



## 10 Reasons to vote against the Legal Aid Residence Test

This briefing paper concerns the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014, the purpose of which is to restrict the availability of civil legal aid to those who pass a 'residence test'. Limited classes of people (e.g. serving British soldiers) are exempted from the test, as are those with particular types of case (e.g. certain family law disputes and those challenging detention). But the test will apply to most of the 46 types of civil legal aid case listed in schedule 1 of part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO').

There are 10 reasons to vote against the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014:

1. It introduces a fundamental change that was not contemplated by Parliament;
2. It is a misuse of the delegated legislation-making powers in LASPO;
3. It introduces a discriminatory test that targets 'foreigners';
4. The discriminatory test it introduces is wholly unjustified;
5. The test will have a particular effect on vulnerable children;
6. The test flouts the UK's obligations under the UN Convention on the Rights of the Child;
7. The test will leave mentally and physically incapacitated people without legal aid for cases concerning their welfare;
8. The test will make it impossible for victims of abuse and crime to hold those responsible to account;
9. The test will serve to immunise the State from the Rule of Law; and
10. The test creates a mockery of a fundamental British value: equality before the law.

Civil legal aid was first introduced through the Legal Advice and Assistance Act 1949. Since then, its availability has always depended on three things: the type of case must be prioritised in the legal aid scheme; it must be strong and important enough to justify public money being spent on it; and the financial resources of the person involved must be so limited that it would be impossible for them to pay for a lawyer themselves. These features have lasted 65 years.

If implemented, the residence test will fundamentally change all this. For identical, equally strong and important cases, all of which are prioritised for funding in the LASPO scheme, some people will receive legal aid whereas others will receive no help at all. The only difference will be 'residence' status i.e. whether those who need legal aid are physically here and can prove they have lived here lawfully for more than 12 months. Who will be excluded is obvious: they will be recent migrants and their children, irregular migrants and their children (including those born in the UK many years ago) and those who cannot prove where they have been living for practical reasons e.g. domestic violence victims who have been driven out of their homes, homeless people and pre-school age children.

The Government claims there is a 'safety net' in the form of section 10 LASPO 'exceptional funding'. But this is currently granted in less than 2% of non-inquest cases and then only after weeks of debate between the Legal Aid Agency and applicants' lawyers about whether human rights will be breached if it is withheld. Only one person has ever been granted exceptional funding without a lawyer's help, yet lawyers' time in making applications for those who fail the residence test will not be funded.

In any event, the Government does not claim exceptional funding will meet the need created by the residence test; it accepts that people with strong, high priority cases who cannot afford to pursue them will be left without advice and representation. It is rather less willing to identify who these people are. But as discussed below, they will inevitably include vulnerable children, mentally incapacitated adults, along with victims of abuse, trafficking and other crimes because, although some types of case brought by these people are exempted, many are not. Nor is there a general exemption, or even discretion, covering vulnerable people who could not hope to represent themselves.

Why should Parliamentarians vote to stop this happening?

This briefing sets out just some of the reasons. It draws on evidence and submissions put before the Court in the ongoing judicial review case challenging the test, *R (Public Law Project) v The Lord Chancellor* CO/17247/2013 ('the PLP case'), heard earlier this year. Surprisingly perhaps, the Government has decided not to await the Court's judgment on the legality of the residence test before asking Parliament to approve it.

## 1. A fundamental change that Parliament never contemplated

When civil legal aid was comprehensively reformed and restricted to the 46 types of priority case listed in LASPO, the Government said this would protect access to justice. So, Jonathan Djanogoly told the Public Bills Committee (HC, 6 September 2011, Col. 346): “[w]e have sought to prioritise legal aid for the cases where there is the greatest risk of harm and the most need...” He later added (Col. 326): “[g]iven the importance of the issue, we believe that that the scope for civil legal aid should be set out in primary legislation, which the Bill places before Parliament for approval.”

His colleague Lord McNally, stated in the House of Lords on 20 December 2011 (HL, Col 1717) that “[i]t is central to our proposal for reform that the reforms establish an affordable system while ensuring that no one is denied access to justice.” On 5 March 2012 (HL, Col 1570), he added: “...there is no question of what services might be funded; they are in the Bill for all to see” (i.e. in schedule 1).

