

Refugee Council

policy response



Refugee Council response to "*Proposals for the Reform of Legal Aid in England and Wales*"

February 2011

About the Refugee Council

The Refugee Council is a human rights charity, independent of government, which works to ensure that refugees are given the protection they need, that they are treated with respect and understanding, and that they have the same rights, opportunities and responsibilities as other members of our society. We achieve this mission by:

- supporting refugees and working with them as they build a new life
- speaking up for refugees and ensuring that refugees themselves have a strong voice in all areas of UK life
- building links with people from across our society to increase mutual understanding of refugees
- making the case for a fair and just asylum system
- taking a leading role in helping to build up a vibrant, sustainable and successful refugee sector in the UK and internationally

We provide advice and support services through a number of One Stop Services. In 2009/10 we delivered 76,586 advice sessions both in person and over the phone. We have extensive experience of trying to assist and advise asylum seekers both in relation to their asylum claims and related issues of support, health and employment. Many of these clients need legal help so we welcome the opportunity to comment on these proposals.

Overview of the proposals

It is essential for asylum seekers to have quality legal advice about their case from the outset and since they are generally destitute access to legal aid is crucial. We are thus naturally pleased to see that asylum will remain within the scope of legal aid but we are very concerned about the impact of some of the proposed system-wide changes in particular the exclusion of most other immigration cases. It is evident that even under existing arrangements, immigration legal aid providers struggle to remain viable; if legal aid is to be confined mainly to asylum then we have very real concerns about the future availability of good quality, experienced practitioners.

We have already seen a steady loss of experienced firms and community providers who, as a result of previous reductions in the amount of legal aid available have ceased to work on immigration, simply because they feel unable to do so within the financial constraints imposed upon them. Those that remain face incentives to cherry pick cases, taking on the simplest and giving them only minimal time. In a recent survey of Refugee Council clients 54% said they had only spent one to two hours in total with their legal practitioners.¹ This situation will clearly be made worse by the proposed reduction in fees.

The loss of many existing quality firms has already made it more difficult to find adequate representation for asylum and immigration cases, and the Refugee Council's experience is that as a result, clients are falling into the hands of unscrupulous advisers who, for example, charge them extortionate fees for the simplest of tasks.²

These funding pressures were illuminated during the roll out of the Early Legal Advice Pilot (ELAP), a project designed to ensure that asylum seekers are able to access quality legal help from the outset of their case. The Legal Services Commission acknowledged that the good practice built into ELAP could not readily be "shoehorned" into the existing fixed fee arrangements and hence payments were agreed at an hourly rate.

To this will now be added the uncertainties of the proposed single point of access via a telephone helpline, which is likely to greatly reduce the availability of face-to-face sessions and hence provide even less incentive to specialise in this area of law.

Beyond the immediate concern of asylum it is also important to recognise that taking areas of law such as debt, employment, housing and welfare out of scope will have a significant impact on people who have been granted refugee status in the UK. With the impact of other funding cuts, particularly those affecting local authorities funding commonly provided to community groups and advice centres, the impact of removing legal aid from these areas is likely to be felt particularly hard by many refugee communities. Many refugees already face significant hurdles integrating in the UK and taking up their social and legal entitlements. We are very concerned that refugees and their communities will be one group, among others, who will suffer increased and serious social exclusion and marginalisation if these proposals are introduced.

A further general point that we would like to make is that much of the cost of legal aid in immigration is due to the approach of UKBA in dealing with issues. There is rarely scope for negotiation or mediation. UKBA take the view that they will stick to a decision or their policy until a court tells them otherwise. A clear example of this was the case of *ZO Somalia and others*³ whereby UKBA refused to deal with applications for the right to work from people with fresh claims despite earlier court rulings until finally ordered to do so by the Supreme Court.

Many applications for refugee family reunion that are refused are subsequently overturned at appeal and this is indicative of an approach where the appeal system is used as a default safety net for poor decision making. Under these proposals such cases would no longer be in scope for legal aid.

¹ See: A new survey of Refugee Council client experiences in the asylum process: Refugee Council: November 2010
http://www.refugeecouncil.org.uk/policy/position/2010/NAM_survey

² For example the Refugee Council has seen one client who had been charged £650 to put in further submissions on their claim which simply repeated the initial claim and another £1,200 to apply for Indefinite Leave under the Case Resolution programme for which there is no application process as such. In both cases they subsequently found competent lawyers who obtained legal aid and presented their cases appropriately and with a successful outcome.

