base for alleged financial savings

The financial case for the residence test has still not been made. The Government has still given no estimate of the cost savings that will result from its introduction,[47] therefore has not justified its case that this will be a proportionate step to reduce legal aid spending. No estimate has been made even on data we know to be available to the Legal Aid Agency about residence, for example, an individual's eligibility for VAT.

The Government has also acknowledged that there will be high costs in implementing this test of up to £1m per annum for Legal Aid Agency staff to audit and oversee the implementation of the residence test. Legal aid contract managers currently visit all immigration providers on a quarterly basis for an audit for at least half a day. Contract managers and caseworkers are not specifically trained in immigration law or practice. On a recent visit to one provider the contract manager queried the current lack of evidence requirements to initiate a case opened to assist a client who was applying for indefinite leave as a survivor of domestic violence, because these exist in family cases. There is no evidence requirement for immigration applicants at the point of opening legal aid cases. The fact that a Legal Aid Agency contract manager who has visited a number of immigration firms every quarter since April 2013 did not know this suggests for contract managers to police the residence test requirements will require a significant level of investment in training and to cover their expenses and time to audit files in more depth.

Those excluded by the residence test were specifically given protection by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and now this is being removed, without reference to the massive reduction in legal aid spend that has already taken place since April 2013. In immigration alone the majority of cases are no longer in scope for legal aid and there has been a 45% decrease in cases brought in 2013/4 from the previous year.[48]

Initial indications of the complexity of the test and potential evidence requirements for it suggest that even immigration practitioners will find it complex to understand. We consider that estimates for the knock-on costs within the LAA are grossly understated and could give rise to satellite litigation if misunderstood.
In a debate tabled by Lord Pannick on 7 May 2014 in the House of Lords regarding changes to payment for legally aided judicial review cases, the Liberal Democrat peer and High Court judge Lord Carlile said the following about changes introduced without accurate costings:

[47] Transforming legal aid: scope, eligibility and merits (civil legal aid) IA No: MoJ 194, 05 September 2013
[48] Legal Aid Statistics in England and Wales 2013-2014, Ministry of Justice statistics bulletin, 24 June 2014 p. 23 www.gov.uk/government/uploads/system/uploads/attachment_data/file/322814/legal-aid-statistics-2013-14.pdf

> "I received a briefing this afternoon from a government source in this part of the coalition who told me that it was estimated there would be a saving of between £1 million and £3 million through the provisions that we are debating. That is just about the least robust financial assessment we have ever heard in this House. If the Opposition had put it forward, I can imagine the Government's excoriation of it."[49]

The lack of accurate financial justification to bring in a change that could affect a large number of people whose interests were considered worthy of ring fencing for legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is a reason to vote against this instrument, for there will not be time to collect and analyse such data before the instrument comes into force on 4 August 2014.

Inappropriate timing

We consider that it is inappropriate to introduce new restrictions on legal aid when the full impact of the April 2013 changes, that is, the restriction of legal aid under LASPO and the new legal aid contracts (capping immigration cases at c.100 annually per firm), have yet to manifest themselves.

In this regard we note that Government has relied on the existence of an exceptional funding scheme "safety net"[50] to catch those excluded by the residence test as the means by which fundamental human rights obligations are not violated.[51] This scheme has been widely criticized and in our view is not an effective safeguard on the current evidence. The overall success rate for exceptional funding applications[52] from April 2013-December 2013 was just 1.2% (14 out of 1151 applications) and in immigration cases only 3 applications out of 187 were granted, a grant rate of 1.6%.[53] The Ministry of Justice has refused to give us details as to what type of cases those were. ILPA is aware of four ongoing legal challenges to the exceptional funding regime, with hearings listed for the coming months. The exceptional funding scheme in our experience is cumbersome, slow, and has such an overwhelmingly high refusal rate that solicitors are disincentivised from even making the applications in the first place (each application takes many hours of work to prepare, work which will not be paid if the application is unsuccessful, as it will be in 99% of cases).

