

Ministry of Justice consultation 'Transforming Legal Aid: Next Steps' November 2013

Submission by Bail for Immigration Detainees, September 2013

About Bail for Immigration Detainees

BID is an independent national charity established in 1999 to improve access to release from immigration detention for those held under Immigration Act powers in immigration removal centres and prisons. BID provides immigration detainees with free legal advice, information, representation, and training, and engages in research, policy and advocacy work, and strategic litigation. BID is accredited by the Office of the Immigration Services Commissioner (OISC), and won the JUSTICE Human Rights Award 2010.

From 1 August 2012 to 31 July 2013, BID assisted 3367 people held in immigration detention. BID runs a bi-annual survey of legal representation across the UK detention estate, and aims to raise awareness of immigration detention through its research and publications, including "*Fractured Childhoods: the separation of families by immigration detention*", (2013) and "*The Liberty Deficit: long-term detention and bail decision-making. A study of immigration bail hearings in the First-tier Tribunal*", (2012). BID also works through advocacy with civil servants via a number of Home Office-convened stakeholder groups.

BID's work is not funded by legal aid, but around two in three of our clients rely on legal aid for all or part of their immigration case. With the assistance of barristers acting *pro bono*, BID prepares and presents bail applications in the Immigration and Asylum Chamber of the First-tier Tribunal for the most vulnerable detainees, including long term detainees, foreign national ex-offenders, people with serious mental or physical ill-health, detainees who have intractable travel document problems, or who are main carers separated by detention from their children, and who are unable to obtain legal representation. BID also produces self-help materials, runs workshops in Immigration Removal Centres (IRCs) and prisons, and provides telephone support to assist detainees in representing themselves at bail hearings. It is an auditable requirement under the Home Office Detention Centre Operating Standards that BID's self-help manual on seeking release from detention ("*How to Get out of Detention*") be available in all IRC libraries.

BID is an experienced third-party intervener. The domestic and European courts have granted BID permission to intervene in a number of cases raising important issues regarding immigration detention policy and practice, including: *Mustafa Abdi v United Kingdom* (European Court of Human Rights, Application 2770/08)¹; *Razai & Others v SSHD* [2010] EWHC 3151 (Admin)²; *SK (Zimbabwe) v*

¹ The sequel to the Court of Appeal's decision in *R(A) v SSHD* [2007] EWCA Civ 804

² In which the court considered evidence indicating systemic difficulties with the Secretary of State's policy of providing accommodation for immigration detainees who are considered to be high risk.

SSHD UKSC 2009/0022³; Walumba Lumba (Congo) and Kadian Delroy Mighty (Jamaica) [2011] UKSC 12⁴, and most recently by the Court of Appeal in the case of David Francis v SSHD (2013/2215/A).

BID submitted a detailed response to the Ministry of Justice consultation 'Transforming Legal Aid' in June 2013⁵.

SUMMARY OF OUR CONCERNS ABOUT FUTHER PROPOSED REFORMS TO LEGAL AID

1. Despite an undertaking to do so, the government has failed to evaluate the impact of LASPO, which had the effect of removing entire categories of law from the scope of legal aid, before pressing ahead with the introduction of further reforms to legal aid.
2. These further reforms will be introduced by means of secondary legislation. This is entirely inappropriate as these further reforms will affect access to the courts and undermine the rule of law. Proposals to put the executive beyond the scrutiny of the courts, or render certain groups unable to enforce their rights should be subject to full parliamentary scrutiny.
3. BID has major concerns about the proposed residence test and the proposed cuts to funding for judicial review.
4. The residence test if introduced, and despite the growing list of exclusions, would have the effect of rendering it impossible for released detainees to bring civil claims for unlawful detention, assault or abuse while in detention, or misfeasance in public office.
5. Vulnerable groups, including people who have been trafficked, unaccompanied children, and people who lack mental capacity, will not be able to obtain legal aid to challenge decisions that affect them.
6. This will leave the Home Office, including the parts that were formerly the UK Border Agency, free to act with impunity towards those held in administrative detention with no upper limit on the length of their detention.
7. Exceptional Funding has already been shown to be an inadequate safeguard against the removal of legal aid, due to its complexity and high threshold, and cannot render the residence test compatible with the ECHR.

³ Where the court considered whether a breach of public law duty involves non-adherence to a published policy (and delegated legislation) requiring periodic detention reviews.