In one of the last LASPO Bill debates the then Lord Chancellor, Kenneth Clarke, told Parliament “we are continuing legal aid in all cases involving judicial review... that applies to every kind of judicial review, because we do not think that the Government or a public body should be resisting a claim about abuse of their powers from a litigant who cannot get legal advice. That is not an easy concession to make, because quite a lot of people who seek judicial review are not instantly popular with all sections of society, but we still give them legal aid.” See, HC, 17 April 2012, Col 227.

It was with these assurances of prioritisation, clarity and focus on access to justice that Parliament approved LASPO. The residence test flies in their face. There will be no protection against ‘the greatest risk of harm’ for those who fail it. Cases where there is ‘the most need’ for representation will not receive it.

## 2. LASPO’s delegated legislation-making powers are being misused

Sections 9 and 41 of LASPO empower the Lord Chancellor to vary or amend the types of case for which legal aid is available using delegated legislation, but not to create a residence test. The *Government Response to the Report of the House of Lords Select Committee on the Constitution* (December 2011) explained “[t]he intention is that [this] will be a focussed power to omit services where, for example, funding may no longer be necessary ...” Lord McNally gave the House of Lords two examples: first, “...this may be necessary is where the governing legislation behind an area of law is repealed or otherwise altered and we need to alter civil legal aid provision accordingly ...”; and secondly, “where particular court proceedings are moved to a tribunal. It may cease to be appropriate to provide funding for advocacy in those proceedings ...” (Hansard 27 March 2012 Col.1253).

There was no hint that this power would be used to disentitle groups of people so that two individuals with the same means and equally meritorious cases, having the same underlying

legal rights in the same priority areas, are treated completely differently by reference to some characteristic which bears no relation to means, merits or need.

This is why the Joint Committee on Statutory Instruments took the exceptional course of reporting its view that *“there is no indication at all”* in the LASPO Parliamentary materials that the Government proposed to *“create a general exception of the type now contemplated under which individuals who do not meet a residence test would be excluded from access to many of the types of civil legal services listed in Part 1 of Schedule 1. On the contrary, it appears to the Committee that the Government consistently presented the power [to vary or amend LASPO Schedule 1] as a focussed one needed to make consequential amendments to Schedule in light of changes to other legislation.”* The Committee concluded there was doubt over whether the Order would be *intra vires* and the use of the power was unexpected: see its [First Report of Session 2014-15, published 11 June 2014](#).

It is easy enough to test the point. Suppose the Lord Chancellor proposed to use his amendment and variation powers to create another form of residence test so that people residing in Wales could not receive civil legal aid. If this would be beyond his LASPO powers, the draft order must be too.

### **3. A discriminatory test, intended to target ‘foreigners’**

In [Transforming Legal Aid: Next Steps](#) which confirmed the decision to implement the test, the Government recognised it had *“the potential to put non-British nationals at a particular disadvantage compared with British nationals, as British nationals would be able to more easily satisfy the test than other nationals.”* In other words, the Government accepted the test indirectly discriminates against non-British people. This was also its lawyers’ position in the PLP case.

This is no accident. The Parliamentary Under-Secretary of State for Justice, Mr Shailesh Vara, said this to the House of Commons on 18 March 2014 *“[w]e have made it absolutely clear that for the residence test it is important that they are our people – that they have some link to this country”* (HC Col 623). The Lord Chancellor was even more candid about his thinking about the residence test when he told the Joint Committee on Human Rights on 26 November 2013 that *“I am treating people differently because they are from this country and established in this country or they are not ...”* (Transcript of Oral Evidence, HC 766). Then, on 20 April 2014, he told the Telegraph *“[m]ost right-minded people think it’s wrong that overseas nationals should ever have been able to use our legal aid fund.”*

In fact, there is no evidence to suggest ‘most’ people do share these views: in the PLP case, the Government was unable to point to a single consultation response that supported its position. Even its own panel of specialist lawyers took the extraordinary step of publishing a [letter on 4 June 2013](#) which said that the residence test *“risks creating an underclass of persons within the UK for whom access to the courts is impossible...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. By the same token, to prevent people bringing legal proceedings who are subject to the actions of the UK acting abroad, often in ways which are alleged to be contrary to the most fundamental human rights, is in our view impossible to reconcile with the rule of law."*

#### **4. Discrimination without justification**

The Government accepts the discriminatory nature of the residence test demands justification. But it has been unable to offer anything tangible.