A commission of inquiry set up Lord Colin Low stated:

> *"Urgent action is also required to address the application and funding problems arising with section 10 of the LASPO Act on exceptional funding arrangements. These were intended to act as a safety net to guarantee the funding of cases that would ordinarily be out of scope*

[49] Hansard, House of Lords 7 May 2014 : Column 1546
[50] Lord McNally, HL Report 21 November 2011: Column 821
[51] Ministry of Justice, *Transforming Legal Aid: Next Steps*, 05.09.13 Annex B para 11 https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps
[52] Excluding inquests
[53] Ministry of Justice, Ad Hoc Statistical Release, Legal Aid Exceptional Case Funding Application and Determination Statistics: 1 April to 31 December 2013, 13 March 14 www.gov.uk/government/uploads/system/uploads/attachment_data/file/289183/exceptional-case-funding-statistics-apr-13-dec_13.pdf

for legal aid funding, but where either human rights or EU law require the provision of legal aid. The evidence to date is that these arrangements are not working."[54]

The Joint Committee on Human Rights has stated that

"[T]he Government cannot rely on the scheme as it currently operates in order to avoid breaches of access to justice rights.[55]

A judicial review challenge is ongoing in relation to the residence test, brought by the Public Law Project[56]. Permission was granted by the High Court on 24 January 2014 and the full hearing was on 3 and 4 April 2014; judgment is awaited. The grant of permission demonstrates that the High Court considered that the applicant has (at least) an arguable case that the residence test is unlawful.

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[54] The Low Commission, Tacking the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales, January 2014 http://www.baringfoundation.org.uk/LowComReport.pdf
[55] Joint Committee on Human Rights, 13.12.13, The implications for access to justice of the Government's proposed legal aid reforms, pp.4-5 www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/100/100.pdf
[56] http://www.publiclawproject.org.uk/news/31/permission-granted-in-residence-test-challenge.

APPENDIX A – residence test: detailed criteria

The residence test would require, to be eligible for legal aid, someone demonstrate that on the day of applying for legal aid he or she is:

- living in the UK;[57]
- if he or she requires leave to enter or remain to be in the UK that he or she has leave;[58] and
- he or she is less than 12 months of age;[59] or
- has lived in the UK over a consecutive period of at least 12 months (with no more than 30 days absence during this period) prior to the day of applying for legal aid;[60] or
- the person has refugee leave or humanitarian protection following an asylum claim in the UK (i.e. has been recognised to be at risk of persecution or torture, inhuman or degrading treatment or punishment if removed from the UK) and has lived in the UK over a consecutive period of at least 12 months (with no more than 30 days absence during this period) prior to the day of applying legal aid.[61]

In the case of someone who qualifies by virtue of the last of these criteria, legal aid will cease to be available at any point at which he or she no longer has refugee leave or humanitarian protection.[62]

In addition to the inclusive criteria outlined above, certain people are exempted from the residence test. These are those who on the day of applying for legal aid:

- have an outstanding asylum claim or appeal (provided that appeal was brought in-time[63]);[64]
- have refugee leave or humanitarian protection following a claim for asylum and less than 12 months has passed since the date that claim was made;[65]
- have leave as a resettled refugee (i.e. someone who has not claimed asylum in the UK and was accepted to come to the UK as a refugee);[66]
- are member of HM Armed Forces;[67] or
- are the spouse, civil partner, cohabiting partner or child of a member of HM Armed Forces.[68]

[57] paragraph 19(2) introduced by regulation 2
[58] paragraph 19(2) introduced by regulation 2
[59] paragraph 19(3) introduced by regulation 2
[60] paragraph 19(4) introduced by regulation 2
[61] paragraph 19(5) & (7) introduced by regulation 2
[62] paragraph 19(5) & (7) introduced by regulation 2
[63] i.e. within 10 days of being notified of an asylum refusal decision if he or she is in the UK and at liberty, within 5 days if detained in the UK and within 2 days if detained in the asylum fast track
[64] paragraph 19(6) introduced by regulation 2
[65] paragraph 19(7) introduced by regulation 2
[66] paragraph 19(8) & (12) introduced by regulation 2
[67] paragraph 19(9)(a) introduced by regulation 2
[68] paragraph 19(9)(b) & (14) introduced by regulation 2

In the case of someone who is exempted from the residence test by virtue of the first three of these criteria, legal aid will cease to be available at any point when the criterion ceases to be met (i.e. his or her claim or appeal is finally determined, or he or she no longer has the requisite leave), save that under the first criterion legal aid will continue to be available in the instant matter if the claim or appeal is successful.