⁴ Established a breach of a public law duty involving non-adherence to a published policy identifying substantive detention criteria.

⁵ Available at <http://www.biduk.org/154/consultation-responses-and-submissions/bid-consultation-responses-and-submissions.html>

Q7. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

Q8. Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

No. We do not agree that either the range or extent of impacts under the proposals set out in this consultation paper have been correctly identified.

Failure to evaluate impact of LASPO before introduction of further reforms to legal aid

We are disappointed that the Government has decided to publish its response to ‘Transforming Legal Aid’ without waiting for the outcome of the enquiry of the Joint Committee on Human Rights into the implications for access to justice of the proposed further reforms to legal aid. This telescoping of cuts to legal aid provision into a matter of months, coming so soon on the back of the sweeping cuts introduced in April 2013 via the Legal Aid, Sentencing, and Punishment of Offenders Act, feels unnecessarily rushed. There has been no meaningful pause by the government to evaluate the effects – financial and otherwise – on individuals and the legal advice sector of removing entire categories of law from the scope of legal aid at a stroke.

We note that the Ministry of Justice impact assessment document recognises that:

“The full effect of the LASPO scope reforms - which will also have had an effect on providers – has not been captured in this base data, and may also have an affect [sic] on the sustainability of the provider market as a whole” (MoJ, 2013: 11)

The cost savings announced by the Minister under LASPO, and now under ‘Transforming Legal Aid: Next Steps’, are anyway small. It seems almost inconceivable that there will not be cost shifting to other areas of government, or even other parts of the Ministry of Justice such as HM Courts & Tribunal Service.

A recent parliamentary exchange on cost shifting within the Ministry of Justice as a result of an increase in the number of litigants in person in the courts demonstrates the contradictory approach to the reform of legal aid by the Minister: on the one hand an acknowledgement by the Secretary of State for Justice that impact assessment is taking place, while at the same time his Minister is pressing on with reform without waiting to see precisely what the impact of reforms turns out to be.

“Karen Buck (Westminster North, Labour): To ask the Secretary of State for Justice whether his estimate of potential savings in the legal aid budget assumes a potential increase in costs to the court system arising from additional numbers of litigants in person.

“Jeremy Wright (Kenilworth and Southam, Conservative):While the reforms may result in an increase in numbers of litigants in person (LiPs), it is not immediately evident that this will result in increased costs for the courts. The impact assessment which accompanied the Act set out a number of actions that the MOJ will, and is now, taking to monitor the impacts on the courts”⁶ (emphasis added)

The government undertook to carry out a review of the impact of LASPO, to be published one year after the cuts and other reforms to legal aid took effect on April 1st 2013. The Secretary of State for Justice has referred in Parliament to ongoing monitoring of the impact of LASPO on the courts. Despite all this the Minister has stated in a letter to Nick Fluck, President of the Law Society, that he is not prepared to accede to the request of Dr Hywel Francis, Chair of the Joint Committee on Human Rights, for an assurance that the Government would not implement any changes until after the committee has had an opportunity to report on the implications for access to justice of changes.

The Secretary of State has not given a satisfactory explanation for his failure to wait for the results of the evaluation of LASPO which his own office agreed to. How – without an evaluation of the impact of LASPO – can he be sure that rather than achieving cost savings from reducing the scope of legal aid he is not merely achieving cost shifting?

Residence test and immigration detention

In our response to ‘Transforming Legal Aid’ (June 2013) we showed how the proposed residence test for legal aid was unworkable for a number of practical reasons. We were not alone in this view⁷. The unworkability point has not been addressed at all in the Government’s response to ‘Transforming Legal Aid’, nor in the impact assessment summary for scope, eligibility and merits for the ‘Transforming Legal Aid: Next Steps’ consultation launched in September 2013. We therefore repeat our evidence below.

Difficulties in providing documentary evidence to lawyers administering the residence test

At a Ministry of Justice event in relation to the first ‘Transforming Legal Aid’ consultation (London, 23 May 2013) Ministry of Justice staff asked those present to provide details of any groups of people who may not easily have evidence to hand that could support both limbs of the proposed residency evaluation. Had these proposals been thought through by the Ministry in any detail, and had legal practitioners been consulted before these proposals were published, the numerous circumstances in which evidence of residency might be difficult to produce would surely be obvious, and this test would have been exposed as unworkable at an earlier stage.

