



**Asylum Aid's submission to
the Joint Committee on Human Rights**

***The implications for access to justice of the
Government's proposed Legal Aid reforms***

5 August 2013

“

I am sure that most noble Lords would not dream of buying a house without decent legal advice. Certainly, no one should be forced to defend their life without it

”

Baroness Sherlock, House of Lords

About Asylum Aid

Asylum Aid is an independent, national charity working to secure protection for people seeking refuge in the UK from persecution and human rights abuses abroad. We provide free legal advice and representation to the most vulnerable and excluded asylum seekers, and lobby and campaign for an asylum system based on inviolable human rights principles. The Women's Project at Asylum Aid strives to obtain protection, respect and security for women seeking asylum in the UK by providing specialist advice and research and campaigning on the rights of women seeking asylum. Asylum Aid was highly commended in the Charity Awards 2010.

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Asylum Aid is gravely concerned about the government's proposed Legal Aid reforms.

These changes are likely to impact the human rights of some of Asylum Aid's most vulnerable clients, including:

- people from many of the most dangerous countries in the world who need to bring fresh information about their asylum claims before the Home Office;
- children challenging the decisions of local authorities; and
- women seeking protection after being trafficked into the UK for sexual exploitation.

At the same time as removing access to justice from our clients, the proposals would immunise the government from challenges against its decisions.

This will have deep, worrying and lasting implications for human rights in the UK.

The proposed introduction of a residence test for civil Legal Aid claimants, so as to limit Legal Aid to those with a “strong connection” with the UK

Asylum Aid is very concerned that the proposed ‘residence test’ – generally understood as one year’s legal residence in the UK – is incompatible with human rights.

It will directly affect our clients whose applications for asylum have been refused, but who rely on Legal Aid to bring new information about their situation (or ‘fresh claims’) before the Home Office. This right is essential, given that:

- the existing Legal Aid system carries no incentives to conduct detailed, quality work at the beginning of the asylum claim. As a result, not all relevant information is necessarily available to the Home Office official when making an initial decision;¹
- barriers remain which prevent asylum seekers disclosing all relevant information when they first seek protection, including limited provisions in practice for the delayed disclosure of traumatic experiences, poor legal representation, and uncertainty about childcare at immigration offices;²
- how quickly situations can change overseas; and
- how new case law can affect the rights of previously refused asylum seekers.

1.1. Fresh asylum claims and destitute asylum seekers

It is unclear from the consultation document whether the Ministry of Justice proposes to grant access to Legal Aid as soon as a fresh claim for asylum has been submitted or, as it appears from the consultation proposals, whether Legal Aid will only be granted once an application has been accepted by the Government as amounting to a fresh claim. This needs to be clarified as a matter of urgency.

If it is the latter, then in a situation where a person submits a fresh claim but the government refuses to treat it as such, the applicant would not have a right of appeal. Under the present system the only legal remedy open to a person in this situation would be to seek Judicial Review – but under these

¹ On the existing Legal Aid system and its impact on asylum work, see The Runnymede Trust (2012), *Justice at Risk: Quality and Value for Money in Asylum Legal Aid*

http://www.asylumaid.org.uk/data/files/publications/208/Justice_at_Risk_Report.pdf

² These issues and more are outlined in Asylum Aid’s submission to the Home Affairs Select Committee inquiry into asylum in 2013:

http://www.asylumaid.org.uk/data/files/publications/217/HomeAffairsCommittee_AsymAid.pdf

An alternative approach, built on more consensual relations between officials and asylum legal representatives, is outlined in Asylum Aid (2013), *Right First Time* http://www.asylumaid.org.uk/data/files/publications/210/RightFirstTime_V3.pdf

proposals, where a person has no right to reside, access to Legal Aid for Judicial Review would also be curtailed. This has the potential to deny access to justice for vulnerable asylum seekers and is therefore incompatible with human rights legislation.

Asylum Aid's work advising destitute asylum seekers consistently finds that at least 50% of the clients advised have legitimate merits for accessing Legal Aid to reopen their cases. This could be to undertake fresh asylum claims or to commence judicial review proceedings as a result of the Home Office not following their own established policies and procedures.³ This vulnerable client group already faces extreme barriers accessing Legal Aid for further advice on their cases. This is why Asylum Aid has developed outreach advice surgeries to undertake this work, outside the scope of Legal Aid. Once we have established the merits of the case, we use this as evidence to persuade legal providers to take these people on because – despite the barriers they have faced – they should be entitled to access Legal Aid. This can then also assist to resolve destitution problems.

The Ministry of Justice proposals would establish further barriers for this vulnerable client group, making it more difficult for them to access justice and exacerbating their destitution. Moreover, preventing access to justice for people with legitimate human rights claims in this way may well be incompatible with human rights legislation to which the government has signed up.