APPENDIX B – residence test: application

The matters for which the order would exclude access to legal aid to those who cannot satisfy the residence test are civil proceedings relating to:

- the assessment of and provision for special education needs;[69]
- the abuse of a vulnerable adult (i.e. an adult whom it is acknowledged is unable to take care of him or herself or to protect him or herself from serious harm or exploitation;[70]
- the exclusion of someone from working with a child or vulnerable adult;[71]
- the treatment of someone on grounds of mental ill-health or incapacity;[72]
- the provision of community care to an adult (i.e. care provided to those disabled by age, mental or physical health or learning disability to assist them to live independently);[73]
- facilities for disabled persons under the Housing Grants, Construction and Regeneration Act 1996;[74]
- welfare benefits appeals;[75]
- the inherent jurisdiction of the High Court to protect vulnerable adults from their exploitation or abuse, or harm to their interests, by others;[76]
- mediation in family disputes (essentially disputes between spouses, civil or cohabiting partners over such matters as access to children, maintenance and accommodation);
- judicial review other that in relation to unlawful detention, refusal of a fresh asylum claim, exclusion of any or any in-country asylum or human rights appeal in immigration proceedings,[77] or the Special Immigration Appeals Commission;[78]
- abuses of position or power by public authorities;[79]
- breaches of a person's human rights by public authorities;[80]
- support or accommodation provided to a refused asylum-seeker or other person on

[69] this results from the introduction by regulation 2 of paragraph 19 in Part 2 of Schedule 1 to the 2012 Act, and the silence of regulation 3 upon paragraph 2 of Part 1 of Schedule 1 to the Act
[70] regulation 3(3) excludes the operation of the residence test in connection with abuse of a child
[71] as fn. 39 in relation to paragraph 3 of Part 1 of Schedule 1 to the 2012 Act
[72] regulation 3(4) excludes the operation of the residence test in connection with certain matters concerning detention or imprisonment
[73] regulation 3(5) excludes the operation of the residence test in connection with community care provided under the Children Act 1985
[74] as fn. 39 in relation to paragraph 7 of Part 1 of Schedule 1 to the 2012 Act
[75] as fn. 39 in relation to paragraph 8 of Part 1 of Schedule 1 to the 2012 Act
[76] regulation 3(6) excludes the operation of the residence test in connection with the inherent jurisdiction to protect children, or in connection with deprivation of an adult's liberty
[77] the limited scope for application of this saving for certain non-human rights immigration appeals will cease with the general removal of such appeal rights by the Immigration Bill currently before Parliament
[78] these savings are provided for by regulation 3(10)
[79] as fn. 39 in relation to paragraph 21 of Part 1 of Schedule 1 to the 2012 Act
[80] as fn. 39 in relation to paragraph 22 of Part 1 of Schedule 1 to the 2012 Act

temporary admission on grounds that he or she cannot return to his or her country of origin;[81]

- a court order for sale or possession, or eviction from, or bankruptcy proceedings involving the loss of, a person's home;[82]
- allocation of housing to a person who is homeless or threatened with homelessness;[83]
- a landlord's responsibility to remove a risk to health and safety;[84]
- an anti-social behavior or related order against the person;[85]
- an injunction to restrain a person from harassment of another;[86]
- an injunction to prevent gang-related violence;[87]
- a sexual offence against the person;[88]
- the seizure of property or funds as proceeds of crime;[89]
- an inquest into the death of the person's family member;[90]
- an injunction to prevent prescribed types of pollution;[91]
- contravention of equalities legislation;[92]
- minimum standards to protect access to justice in cross-border disputes within the European Union;[93]
- a terrorism prevention and investigation measure (TPIM);[94] and
- any matter that, under circumstances prescribed by the Lord Chancellor, is connected with any of the matters specified in Part 1 of Schedule 1 being those for which legal aid is available.[95]

APPENDIX C: case studies

This Appendix gives examples of case studies of persons who previously were granted legal aid to realize their rights under the law. All of the examples given would be unable to gain redress were the residence test brought into effect.