A selection of reasons why foreign nationals or apparent foreign nationals are likely to have difficulty providing evidence to support a residency evaluation:

⁶ HC Deb, 12 September 2013, c843W)

⁷ For example, the Immigration Law Practitioners’ Association (ILPA), and No Recourse to Public Funds Network (NRPF).

- The Home Office routinely holds the passports of foreign nationals who are making specific applications for leave to enter or remain, or who are being held in immigration detention.
- If a person has made an in-time application and is therefore lawfully resident, but the Home Office is still holding their passport they will have no evidence to show that they are lawfully resident nor for how long they have been lawfully resident.
- British nationals and people with enforceable EEA rights of residence may have no evidence that they have been lawfully present in the UK for 12 months. A resident test cannot be administered simply by looking at documents: British and EU documents are not stamped on entry or exit from the UK. ILPA has pointed out that a person may have a right to reside by operation of law. Residence may be a complex issue of EU law.
- People who have entered the UK under duress or non-standard circumstances are unlikely to have travel documents in their possession. Male family members may hold travel documents belonging to women and children. Parents separated from their children by prison and immigration detention may have travel documents held by the Home Office.
- Routinely therefore, certain groups who may urgently require legal assistance may not easily be able to satisfy even the first limb of the proposed residence test: victims of trafficking, survivors of domestic violence, unaccompanied children, abducted children, individuals subject to Forced Marriage Protection Orders, and children separated from their parents by prison or immigration detention.
- People who have been taken into immigration detention by the Home Office at a routine reporting event, or in a home or workplace raid, routinely become separated from their possessions including personal documents, which may be destroyed by landlords.
- It is not unheard of for the former-UKBA (now the Home Office) to lose passports and other documentary evidence. A number of BID's clients over the years have reported this to our legal advisors, or such losses are noted in correspondence from the Home Office.
- Where supporting evidence in relation to residency must be obtained via a Subject Access Request to the Home Office, which has a poor record of responding to such requests within statutory timescales. In BID's experience Home Office responses to Subject Access Requests routinely take 6 months or more.

Complexity of the 'residence' issue makes the residence test difficult for non-immigration lawyers to administer without error

Legal aid providers will be required to demonstrate whether a potential client passes a residence test. In addition to immigration specialists, non-immigration lawyers (housing, family law, community care) would need to administer the residence test. Most non-immigration solicitors do not, in the view of ILPA, have the expertise to satisfactorily conduct a complex immigration test. Home Office guidance for the purpose of verifying immigration status for potential employers who are considering employing a foreign national runs to 89 pages⁸. The fact that supporting evidence

⁸ UK Border Agency, (May 2012), 'Full guide for employers on preventing illegal working in the UK'. Available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/currentguidanceandcodes/comprehensiveguidancefeb08.pdf?view=Binary>

may be very difficult to obtain within a reasonable period of time, as demonstrated immediately above, only adds to the difficulties facing legal aid providers required to administer this proposed test.

In practical terms it will almost always be safer for non-immigration solicitors to presume that someone who is or who appears to be a foreign national is not eligible for legal aid, since the financial risk lies with the provider if they are later found to have made an incorrect decision. Where legal aid fees are at risk of clawback from the Legal Aid Agency as a result of incorrect operation of the proposed residence test, non-immigration solicitors may simply refuse to consider cases from people who are or who appear to be foreign nationals. NRPF Network notes that such precautionary practices may later form part of a public law legal challenge (2013: 5d: 3) as there is apparently no procedure allowing for incorrect decisions to be challenged by those in need of legal advice.

In BID's view the proposed residence test for legal aid, to be applied across all categories of law, is discriminatory, removes the right of access to the courts for poor foreign nationals and undermines the fundamental principle of the rule of law that all are equal before the law. We are not alone in this view. The residence test will create a class of people unable to access the courts to enforce the rights conferred on them by primary legislation. However, we limit our comments here to the impact of the proposed residence test on foreign nationals held as immigration detainees in removal centres and prisons.