1.2. Fresh asylum claims and women

Making it harder to get Legal Aid for fresh claims has a disproportionate impact on women asylum seekers. This is because there are a range of factors that can make it harder for women to disclose their experiences at the time of their asylum claim and appeal.

These factors include:

- Applicants submitting gender-related applications concerning, for example, sexual or domestic violence, forced marriage, honour crimes, female genital mutilation, forced prostitution and trafficking may feel unable or reluctant to disclose information for many reasons. These reasons include the effects of trauma, stigma and shame, other mental health problems, lack of trust in authorities and fear of serious harm as a reprisal. Because of this an applicant may be reluctant to identify the real reasons for the application, or the true extent of the persecution they have suffered and/or feared;
- Women may not know that such types of harm are relevant to their asylum claim if they have not been adequately advised about the merits of their claim;

³ Asylum Aid has run a dedicated destitution project since 2009, working in co-ordination with the British Red Cross and the Notre Dame Refugee Centre.

- Psychological symptoms experienced during asylum interviews such as dissociative experiences, flashbacks, avoidance behaviours (for example, avoiding thoughts or feelings associated with the trauma and not being able to remember details) have an impact on asylum seekers ability to disclose. Shame is particularly salient for people with a history of sexual violence preventing them from disclosing sexual issues. Indeed being forced to talk about a traumatic event could potentially activate shame reactions, and so people experiencing shame may engage in strategies to avoid this feeling, such as non-disclosure of sensitive personal information;⁴
- The UK's own credibility guidance notes that mitigating factors for delays in providing details or material facts would include trauma and painful memories, particularly those of a sexual nature;⁵ and
- The gender, cultural and educational background of a female applicant may affect her ability to relate her account to the interviewer. She may be unaccustomed to communicating with strangers and/or persons in public positions due to a background of social seclusion and/or social mores dictating that, for example, a male relative speaks on her behalf in public situations.

I would also draw your attention to the situation described by the campaign group Save Justice, whose client was recognised as a refugee and was able to access Legal Aid to apply for a non-molestation order against her violent and dangerous ex-husband.⁶ This potentially life-saving provision would be lost under these proposals.

2. Separated Asylum-Seeking Children

Asylum Aid works to ensure separated asylum seeking children are kept safe from harm.⁷ We are therefore deeply concerned about the potential impact that the residence test could have on this extremely vulnerable group of young people, and about the potential breaches of the Convention on the Rights of the Child, a legally binding international agreement which the UK has ratified and which is applicable to all children present in the United Kingdom.

⁴ Bögnér et al (2007) 'Impact of sexual Violence on disclosure during Home Office interviews', *The British Journal of Psychiatry*, London: Royal College of Psychiatrists, Online. Available HTTP: <http://bjp.rcpsych.org/content/191/1/75.full> (accessed 21 May 2013).

⁵ UK Border Agency (2012), *Asylum Process Guidance: Considering Asylum Claims and Assessing Credibility*, para 4.31. See <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanddecidingtheclaim/guidance/considering-protection-.pdf?view=Binary>

⁶ See <http://savejusticeuk.wordpress.com/2013/07/23/if-i-hadnt-had-legal-aid-i-would-be-dead-now/>

⁷ Asylum Aid has employed a dedicated Children's Caseworker in our Legal Team since 2010.

Asylum Aid is particularly concerned that the introduction of a residence test would breach Articles of the Convention, including:⁸

- An unaccompanied child recently recognised as a refugee, if subjected to an age dispute by social services less than a year later, would have no means of challenging that decision, and would be deprived of age appropriate support, education and accommodation as a result. This would breach Article 26, which entitles the child to ‘the right to benefit from social security’, and Article 28, which ‘recognises the right of the child to education’.
- The children of families recognised as refugees in the UK will not have the same right to legal aid representation as the children of families who have been settled in the UK for a longer period. This would breach Article 2, as it would discriminate against those children.
- A family granted refugee status will not have access to legal aid if it is necessary to take out a non-molestation order against a violent ex-partner. We believe this would breach Article 19, as the child’s right to be protected from all forms of violence would not be honoured.

3. Assessing the Residence Test

Asylum Aid believes that the ability to assess a client under the proposed residence test will be an extremely complicated process and that, as such, only specialist immigration lawyers would be competent to undertake this work. If this reform is implemented, it would be necessary to grant Legal Aid to advise on this process.

Notwithstanding this concern, this is a complex area of law with significant scope for wrongful interpretation, particularly in the absence of concrete evidence to prove or disprove the right to reside. It is highly likely that people will be denied access to justice due to a misunderstanding of their eligibility.