³ R (on the application of ZO (Somalia) and others) (Respondents) v Secretary of State for the Home Department 28th July 2010.
<http://www.bailii.org/uk/cases/UKSC/2010/36.html>

This is similar to systemic failures which can be seen in the rate at which asylum appeals are overturned. Although of course these will remain in scope the fact is that one in three is overturned, almost one in two are in the case of some countries and this has been persistently the case over many years. This reveals a deep malaise within the overall decision making process and a tendency to regard the appeal system as an expensive safety net as suggested in relation to family reunion applications above.

We will not respond to all of the 51 questions in the Consultation but will confine our observations to the points that immediately concern us.

Primary concerns in the proposals

The Refugee Council has five major areas of concern regarding these proposals. These are:

- i) The proposal that asylum support will be out of scope and no longer eligible for legal aid. (Q.3)
- ii) The classification of family reunion for refugees as an immigration rather than an asylum matter, hence taking it out of scope. (Q.3)
- iii) That advice on asylum matters will be initially by telephone and it will rest with a specialist adviser to determine whether a face to face interview is necessary. (Q.7-9)
- iv) Issues particularly affecting, or specific to children. (Q.3)
- v) Issues particularly affecting or specific to women experiencing domestic violence or who have been trafficked. (Q.3)

i) Asylum support

Asylum support is the only access to any benefits that asylum seekers have, providing the most basic level of accommodation and income.

It is hence a safety net for people in a state of absolute destitution and its denial involves potential homelessness with the related serious impacts on health and well being. A refusal to grant asylum support may not be immediately life threatening but it does involve destitution and homelessness which in our experience can have severe repercussions for people's health. We do not accept the proposition that legal aid should only be available for matters of life and death. As the UK Border Agency has an adversarial approach to challenges to asylum support decisions, we do not accept that the interests of justice are served by undermining the legal protection that our clients may sometimes need.

Whilst it may be true that the basic outline to asylum support entitlements is straightforward and easy to explain, the complications that can arise are not. People can be refused asylum support for a variety of reasons which can include not applying in time, disagreements over whether a person is destitute and matters relating to the applicants' co-operation with UKBA. As asylum support is the only means of support available to asylum seekers, who are generally not permitted to work, it is vital that if an application for asylum support is refused, the applicant is able to access legal advice to establish whether there are grounds to challenge the decision and to make the basic case. This may involve discussion or correspondence with UKBA outlining the basis of the case in the hope of resolving it without the necessity of recourse to the courts.

The extent of the need is demonstrated by research from the Asylum Support Appeals Project (ASAP), which provides free legal advice to people appealing asylum support decisions:

"ASAP believes that it is vital that UKBA adopts a clear structure when deciding whether someone is destitute in order to maintain a fair asylum support decision-making process. Yet these findings show that UKBA consistently fails to include an outline of the legal test of destitution in its written decisions

and, more worryingly, fails to apply the tests set down in law when assessing whether someone is Destitute."

ASAP found that:

"Out of 40 decision letters [the letter which an applicant for asylum support receives from UKBA] analysed, only one letter outlined the destitution test; 22 decision letters did not apply appropriate and/or separate legal tests of destitution; in 16 decision letters, glaring errors or wording of the decision made it impossible to understand on what basis UKBA decided the person was not destitute".⁴

If a challenge to an asylum support decision is unsuccessful then there is the option of an appeal (for which there is no legal aid currently – hence the need for the ASAP) and then judicial review (which will remain in scope). However, it is difficult to see how any case will reach the stage of possible judicial review if the first stage of legal help is no longer available. It is certainly not true to say that voluntary sector, non-legal advice agencies are able to advise on the intricate case law on entitlements that has arisen over the years. Furthermore, the current round of government spending cuts means it is far from certain what alternative sources of advice will be available in future.

Case study: A couple and child were homeless and having to stay with various friends when they applied for support under Section 4 of the 1999 Immigration and Asylum Act. The application was made in July but despite repeated enquiries, UKBA failed to make a decision on the application, meaning that there was not even the scope for an appeal. Finally in October, the case was referred to a local solicitor who wrote to the UKBA and threatened further action. This immediately produced a favourable decision after three months waiting.

- **Asylum support should remain in scope as a high priority just as homelessness is, namely because of "the potential impact on the livelihood, health, safety and well-being of the litigant and their family and.....given the gravity of the consequences".⁵**

ii) Refugee Family Reunion

We are also concerned that applications for refugee family reunion are to be treated as immigration matters and not asylum, and hence will be out of scope. It is difficult to see how this can be justified. The right to family reunion arises directly from the recognition of an individual's need for protection. The entitlement is strictly limited to spouses and dependant children. Living with one's spouse and children is a fundamental human right, not a matter of choice, nor simply something one simply decides to do.