The 'Transforming Legal Aid' consultation exercise (2013) invited opinions on the proposal for a residence test for civil legal aid claimants, so as to limit legal aid to those with a "strong connection" with the UK. This subsequent consultation "Transforming Legal Aid: Next Steps", introduces a number of additional exceptions to the residence test. The consultation document states:

"We have also concluded that there are further limited circumstances where applicants for civil legal aid on certain matters of law would not be required to meet the residence test. The test will therefore not apply to categories of case which broadly relate to an individual's liberty, where the individual is particularly vulnerable or where the case relates to the protection of children" (MoJ, 2013)

BID recently sought clarification on the precise intention of this new exemption in relation to the wording "broadly relate to an individual's liberty". On 19th September 2013 we received the following response from the Ministry of Justice:

"1. Detainees making applications [release on] immigration bail

2. Detainees making applications for [release on] temporary admission

Both these situations will be exempt from the residence test, where they qualify for funding under paragraphs 5, 20, 25, 26 and 27 of Part 1 of Schedule 1 to LASPO.

Challenges to the lawfulness of detention by way of judicial review under paragraph 19, will also be exempt.

Detainees who wish to make civil claims to challenge the legality of their detention after having been released.

These types of proceeding, which are funded under paragraph 22 of schedule 1 to LASPO, will not be exempt from the residence test.” (Ministry of Justice, 2013)

In simple terms the effect of this further exclusion to the residence test is that, subject to the statutory means and merits test for legal aid, immigration detainees of limited or no means will continue to be able to apply for legal aid in order to make an application for release from detention. This is an essential safeguard, and typically such an application is made when detention has not resulted in removal after a reasonable time, or where there are practical barriers to removal. Where a detainee wishes to seek release on the basis that their detention has become unlawful (this is a different type of decision to a bail application or application for temporary admission) via judicial review, this will be exempt from the residence test.

However, this exemption does not offer sufficient protection to the rights for compensation for unlawful detention of immigration detainees under Article 5(5) ECHR, nor does it provide safeguards against abuse by the Home Office or its commercial agents.

If the decision under challenge – in this case to maintain detention – is withdrawn by the UK Border Agency (now the Home Office) before the decision of the court is handed down, or an injunction ordering release is sought and granted, then any public law elements of the unlawful detention judicial review (for example additional grounds related to a breach of Article 3 – the prohibition of torture or inhumane or degrading treatment⁹ - while in detention) become academic and must be determined as part of a separate private law claim for damages.

What is now clear is that it is the intention of the government that such civil claims brought by detained foreign nationals to challenge the legality of the conditions of their detention or the legality of their detention, if the challenge is mounted after they have been released, will engage the residence test. This will have the effect of putting the treatment of foreign nationals held in administrative detention beyond challenge, except by individuals with significant financial means.

Civil claims for false imprisonment, inhuman or degrading treatment, assault by a custody officer or escort contractor, unlawful removal from the UK, and misfeasance in public office will all now be subject to the residence test for detainees of limited means reliant on legal aid. This is despite the fact that such actions concern the same issues of unlawful detention. The ability to bring a civil

⁹ The High Court has recently found breaches of the prohibition of inhuman and degrading treatment in Article 3 ECHR arising out of the treatment of mentally ill men held in immigration detention in four separate cases: R (S) v Secretary of State for the Home Department [2011] EWHC 2120; R (BA) v Secretary of State for the Home Department [2011] EWHC 2748; R (D) v Secretary of State for the Home Department [2012] EWHC 2501; and R (HA (Nigeria)) v Secretary of State for the Home Department [2012] EWHC 979.

action is no less important constitutionally than judicial review, and for very many people unlawfully detained a civil claim is the only remedy they will have available if they have been released after a period of unlawful detention and the time limit to bring a judicial review has passed.

The recent exposure in *The Observer* of the alleged sexual abuse of female immigration detainees by custody staff at Yarls Wood IRC¹⁰, for which HM Inspectorate of Prisons has now confirmed two custody officers have been dismissed¹¹, offers an example of the type of unlawful treatment for which a legal claim may be impossible if the residence test was to be introduced.

The residence test raises the prospect of a cohort of foreign nationals unable to seek compensation for abuse in detention because for example they were detained on arrival in the UK, alongside other foreign nationals who experienced the same abuse, possibly from the same officials, who meet the residence criteria and are able to bring a legal challenge. A fair system and the rule of law surely dictates that a "strong connection to the UK" in the form of 12 months lawful residence should not be necessary in order to be able challenge abuse in detention, to give just one example.

In BID's experience, the focus of legal practitioners is often to get a long-term, unwell, or otherwise vulnerable person out of detention as quickly as possible. It is often not practically possible to mount a legal challenge to unlawful treatment in detention while seeking immediate release, not least because the length of time it can take the Home Office (UKBA as was) to disclose documents during such cases renders this impractical.