Andrei (a victim of slavery)

Andrei is from Lithuania. He came to the UK to find work after Lithuania joined the European Union. A man offered him labouring work. He accepted the job, and provided his passport to prove he was eligible to work. It was taken from him and not returned. He was forced to live in a shed with several other men, with no electricity or plumbing, and was

[81] regulation 3 is silent upon paragraph 31 of Part 1 of Schedule 1 to the 2012 Act, so the residence test will apply; this will affect those who are entitled to accommodation and support under section 4 of the Immigration Act 1999, who have not submitted or yet had formally acknowledged receipt of a fresh asylum
[82] as fn. 39 in relation to paragraph 33 of Part 1 of Schedule 1 to the 2012 Act
[83] as fn. 39 in relation to paragraph 34 of Part 1 of Schedule 1 to the 2012 Act
[84] as fn. 39 in relation to paragraph 35 of Part 1 of Schedule 1 to the 2012 Act
[85] as fn. 39 in relation to paragraph 36 of Part 1 of Schedule 1 to the 2012 Act
[86] as fn. 39 in relation to paragraph 37 of Part 1 of Schedule 1 to the 2012 Act
[87] as fn. 39 in relation to paragraph 38 of Part 1 of Schedule 1 to the 2012 Act
[88] as fn. 39 in relation to paragraph 39 of Part 1 of Schedule 1 to the 2012 Act
[89] as fn. 39 in relation to paragraph 40 of Part 1 of Schedule 1 to the 2012 Act
[90] as fn. 39 in relation to paragraph 41 of Part 1 of Schedule 1 to the 2012 Act
[91] as fn. 39 in relation to paragraph 42 of Part 1 of Schedule 1 to the 2012 Act
[92] as fn. 39 in relation to paragraph 43 of Part 1 of Schedule 1 to the 2012 Act
[93] as fn. 39 in relation to paragraph 44 of Part 1 of Schedule 1 to the 2012 Act
[94] as fn. 39 in relation to paragraph 45 of Part 1 of Schedule 1 to the 2012 Act
[95] as fn. 39 in relation to paragraph 46 of Part 1 of Schedule 1 to the 2012 Act

taken once a week to a motorway service station to shower. He was not paid anything for his work and was told that he owed his captors money for rent and food. If he complained, he was physically abused. Eventually Andrei escaped and got help from the police, but he had no place to stay. The police told him to see a solicitor who could help him get homelessness assistance from the local authority, but the local authority did not consider that they were under any obligation to help. Legal aid meant that Andrei was able to get assistance from housing solicitors who ensured that the local authority upheld their obligation to house him. Andrei did not have identification and could not prove where he was from or when he entered the UK, he would thus have been unable to avoid homelessness were the residence test in force.

A (a woman at risk of having to deliver her own baby)
A had been in the UK for 13 years. She has severe learning disabilities and is dependent on her sister, a British citizen. A's sister tried to resolve A's immigration status but the case was very badly handled and A was left without leave to remain. Access to healthcare was being denied on the basis of her immigration status. A was pregnant and faced delivering a baby at home on her own, with no medical support. The denial of healthcare was unlawful because antenatal care is necessary treatment which must be provided regardless of immigration status. Legal aid paid for the necessary legal challenge to the unlawful denial of treatment and A was able to get the medical treatment and care for her and her child to which they were entitled, meaning that her health and that of her baby were not put at risk.

Joy (a trafficking victim)
Joy was trafficked to the UK and forced to work as a prostitute for two years. While her traffickers were attempting to move her to another country using a false passport, she was encountered by UK authorities at the airport. She was arrested and charged with possession of a false document. She was convicted and sentenced to 12 months' imprisonment. While in prison she claimed asylum. This was refused and a decision made to deport her.

Joy did not disclose the exploitation as she was in fear of her traffickers who had threatened to harm her if she ever told her story. While in detention she built up a trusting relationship with a befriender and finally disclosed what had happened. She was referred to a legal aid solicitor and into the Government system for identifying potential victims of trafficking. The Home Office refused to consider Joy a victim of trafficking. Her legal aid solicitors challenged this through judicial review, which resulted in the Home Office reviewing its decision and accepting that Joy was indeed a victim of trafficking. This helped get her released from detention, and was instrumental in a subsequent application for refugee status, and revocation of her deportation order.