The framers of the 1951 Refugee Convention reminded Governments of this in General Provision B.

*The Conference, **considering** that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee..... and the rights granted to a refugee are extended to members of his family, **recommends** Governments to take the necessary measures for the protection of the refugee's family.⁶*

⁴ "Not destitute enough" ASAP December 2008 P 9

⁵ Green paper para 4.15

⁶ Convention and protocol relating to the status of refugees 1951 p 12 <http://www.unhcr.org/3b66c2aa10.html>

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Applications for family reunion are often refused and many of these refusals are overturned on appeal. Refugees should continue to get legal aid in order to pursue these appeals effectively.

Case study: A woman from Guinea arrived in the UK in 2006 with 3 of her 5 children and was granted refugee status. She was able to bring her son to the UK from Guinea through the family reunion process, assisted by a legal aid solicitor. She has one remaining (adopted) daughter in Guinea. She adopted her daughter officially and has paperwork to show this, however the child was refused permission to join her family in the UK. This decision is presently being appealed with legal aid representation. This process has now taken over 18 months and the woman is continuing to be assisted by a solicitor in order to challenge the decision made by the UKBA.

Case study: An 8 year old girl's mother died leaving her with no living parent her country of origin. Her maternal aunt, who was recognised as a refugee in the UK, made a refugee family reunion application to enable the child to join her in the UK. Initially the girl was granted a visa for 8 months, which unfortunately was never renewed. When she turned 17 she applied for a driving licence and it was discovered by the DVLA that she was an overstayer. The UKBA issued removal directions.

She was helped by a legal aid funded representative who appealed successfully against the removal directions. However the UKBA appealed and of course was represented in the further hearing. It was very important that the girl had her own representation to counter the UKBA's case in the court. It would not have been possible for her to represent herself nor access the necessary documentation from overseas that related to her case.

- **A refugee's application for family reunion should be treated as an extension to his or her claim for asylum and be within scope for legal aid purposes.**

iii) Telephone Advice Helpline

This proposal is extremely worrying. The basic principle of a helpline is of course desirable. If it were possible to simply phone a single Free phone number, not be put on hold, and talk to somebody who can arrange an appointment with an adviser in an accessible location, then this would be extremely helpful.

However, it is clear that this is not the intention of the proposal. What is proposed is a general, national helpline which will operate as a triage system for all incoming calls. This will establish eligibility for legal aid and the nature of the enquiry. People whose enquiries are out of scope will be given general advice and information. Those that are in scope will be referred to a specialist adviser on a phone line, who will advise them and decide whether a face to face interview is necessary. Thus we are concerned that the phone line operators will be essentially gatekeepers to face to face advice with a legal representative.

This raises a whole range of issues. The first and perhaps most obvious is language. 42% of the Refugee Council's Advice Sessions currently require an interpreter. We are told that Language Line will be available but this is an extremely inefficient and impersonal way in which to interview somebody on what may be extremely sensitive issues.

Secondly there are issues of cost both to the caller and also the overall cost to the legal aid fund. This phone line will not be free to the caller. We have been told that normal rates will apply and if paying for a call becomes an issue then the Helpline will phone the caller back, if necessary at an agreed time. Most asylum seekers do not have access to landlines and have to rely on the generosity of friends or voluntary organisations to give them mobile phones. The cost of using these to make the initial call to the helpline is likely to be prohibitive. For the legal aid fund the cost of these phone calls has to be added the cost of the use of Language Line, an expensive interpreting option, in potentially 42% of cases.

Thirdly there is the issue of documentation. Asylum seekers frequently have bundles of documents relating to their case of which they struggle to make sense. It is extremely unlikely that they would be able to describe the contents of these documents by reading them out to a stranger over the phone.

Next there are the related issues of trust and disclosure. Most refugees have been through traumatic experiences; many have been tortured; some have been raped or experienced other violence. These are difficult issues to discuss and to put in perspective. It requires a level of trust and rapport that can generally only come from a face to face interview with a representative who is able to question sensitively, in such a way that trust can be established. There is an additional concern that people might feel restricted in how openly they can speak about their case, given the public places and situations from which they may be forced to make the phone call.

For asylum cases we regard this proposal as absolutely impractical. There are already in existence pilots, such as the ELAP referred to above and rota arrangements such as in the North East and Humberside, to ensure that asylum applicants can be referred to a solicitor at the earliest opportunity. In the absence of such arrangements they should be able to instruct a solicitor of their choosing. Requiring them first to go through this triage system is wholly inappropriate.