At BID we represent and advise immigration detainees who, it is apparent, may have been detained unlawfully and treated unlawfully while in detention. We routinely refer people to public law specialists to challenge the legality of their detention. A number of these detained individuals go on to successfully challenge the lawfulness of their detention and are awarded compensation for their experiences. The reasons for referral include the extreme length of their detention with little progress in their case, detention despite severe mental ill health, and detention despite failure to obtain travel documents.

These are not frivolous or publicity seeking challenges, nor are they necessarily brought by foreign nationals with a "strong connection to the UK", although a number are brought by long term residents with leave from the Home Office to be in the UK. But it cannot be right to deny the ability to challenge unlawful treatment to people who are so severely mentally ill that they cannot participate in their own immigration case, or people who have been trafficked into the UK and have not had the opportunity to regularise their immigration status.

¹⁰ The Observer, Saturday 14th October 2013, Detainees at Yarls Wood immigration centre 'facing sexual abuse'
<http://www.theguardian.com/uk-news/2013/sep/14/detainees-yarls-wood-sexual-abuse>

¹¹ Nick Hardwick, Chief Inspector of Prisons, Press release by HM Inspectorate of Prisons 29 October 2013, 'Progress made, but further improvements needed'. Available at <http://www.justice.gov.uk/news/press-releases/hmi-prisons/yarls-wood-immigration-removal-centre>

At the time of writing, the High Court has on two occasions found that clients of BID have been unlawfully detained and separated from their children. Despite the unlawful practices highlighted by the High Court in those cases, many of the flaws which were revealed in this case continue to be features of immigration detention. BID's report '*Fractured Childhoods: the separation of families by immigration detention*' (2013) examined the cases of 111 parents who were separated from a total of 200 children by immigration detention. Some of these children moved between unstable care arrangements, experienced neglect and were placed at risk of serious harm. In 92 out of 111 cases, parents were eventually released rather than removed from the UK, their detention having served no purpose. BID is aware of several recent cases where legal proceedings in civil claims to challenge the legality of parent's detention were commenced but the Home Office paid thousands of pounds in compensation prior to the case reaching trial. In one case which settled in early 2013 the parent and child were given £68,500 in compensation.

Case study: Beth and Daniel

Beth's grandfather, who was caring for her and her disabled brother Daniel during their mother's detention, became seriously ill and was admitted to hospital three times. 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, who has limited motor control and 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 his mother'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 compensation for the mother's detention. Under the proposed residence test, this mother would not have been able to access Legal Aid for her civil claim challenging the legality of her detention.

In recent years the courts have recognised unlawful detention and unlawful treatment in detention through both public and private law claims. 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 cases¹². A compensation bill that amounts to millions of pounds each year is a clear indicator of the scale of unlawful action. It cannot be acceptable that unlawful treatment on such a scale could now take place with impunity simply because such unlawful action is directed towards foreign nationals.

We believe it is essential for the operation of the rule of law in the UK that the government continues to be held accountable for unlawful acts, including the unlawful detention of foreign nationals, and failures of the positive duty of care of the Home Secretary towards those she has chosen to detain for administrative purposes. We do not believe that it is truly the intention of this government that such actions could now go unexamined and unpunished.

- **Unaccompanied children**

In 2012, the Refugee Council worked with 24 children who were wrongly detained as adults, and in the first three months of 2013, worked with nine children who have been released from detention¹³. The detention of children in adult institutions raises very serious child protection concerns, and can be extremely detrimental to the child's mental state. Under the proposed residence test, detained unaccompanied children (who do not fall within the asylum-seeker exception) will not be able to access legal aid to challenge an incorrect age assessment and thereby secure their release.

- **Trafficked people in detention**

The Government has now conceded that, where the Home Office has recognised there are reasonable grounds to believe someone has been trafficked, they should be able to access legal aid. However, this concession ignores police estimates that 65% of victims of trafficking are not referred to the Home Office's National Referral Mechanism¹⁴, and evidence that there are serious problems with the quality of decision-making on cases which are referred¹⁵. It is essential that trafficked people are able to access legal aid in order to obtain recognition from the Home Office that they have been trafficked.

