

Briefing on 'Residence Test'

June 2014

House of Commons Delegated Legislation Committee: Draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014

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The proposed regulations will limit the availability of legal aid to those who are:

- a) lawfully resident on the day of the application and
- b) have previously lawfully resided in the UK for one year

Certain exceptions are provided. It will still be possible for immigration detainees who fail the 'residence test' to access legal aid for judicial reviews challenging the legality of their detention.

However, the residence test would prevent ex-detainees from accessing legal aid to bring civil claims seeking **compensation** for unlawful detention. Detainees would also not be able to access legal aid to challenge abuse suffered in detention. This will leave the Home Office free to act with impunity towards detainees, who are held without time limit.

Maltreatment of immigration detainees

There are numerous examples of cases where detainees have been maltreated. In five cases, the High Court has found that mentally ill men in immigration detention have been subjected to inhuman and degrading treatment in breach of Article 3 of the European Convention on Human Rights.¹ In 2013, an 84 year old terminally ill man with dementia died after having been handcuffed by immigration staff for around five hours. The handcuffs were only removed after his heart had stopped.² In the last seven years, 10 staff have been dismissed in relation to allegations of improper sexual contact with female detainees at Yarl's Wood immigration removal centre.³ If the residence test is introduced, detainees in all these situations will not have access to legal aid to challenge their treatment.

Case study: Use of force against pregnant women

The use of force against children and pregnant women during their removal from the UK only ceased as a result of legal action funded by legal aid. In January 2013 *The Guardian* reported that force was used against a pregnant woman during an attempt to remove her from the UK: '*She said her body was covered in bruises after the incident.. an independent doctor warned that putting the woman on the plane without adequate monitoring while she was bleeding could lead to premature labour and ruptured membranes.*'⁴ Despite having no published policy governing the use of force, and widespread criticism, the Home Office continued to use force against children and pregnant women to effect removals.⁵

¹ R (HA) (Nigeria) v SSHD [2012] EWHC 979; R (S) v SSHD [2011] EWHC 2120 (Admin); R (D) v SSHD [2012] EWHC 2501 (Admin); R (BA) v SSHD [2011] EWHC 2748 (Admin); R (S) v SSHD [2014] EWHC 50 (Admin).

² *Guardian* 16/1/14 'Detention Centre castigated over death of elderly man' <http://www.theguardian.com/uk-news/2014/jan/16/harmondsworth-elderly-man-died-handcuffs>

³ *Guardian* 24/6/14 'Serco apologises after dismissals related to Yarl's Wood allegations' <http://www.theguardian.com/business/2014/jun/24/serco-apologises-dismissals-yarls-wood-allegations>

⁴ *The Guardian*, 11/1/2013, 'UK Border Agency rejects calls to stop using force on pregnant detainees'

⁵ HM Inspector of Prisons (2012) *Report on an announced inspection of Cedars Pre-Departure Accommodation*; Home Affairs Select Committee (2012) *The work of the UK Border Agency (April-June 2012) Eighth Report of Session 2012-13*

This situation only changed as a result of a judicial review application in the case of *R (on the application of Yiyu Chen and Ors) v Secretary of State for the Home Department* CO/1119/2013. Shortly before a court hearing, the Home Office re-published an old policy prohibiting the use of force against children and pregnant women save where absolutely necessary to prevent harm. **If the residence test is introduced, detainees will not be able to access legal aid to challenge force being used against them.**

Unlawful detention: compensation claims

There have been numerous cases where detainees have been awarded substantial damages after the courts have found that they were detained unlawfully. For the financial year 2012-13, the UK Border Agency incurred costs in relation to non-staff compensation, adverse legal costs, and ex-gratia payments totalling £19,702,000 over 2147 cases.⁶ BID regularly refers ex-detainees to solicitors to make civil claims for compensation. In one case which settled last year the claimant and their child were awarded £68,500.

Case study: compensation for detention

During Christine's detention, her two children were cared for by their grandfather. He became seriously ill and was admitted to hospital three times. The older daughter, Beth, had to stop attending school to care for her brother and grandfather and missed her GCSE exams. Beth found it extremely difficult to look after her seven year old brother Daniel, who is disabled and has severe behavioural problems. Children's Services deemed Daniel to be at risk of emotional and physical harm, and found that: *'Daniel has found it very difficult being separated from his mother... [A] concerned neighbour rang to report that Daniel was playing alone in the road at 8pm... he walks into people's houses.'*

Two months into Christine's detention Daniel was hit by a car. Despite receiving reports about the welfare of these children, the Home Office detained their mother for 160 days before she was released on bail by the Tribunal. The Home Office subsequently awarded the family substantial compensation for the mother's detention. **Under the residence test, this mother would not have been able to access legal aid for her civil claim challenging her detention.**

'Safeguards'

The **Exceptional Case Funding** (ECF) scheme purportedly provides a safety net for cases which have been removed from the scope of legal aid by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. However, as of 31st March, 235 applications had been made for funding in immigration cases, and only four had been granted.⁷

In BID's experience, detainees lack the legal knowledge needed to make their own applications. Solicitors making applications do so at the risk that they won't be paid for the work if the application is refused. Given the overwhelming rate of refusal, this risk is considerable, and few solicitors are willing to make applications. ECF is therefore not an accessible safeguard for detainees.

The Government has also argued that cases can be brought under **'no win no fee' arrangements** with insurers. This is not a solution – clients and insurers cannot take the risk that they would have to pay the Home Office's costs if the case is lost. Even in the very unlikely event that a case was insured, clients would not be able to afford to pay upfront for expert reports, which may be necessary to evidence their case.

⁶ UK Border Agency Annual Report and Accounts 2012-13. Available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/annual-reports-accounts/annual-report-12-13.pdf?view=Binary>

⁷ Ministry of Justice (24 April 2014) 'Ad hoc Statistical Release: Legal Aid Exceptional Case Funding Application and Determination Statistics 1 April 2013 to 31 March 2014'