- **We do not accept that asylum applicants generally can be adequately prepared and advised about their asylum interview over the phone. We recommend that asylum applicants be able to opt for a face to face interview with a representative of their choice, without the requirement to go through telephone triaging first.**

iv) Issues particularly affecting or specific to children.

The argument given for placing immigration advice and representation being out of scope is that:

*"...these cases do not raise issues of such fundamental importance as asylum applications, where the issue at stake may be, literally, a matter of life and death. In contrast to those cases, an individual involved in non-detention immigration cases will usually have made a free and personal choice to come to or remain in the United Kingdom."*⁷

⁷ Green paper paragraph 4.146

This will often not be the case for a person brought to the UK as a child by adults, who subsequently finds him or herself without secure immigration status. These young people may be orphans, who have been brought to the UK in a variety of legal and non-legal circumstances, such as being privately fostered or trafficked. These circumstances may only become apparent to the young person once they turn 18, when they may be required by service providers to demonstrate their immigration status in order to access certain services. These young people did not make a free and personal choice to come to the UK and should not be forced into making unnecessary asylum applications simply to access free legal advice.

Furthermore, there are children whose claim for asylum is initially refused and in making further representations, raise grounds under the European Convention for Human Rights that do not fall under Article 3 (serious harm – asylum and in scope) but do come under Article 8 (right to family life – immigration and not in scope). We are anxious that representation for these types of cases, who arrived as children, should remain in scope. Cases that comprise asylum and immigration issues should be funded in their entirety.

This is particularly relevant in applications for further leave by unaccompanied children, some of whom will have had no opportunity to appeal their initial refusal of asylum as, under Section 83 of the Nationality, Immigration and Asylum Act 2002, there are no appeal rights where the initial leave was less than a year which is true of many of these cases.

Case study: A child claimed asylum in UK at the age of 16 on the basis of being an orphan and abandoned child. His asylum claim was refused but he was granted discretionary leave to remain (DLR) until his 18th birthday - he didn't appeal against the decision to refuse his asylum claim. During his DLR validity period, he took a 2 year food and catering course and found a part time job in a hotel.

He applied for an extension of his discretionary leave on time but this was refused. His legal representative submitted further representations to UKBA, arguing that the young person had established a private life here, and pointing out that the young person had no family in his country of origin, had arrived in the UK at a young age and lived here for a considerable length of time, had worked during his time here and no family ties in any other country. UKBA accepted the arguments and has granted the young person indefinite leave to remain.

Without legal representation, this young man's future would have been significantly different. The submissions made to UKBA were based on issues that would be out of scope under the proposals.

- **All children's cases involving asylum or immigration, or a combination of the two, should be eligible for legal aid funding in their entirety.**

v) Issues particularly affecting or specific to women experiencing domestic violence or who have been trafficked.

Whilst we are pleased that legal aid will continue to be available to protect women who experience domestic violence we are concerned that this may be narrowly defined and confined to cases involving actual physical contact. Many women experience non-physical forms of intimidation, harassment and violence and find themselves trapped within abusive relationships. This can be greatly compounded where there are underlying issues relating to the immigration status of either or both parties. Women in this situation need to have access to legal advice to protect themselves and their children and to resolve their position. In the absence of this they will have little option but to simply apply for asylum.

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We are also concerned that removing criminal injuries compensation from the scope of legal aid will have consequences for trafficked women contrary to the UK's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings. This requires states to provide legal advice and information to victims and free legal aid to enable them to seek redress, including compensation, for the harm they have experienced.

This is a situation comparable to that relating to asylum support where procedures may be apparently straightforward but the complexities that arise are not and require legal advice to pursue. Again alternative sources of advice and support are not available to assist this vulnerable to group to take their cases forward.

- **Legal aid should continue to be available for women experiencing all forms of violence, physical and non-physical, and for compensation for victims of trafficking.**

Conclusions

The Refugee Council is seriously concerned about the impact of these changes being carried out in the context of overall reductions of advice services. As we have indicated above legal firms are already struggling to remain viable within existing financial constraints and the combination of the proposed reduction of fees and reduced access to face to face advice is likely to bring about a further exodus of quality firms from immigration advice.

We regard the proposed telephone access helpline as unworkable.

It is not the case that there are other non-legally aided sources of equivalent advice. Advice services, CABs and refugee community advice services are having their funding removed at the same time and access to advice for the most vulnerable will become increasingly problematic. Their problems will become increasingly extreme, complex and difficult to resolve and they will all too easily become the prey of unscrupulous advisers.

This Green Paper severely underestimates the impact these changes will have on the wider community. They will remove a safety net which is crucial in providing to access justice for the most vulnerable members of the community. In the long run the costs will be greater.

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