¹² 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>

¹³ Figures from Refugee Council, (2012), 'Not a minor offence: unaccompanied children locked up as part of the asylum system', Available at http://www.refugeecouncil.org.uk/assets/0002/5945/Not_a_minor_offence_2012.pdf, and Refugee Council contribution to the Detention Forum submission to the Home Affairs Select Committee Asylum Inquiry, April 2013.

¹⁴ Serious Organised Crime Agency, (August 2013), 'Intelligence Assessment - UKHTC: A Strategic Assessment on the Nature and Scale of Human Trafficking in 2012'. Available at <http://www.soca.gov.uk/news/608-human-trafficking-assessment-published>

¹⁵ Anti-Trafficking Monitoring Group, (June 2010). 'Wrong kind of victim? One year on: an analysis of UK measures to protect trafficked persons'. Available at http://www.antislavery.org/includes/documents/cm_docs/2010/a/1_atmq_report_for_web.pdf; Centre for Social Justice, (2013), 'It happens here: equipping the United Kingdom to fight modern slavery'. Available at <http://www.centreforsocialjustice.org.uk/publications/it-happens-here-equipping-the-united-kingdom-to-fight-modern-slavery>

A 2008 study by The Poppy Project found that ten of the 55 women surveyed were trafficked more than once, after being returned to their countries of origin by the UK authorities¹⁶. Currently, the only remedy for trafficking victims who are given an incorrect National Referral Mechanism decision is judicial review. However, under the residence test, people who the Home Office wrongly deems not to be victims of trafficking will not be able to access legal aid funding to judicially review this decision. The proposals will therefore greatly increase the risk that more trafficked people will be detained, removed or deported, and re-trafficked.

If the residence test is introduced as now proposed, this will put civil claims out of reach of foreign nationals of limited means. It is not clear what redress the Government proposes would be available to people who are held in immigration detention unlawfully, including those who are subjected to inhuman and degrading treatment.

We recommend that the proposed residence test is dropped in its entirety. If not, the proposal to introduce a residence test should at the very least be subject to full Parliamentary scrutiny.

Q9. Are there forms of mitigation in relation to impacts that we have not considered?

Exceptional Funding

The Ministry of Justice¹⁷ suggests that those who are excluded from legal aid by virtue of the proposed residence test but who wish to challenge the lawfulness of government action (this would include challenges to the lawfulness of immigration detention or the lawfulness of treatment while detained) can apply for Exceptional Funding. This is not a credible response. It has become clear that Exceptional Funding is not a meaningful safety net for people in extreme need, whose rights may be breached, or who need their legal matter to be dealt with as a matter of urgency.

Entire categories of law were ruled out of scope of legal aid under LASPO, but the Ministry of Justice has promoted the Exceptional Funding scheme as a means of providing some legal aid in cases where to refuse to do so would breach Article 6 (the need for a fair hearing and examination of a

¹⁶ The Poppy Project, (2008), '*Detained: prisoners with no crime - detention of trafficked women in the UK*'. Available at <http://i2.cmsfiles.com/eaves/2012/04/Detained-c1f762.pdf>

¹⁷ Baroness Scotland of Asthal: To ask Her Majesty's Government how the proposed residence test envisaged by the Ministry of Justice consultation will impact upon the attainment of legal redress by non-residents in challenging Government action. The Minister of State, Ministry of Justice (Lord McNally): Anybody excluded from civil legal aid as a result of the residence test in the future would be entitled to apply for exceptional funding, including in respect of services described in Part 1 of Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 from which the individual has been excluded as a result of the residence test. [HL2223] House of Lords Summer Recess 2013 Written Answers and Statements, 23rd September 2013. Available at <http://www.publications.parliament.uk/pa/ld/ldtoday/writtens/230913.htm>

person's civil rights and obligations, where withholding of legal aid would make assertion of a claim practically impossible or there would be an obvious unfairness). Strong financial disincentives operate to dissuade legal aid providers from applying for Exceptional Funding on behalf of potential clients. The application process itself is lengthy, complex, and unfunded. If EF is granted, funding sufficient to avoid a HR breach will be made¹⁸, but not necessarily sufficient to conclude the legal issue. There is no emergency procedure for accessing Exceptional Funding, generating the risk that human rights will be breached as a result of the delay or by individuals having to represent themselves in proceedings.

Data from the Legal Aid Agency show that between April 1st 2013 and September 2nd 2013, across all categories of law 589 applications for Exceptional Funding had been processed but nationally only 11 grants of such funding had been made¹⁹.

