



Response to Ministry of Justice consultation *Transforming Legal Aid: delivering a more credible and efficient system*

June 2013

About the Refugee Council

The Refugee Council is a human rights charity, independent of government, working to ensure refugees are given the protection that they need, are treated with the respect and understanding that they are entitled to, and that they are assured the same rights, opportunities and responsibilities as other members of society.

The Refugee Council gives advice to asylum seekers and refugees, most notably for adults relating to asylum support and to unaccompanied children on a range of issues relating to their protection and care. The Advisers who directly assist our clients are accredited by the Office of the Immigration Services Commissioner at level one. We are not able to provide legal advice above this accredited level and work closely with legal representatives to ensure that the people we help receive the appropriate level of advice and representation for their asylum claim and other matters relevant to their situation.

Our response to the consultation document

We have restricted our response to the questions most relevant to our work so comment upon the proposals to

- Introduce a residence test for civil legal aid applicants.
- Limit the legal aid relating to judicial review applications to those where permission is granted.
- Remove legal aid funding from 'borderline' cases including those where a person is appealing their refusal of asylum.

In addition to our comments on these specific proposals we would like to make several points about this consultation generally. The government is, through this paper, proposing to make wholesale changes to an individual's ability to access justice and we do not feel it appropriate to make these changes without parliamentary scrutiny. Furthermore, the consultation paper was issued a week after the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO Act 2012). During the passage of the Bill that was to become the LASPO Act 2012, the government stated in Parliament that legal aid would be retained for matters of 'the utmost priority'¹.

Finally, both the introduction to the consultation document and the Ministerial foreword cite financial savings as a motivation for these proposals. The impact assessment included as an annex to the document assesses that in the three proposals listed above (the residence test, the limit to judicial review funding and the removal of funding for 'borderline cases') the financial impact will be negligible or very small. We are therefore concerned that the reasons for introducing these proposals may be at best confused and at worst, misrepresented.

¹ Lord McNally (Minister of State), *Hansard, House of Lords 16th Jan 2012 column 349*

Introduction of a residence test for civil legal aid claimants.

Consultation question 4: Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

We do not agree that the residence test as proposed will have the effect as described in the question. A person may not have been continuously lawfully resident for 12 months yet have a strong connection to the UK, for example a person whose entire family lives in this country or a young person whose formative years have been spent in the UK.

We acknowledge that people with an extant claim for asylum will be exempt from the residence test and the reasons given for this are entirely appropriate. However, we are concerned that asylum seekers whose claim has been refused and where they have no outstanding appeal will fall outside of this exemption, when s/he may remain in need of advice and representation. The main category of our client group that would be affected by this measure is those who, following a refusal of asylum claim and dismissal of appeal (or those who have not exercised their right of appeal, including those who were not able to get legal aid to fund their advice and representation at this stage), have sufficient evidence to make a fresh claim for asylum. We are gravely concerned that people who have a strong case may be unable to present this adequately because they will not have access to legal aid to fund the preparation of their case and/or independent evidence to corroborate their claim. Those with such strong claims will include survivors of sexual violence, people whose individual circumstances have changed since their initial asylum claim and those who were refused but where case law subsequently indicates that their asylum claim and appeal were wrongly dismissed. It is likely that the effect will be particularly felt by women making claims based on gender specific persecution, as it is widely accepted that historically, decision making on these types of claims has been poor.²

We recommend that this proposal be reconsidered, particularly in the light of the assessment that it will result in negligible financial saving.

Payment for work carried out on application for permission for judicial review contingent on permission being granted.

Consultation question 5: Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an onward permission appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursements should be payable in any event)? Please give reasons.

We do not agree that the funding for work on a person's application for judicial review is correctly measured by its success at permission stage. Our clients are frequently wrongly denied their legal rights. Common issues affecting them include

- Unlawful decisions made as to a child's age or eligibility for services under the Children Act 1989.
- Refugees wrongly denied access to public services such as housing, social services assistance under community care law and state benefits.
- Delays from the government in issuing status documents.
- Failure by the government to adhere to its own guidance or to case law.
- Unlawful detention or issuing of removal directions.

² For example, Nick Clegg, Deputy Prime Minister speaking at the Refugee Council in 2011, quoted by Asylum Aid in 'I feel as a woman, I am not welcome' 2012.

The Refugee Council helps people to challenge such decisions and sometimes succeeds. However, we frequently fail to persuade the state authorities simply through our interventions. Where this is the case we have no option but to refer our clients to a legal representative who can assist the client by way of judicial review. This process will begin by the legal representative's written request to the state authority to reconsider its decision. In many cases this is successful. Under these proposals this work will not be funded and will therefore not take place. Whilst most individuals and agencies wish that this were different, it is our experience that many statutory bodies will not reconsider unlawful decisions without this legal intervention. In our opinion this will result in an increase in unlawful decisions relating to access to services with disastrous effects on the individual and/or an increase in the number of individuals who seek to ask the court to intervene without the assistance of a properly qualified representative. This is not in the interests of justice.

We note that much case law relating to the above categories of state assistance have been made possible through legally aid funded judicial reviews. The Refugee Council was involved in a case in 2003 and 2004³ which established important matters relating to a breach by the government of Article 3 of the European Convention on Human Rights. This, and many other landmark cases, would not have been happened without legal aid funding and legal representatives will not be able to afford to take the financial risk that is proposed in the consultation document. This is noted in the document's impact assessment. The conclusion drawn that *these are likely to be cases that would not be considered by the Court to be arguable in any case*' is flawed; it fails to take into account the large numbers of cases that do not reach this stage because once proceedings have been initiated, the statutory authority withdraws its decision.

We recommend that this proposal be reconsidered, particularly in the light of the assessment that it will result in negligible financial saving.

Removal of the current provisions which allows certain cases with borderline prospects of success to be funded.

Consultation question 6: Do you agree with the proposal that legal aid should be removed for all cases assessed as having "borderline" prospects of success? Please give reasons.

We do not agree with this proposal. It is important to recognise that 'borderline' in this instance does not mean 'with less merit' but rather 'less clear'. Our key concern relates to children's asylum appeals. Most of the children we help are unaccompanied and in need of expert assistance; indeed in domestic and European law special provision is made for the legal assistance in relation to children in the asylum system and specifically their legal representation.

After working closely with the Legal Services Commission in 2005, a policy⁴ was introduced to ensure that children received assistance in lodging and presenting their appeals. The policy stated that children appealing a refusal of asylum should be considered to reach at least 'borderline' status with regard to the merits of their case when deciding to grant funding for the advice and representation relating to the appeal. If the 'borderline' status were to be removed this policy could not continue to work. It is important that the 'borderline' category is retained for matters of wider public interest so we recommend that the proposal to remove it is not taken forward.

Judith Dennis
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³ Secretary of State for the Home Department and Limbuela and others EWCA Civ 540

⁴ Legal Services Commission immigration team newsletter June 2005.