⁸ A useful summary of the Convention on the Rights of the Child can be found at http://www.unicef.org/crc/files/Rights_overview.pdf

The proposal that providers of legal services in applications for judicial review against public bodies should only be paid for work done on the case if the Court grants permission for the application to proceed

The proposed changes to access to Judicial Review (JR) are likely to impact asylum seekers and refugees, as well as the charities who work with them, far beyond that anticipated in the consultation.

Work to research, prepare and present a JR is often substantial, especially to address concerns in the handling of the most complex asylum claims. If implemented, this proposal would act as a disincentive for providers to undertake JR work even where merits are established, as any work prior to permission being granted by the court would have to be undertaken pro bono. This will make it very difficult for people facing destitution to access JR, particularly to apply for urgent injunctions. It will also make it far more difficult to undertake strategic litigation work to test and develop the law, which by definition is work carried out at risk, with border line potential for success.

The government has emphasised that funding will remain in place for meritorious JRs, to be paid after the decision on merits; but few organisations will have the cash-flow resources to prepare a JR appropriately knowing that this work will not be recompensed for many months. As the Immigration Law Practitioners' Association (ILPA) has argued recently, after a succession of cuts many Legal Aid providers "cannot assume any more financial risk in their businesses".⁹ In practice, it will become a lasting challenge to fund upfront the work needed to file a JR, even where the merits of the case are immediately evident.

In addition, the underlying motive to save public expenditure is questionable when one takes into account the fact that weak cases are already refused permission to proceed. This mechanism is already in place to protect the public purse and strikes a fair balance. In urgent cases the merits of the case need to be kept under ongoing assessment, but the final decision on whether to grant Legal Aid always rests with the Legal Aid Agency, not the provider. Restricting access to JRs would have the effect of limiting essential access to justice, even where there is an overwhelming need to correct an error in a previous decision. Some of the most vulnerable asylum seekers and refugees would be left without recourse to help to which they are entitled, including:

- asylum seekers who have faced substantial and unreasonable delays without receiving any Home Office decision at all;
- asylum seekers that have suffered detriment, including negative determinations, as a result of the Home Office not following their own established policies and procedures;
- asylum seekers who have been unlawfully detained in immigration removal centres; and

⁹ See <http://www.ilpa.org.uk/data/resources/18039/13.06.03-ILPA-response-to-Transforming-legal-aid.pdf>

- asylum seekers who have provided detailed new information in support of their claims, but whose claim has not then been considered by the Home Office.

Asylum Aid is deeply concerned at this prospect.

Having borne witness over many years to the flaws and shortcomings in asylum decision-making, and the regularity with which the Home Office acts in breach of its own policies and procedures, the use of JR is paramount where there are legitimate concerns that the government has acted illegally or irrationally.

The government can maintain access to justice and more effectively save money by ensuring the Home Office takes a fair and competent approach to asylum claims earlier in the system. If the operation of the asylum system is aligned with the policies already in place, recourse to an expensive JR process will rightly become an exceptional occurrence.

The proposal that Legal Aid should be removed for all cases assessed as having “borderline” prospects of success

There is a very real risk that, by removing Legal Aid from cases which meet the ‘borderline’ criteria, the human rights needs of some asylum seekers will not be met.

We share the concerns raised by ILPA in their response to the government’s consultation paper, where ILPA stated:

*[Legal Aid practitioners] are frequently in the position of challenging cases that they know will be hard to win, for example because there is settled law in the higher courts against them. It is frequently impossible fairly to judge the merits of a case before it has been prepared, which is why the borderline category is important.*¹⁰

This is true of many of the complex asylum cases in which Asylum Aid specialises, where particular expertise and time is required to identify the protection needs that ensure a case meets at least the ‘borderline’ criteria. If these cases are no longer funded, such vulnerable clients will not enjoy access to justice. This is also the case for strategic litigation, which necessarily tests the law in areas which remain under development.

In addition, it is our experience that some legal representatives are unable or unwilling to take on the most complex appeals and Judicial Reviews because of the unfunded hours of work required to demonstrate that they meet at least the ‘borderline’ criteria. In our 2011 *Unsustainable* research into women’s asylum claims, for example, half the women in our sample from Cardiff did not have legal representation on appeal, something likely related to the complexity of many gender-related asylum claims.¹¹

Despite this, women’s claims are disproportionately likely to be overturned on appeal, indicating that some work at first assumed not to meet ‘borderline’ criteria is nonetheless necessary to overturn poor initial Home Office decisions.

¹⁰ See <http://www.ilpa.org.uk/data/resources/18039/13.06.03-ILPA-response-to-Transforming-legal-aid.pdf>

¹¹ Asylum Aid (2011), *Unsustainable: the quality of initial decision-making in women’s asylum claims*, pp. 41-42.
<http://www.asylumaid.org.uk/data/files/unsustainableweb.pdf>