The Public Law Project report²⁰ that one of the eleven cases of Exceptional Funding granted was "an immigration case where the law was particularly complex. For the latter, funding was only granted after the solicitor sent a pre-action protocol letter to the LAA threatening to judicially review their initial refusal of funding." If the residence test is introduced as proposed, the claimant may not have been able to make this challenge. It appears that an amendment to LASPO would be needed in order to make exceptional funding accessible to those who fail the residence test.

In the view of LIBERTY²¹, the introduction of a residence test would be unlawful:

"Unlike the State's own nationals, foreigners have to meet a further, exceptional, test. It is not enough that they have legal rights, legal merits and the absence of means. They must show that the refusal of funding in their individual case is itself a violation of the Human Rights Act 1998 or EU law. That is unequal treatment which is unjustifiable. The prohibition does not focus on legitimacy of the resort to the Court, the nature of the issue, the viability of the argument. Being a foreigner does not indicate a lesser need, or a lesser justification, for effective access to the Court" (LIBERTY, 2013)

The residence test would have perverse and arbitrary consequences for detainee's access to justice in circumstances where former detainees were pursuing private law claims. For example, people who had Indefinite Leave to Remain in the UK and were convicted of a criminal offence, as a result of which the Home Office sought to deport them, would be lawfully resident in the UK and 'pass' the residence test unless and until they became appeal rights exhausted in their deportation case. By

¹⁸ Funding granted under s.10(3)(a) is designed to be "limited to the minimum services required to meet the obligation under ECHR or EU law" (Lord Chancellor's Exceptional Funding Guidance (Non-Inquests), §35)

¹⁹ Source: Immigration Law Practitioners' Association (ILPA)

²⁰ http://www.publiclawproject.org.uk/documents/exceptional_funding_blog.pdf

²¹ Liberty, (May 2013). 'The legality of the proposed residence test for civil legal aid: joint opinion'. Available at <http://www.liberty-human-rights.org.uk/materials/pub-counsels-opinion-on-legality-of-proposed-residency-test.pdf>

contrast, people who were in exactly the same situation but did not have Indefinite Leave to Remain before being convicted of an offence would fail the residence test and not be able to access legal aid in many areas of law. BID regularly deals with clients who would fall into both of these groups, yet if the residence test were to be introduced only one set of people, if unlawfully detained or unlawfully treated while detained, would be able to exercise their common law right of access to the courts.

For example, a single mother and former BID client, 'MXL', was detained without her children and successfully challenged the legality of her detention²². She had Indefinite Leave to Remain before committing a criminal offence, and would therefore have been able to access legal aid under the residence test while her deportation case was ongoing. By contrast NXT, another single mother with three children, who the courts also found was detained unlawfully²³, did not have Indefinite Leave to Remain before committing a criminal offence and would therefore have failed the residence test and not been able to access legal aid while her deportation case was ongoing. One of NXT's children changed foster placements six times during her imprisonment and detention and experienced abuse and neglect. The judge found that a period of her detention violated her rights under Article 5 of the European Convention on Human Rights. However, under the residence test she would not have been able to access legal aid for a civil claim to challenge the legality of her detention.

Numerous learned and august respondents to the recent consultation 'Transforming Legal Aid' (2013) have shown in detail how the residence test will be unworkable in practice as well as unlawful. For example, over one hundred Treasury Counsel, appointed to act for the Crown or Government Departments, who together wrote to the Attorney-General on 4th June 2013 to express their concern about two aspects in particular of the proposals in 'Transforming Legal Aid', one of which was the residence test for legal aid. The respondents wrote:

"To deny legal aid altogether to such persons, so that even the minimal rights provided to them by the law cannot be enforced, is in our view unconscionable".

The residence test, already widely considered unworkable, is becoming more complex as each new exception to the test is announced by the Ministry of Justice. The introduction of such a test will render challenges to the lawfulness of detention and treatment in detention impossible in many cases, leaving the Home Office and its commercial contractors free to act with impunity. That much is clear on the basis of immigration detention-related matters alone, regardless of the operation of the residence test more broadly.