Joy did not have legal residence in the UK at the point where she had been told there were no reasonable grounds to consider her a victim of trafficking. She would have failed the residence test. Without legal aid Joy would now be facing removal from the UK back to a life of abuse and possible retrafficking.

Na (a mother of an autistic child facing removal)
Na came to the UK on a visitor's visa. She and her British husband were settled in Thailand with their three year old son Oliver who is British through his father. They came to the UK for a visit in 2011 but while in the UK Oliver was diagnosed with autism. The family decided they should remain for his welfare; Na did not want to leave Oliver even temporarily as she

is his main carer and he needs constant attention. Her husband is physically disabled so could not take on the role of primary carer. Na submitted an application in 2012 for leave to remain as a spouse on a discretionary basis. The couple could not afford to pay the application fee of £550. The application was rejected for non-payment of a fee, leaving Na vulnerable to removal from the UK, and her son. The Home Office would not consider the application without a fee, and there was no right of appeal against this decision, Na's legal aid solicitor issued a claim for judicial review. The Judge urged the Secretary of State to reconsider the case "to save costs and human anguish". He said the fee structure needed to recognise exceptional cases and "if ever there was a worthy case - this is it". The Home Office after further delays agreed to reconsider Na's application without requiring a fee. Na had to wait for over a year to get a decision on the case. Na did not have 12 months lawful leave and would have failed the residence test. The Home Office has now made a decision to grant Na leave to remain and paid Na's legal costs, reimbursing the legal aid fund.

A (a destitute victim of torture)
A is a victim of torture with related physical and mental health problems who was refused asylum in the UK. His eyesight is very poor, as a direct result of his having been tortured. After the refusal of his asylum application he was left destitute and living on the streets. A Law Centre advised him to submit further representations regarding his asylum claim by post as he was unable to travel by person to the Further Submission Unit in Liverpool. They also helped him apply for support. The UK Border Agency refused him support on the grounds that he had not attended the Liverpool Further Submissions Unit in person, as required by their policy. They made no mention of his postal submissions nor did they address his request to submit them by post for medical reasons. They also failed to abide by their own policy of returning all postal submissions to the sender. Funded by Legal Aid, the Law Centre was able to advise A about his options for challenging the refusal of support. This included appealing to the Asylum Support Tribunal or judicially reviewing the decision not to accept his submissions by post. Without the Law Centre's advice, it would have been very difficult for A to consider his next steps and he may have been left destitute, even though he was clearly eligible for and in desperate need of support. A is now on route to establishing his asylum case on the basis of his fresh submissions. Were the residence test in force, A would still be destitute and living on the streets with no means of redress.

N (a pregnant woman sleeping rough)
N was seven months pregnant and had been street homeless and sleeping rough for two months. She was waiting for a decision from the UK Border Agency's as to whether it would accept her fresh claim for asylum. A voluntary sector organisation assisted her to apply for support. At the time when she saw legal aid lawyers, the application had been outstanding for 14 days, during which time N continued to sleep rough while heavily pregnant, with her health, and that of her unborn child at risk. The UK Border Agency refused to say when a decision would be made. A legal aid lawyer assisted N under the Legal Help Scheme and sent the UK Border Agency an urgent letter before claim threatening judicial review due to the delay in making a decision on N's application for support. This was successful with N being granted support and accommodation that same day. Under the residence test N would have been unable to get access to a legal aid lawyer and would have had to remain sleeping rough at a critical time for her pregnancy.

B (an amputee refused housing support)
B was informed that his support should have ended two years previously as it was alleged that B had breached the conditions of his support at that time. This was not something that

had previously been put to B and he denied the allegation of a breach in any event. A voluntary sector organisation assisted B to make a new application for support, and asked that this be treated as urgent due to his imminent homelessness and because he has a disability; his leg has been amputated and he wears a prosthetic limb. However, the UK Border Agency refused to give B's application any priority or provide him with accommodation before his current accommodation was due to end. The voluntary sector organisation referred B to the legal aid lawyers as they considered that B would be street homeless unless legal action was taken. B instructed lawyers under the Legal Help Scheme two days before his accommodation was going to end. The lawyers sent the UK Border Agency a letter before claim threatening judicial review, this was instrumental in his being provided with accommodation the following day. B would have failed the residence test.