Judicial review

The current consultation '*Judicial Review: proposals for further reform*' suggests further measures to reform funding and procedures for judicial review with a view to

²² *MXL, R (on the application of) & Ors v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin)

²³ *NXT, R (on the application of) & Ors v Secretary of State for the Home Department* [2011] EWHC 969 (Admin)

“Tackl[ing] the burden that the growth in unmeritorious judicial reviews has placed on stretched public services.... In this paper the Government sets out a series of further reforms which, it states, seek to address three interrelated issues: i. the impact of judicial review on economic recovery and growth, ii. The inappropriate use of judicial review as a campaign tactic, iii. The use of the delays and costs associated with judicial review to hinder actions the executive wishes to take.” (MoJ, 2013: 6-7)

Within the scope of this enquiry we wish to make a general point on the scope and tone of the proposals. Given that this is the second consultation on reform of judicial review within a few months, and despite the submission to the Ministry of Justice earlier in 2013 of detailed responses from learned and experienced judicial and legal bodies, the language used in this second proposal document is extraordinary, and arguments for reform presented are both partial and fallacious.

At best the Ministry of Justice offers a highly partial characterisation of judicial review, focusing on the inconvenience caused to the executive by judicial review while completely ignoring the benefits of judicial review to individuals, to the maintenance of the rule of law, and to society at large. The proposals ignore the safeguards offered by judicial review to the exercise of individual rights, the role of judicial review as a check on unlawful policies or the unlawful application of policies, and the use of judicial review by the government itself to develop clear boundaries to policies.

“The Government is concerned by the use of unmeritorious applications for judicial review to delay, frustrate, or discourage legitimate executive action” (MoJ, 2013: 7 iii)

The proposal document appears to miss the point, which is that it is for the courts to decide whether executive action is legitimate.

Far from being used as a delaying tactic, as the Ministry asserts, judicial review procedures are now an essential and routine legal tool to overcome the inertia of Home Office caseowners in immigration cases. It is becoming increasingly necessary to use judicial review proceedings to force the Home Office (UK Border Agency as was) to make decisions in immigration cases, or simply to respond to correspondence. Judicial review offers a degree of protection against poor quality decision making and administration on the part of the Home Office. Judicial scrutiny is essential to ensure that government departments work fairly and efficiently. It has been estimated that up to one third of immigration applications for judicial review are to challenge potentially unlawful delays in UKBA decision making²⁴. Where individuals are held in administrative detention time is always of the essence since detention may become unlawful over time where the Home Office fails to act within a reasonable period.

²⁴ Source: Immigration Law Practitioners' Association (ILPA).

For more information refer to BID's submission to the Ministry of Justice consultation 'Judicial Review: proposals for further reform', November 2013²⁵.

Judicial reviews to challenge removal from the UK

BID has worked with a number of parents who the Home Office has sought to remove or deport despite this not being lawful or in their children's best interests. Judicial review is a crucial safeguard against such action and legal aid funding must be retained for such cases.

Case study

Faith was detained with her partner for 206 days *after* serving a prison sentence. Her four children were aged between one and 11 when she went to prison; the eldest child was a British Citizen. The children were extremely distressed, and some of them developed behavioural and health problems.

Three months into her detention, the Home Office wrote to Faith and her partner informing them that they intended to remove the parents and children together. The family had been separated for two years and five months. The Home Office noted the need for the children to 're-establish their relationship with their parents before removal,' and envisaged that this might happen at Heathrow Airport. It is extremely concerning to see that the Home Office thought it would be appropriate to reunite these extremely distressed children with their parents during the course of their forced removal. This removal attempt was cancelled, and the Home Office arranged a new date for the family to be removed using the same method, but this was prevented by a Judicial Review application. The parents were subsequently released from detention and granted leave to remain in the UK.

Judicial reviews challenging maltreatment of detainees

In January 2013 The Guardian reported on a case where 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"*²⁶

²⁵ Available at Bail for Immigration Detainees <http://www.biduk.org/162/bid-research-reports/bid-research-reports.html>

Despite having no published policy governing the use of force, and widespread criticism of their practices, the Home Office continued to use force against children and pregnant women to effect removals. 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. This is just one example of the very many cases in which very serious harm to detained families and pregnant women has only been prevented by an application for judicial review.

FOR FURTHER INFORMATION

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²⁶ The Guardian, Friday 11 January 2013 , 'UK Border Agency rejects calls to stop using force on pregnant detainees: Government document outlines recommendations by prison inspectors as one detainee claims she was 'dragged like a dog'. Available at <http://www.theguardian.com/uk/2013/jan/11/uk-border-agency-rejects-force>