First, the residence test is said to be part of a cost-saving package, so the 5 September 2013 [Final Impact Assessment](#) comments "[w]e are concerned that limited public resources should be targeted at cases that most justify it". But this is circular as the cases that most justify funding are those listed in LASPO schedule 1. Further, the assessment shows a net cost (£1m per annum) of the test and no savings. The Government says that is because it is unable to work out how many people will be denied legal aid. But it also accepts it is unable to work out the knock-on costs, commenting in the Impact Assessment "*we are unable to draw conclusions as to whether wider economic and social costs are likely to result*".

Secondly, the Government argues there is a 'principle' that legal aid should only be available to those with a close connection to the UK. But this cannot justify the test because those who will be denied legal aid have close connections arising from the very cases with which they need help.

The family of Jean Charles de Menezes would not have passed the residence test. Legal aid enabled them to have access to the police complaints process, the inquest process, a judicial review challenging the decision of the DPP not to prosecute and a compensation claim arising from his death. Their connection was the killing of their son on British soil. Similarly, the connection Baha Mousa's father had to the UK is that his son was beaten to death in a British detention facility by British soldiers subject to British law. In any LASPO-listed area of funded work, the premise is the same: the individual concerned has an underlying legal right enforceable only in British courts. LASPO makes legal aid available only for issues of British law.

#### **5. A test that will have a particular impact on vulnerable children**

Part of the Government's rationale for the residence test appears to be that people ought to contribute to the public funds from which legal aid is paid, thus forming a 'connection'. Children cannot make such a contribution, but the residence test will still apply to them in most cases.

For instance, the residence test applies to all special educational needs cases (LASPO schedule 1, paragraph 2). If a UK local authority is failing in its statutory duties to prepare or implement a statement of special educational needs for a disabled child who has not lived here a year, they will receive no legal aid, regardless of their need, vulnerability or the strength of their case. In the PLP case, Coram Children’s Legal Centre gave the example of the case of L, who had recently arrived in the UK for the purposes of refugee family reunion and would have been unable to access legal advice in relation to the failure of the local authority to assess the needs of her autistic 8-year-old son because she had only been in the UK for three months. Yet Parliament was told that legal aid for such cases was being retained in LASPO because they are “*the most important education cases*” and “*of the highest priority*” (HL Deb, 18 January 2012, Col 584).

The residence test also applies to all judicial review cases that can be brought by children, save those about detention. Children can receive advice under LASPO schedule 1, paragraph 6 about their section 17 and 21 Children Act 1989 care rights due to a concession, but will be unable to enforce them because that can only be done with judicial review.

In her PLP case evidence, Shauneen Lambe of Just for Kids Law gave two examples of children who needed representation when they fled abusive homes and were refused accommodation and support under the Children Act 1989, and who would not have been able to obtain it had the residence test been in force. For one, child K, lack of legal aid would have left her unable to challenge a refusal of support “*which left her with the choice of returning to an abusive home or being left destitute on the streets at the age of 16*”. Another case concerned a child who had fled an abusive family home and whose family “*refused to provide her with her passport or any other paperwork because she had left home and had since reported the physical abuse to the police.*” Campbell Robb of Shelter gave evidence to PLP about Ms A, a young Nigerian woman who had been trafficked from Nigeria at the age of 16. She had escaped from her traffickers to live with a man by whom she became pregnant, but had left his house after he became violent to her. She was facing imminent street homelessness with her young baby. Shelter were forced to issue judicial review proceedings before the local authority would discharge its duty to provide assistance. Ms A would fail the residence test.

## **6. A test that flouts the UK’s obligations under the UN Convention on the Rights of the Child**

Such cases have led to the residence test being universally condemned by children’s rights NGOs, the UK’s appointed [Children’s Commissioner](#) and the Parliamentary Joint Committee on Human Rights. On 30 June 2014 in its [First Report of Session 2014-15](#), that Committee reported:

*“We cannot see any way in which this proposal can be compatible with the UK’s obligations to ensure that the views of children are heard in any judicial or administrative proceedings affecting*

*the child under Article 12 UNCRC, or to ensure that the child's best interests are a primary consideration in such proceedings under Article 3. To comply with those obligations, which are owed to all children in the UK regardless of their residence or other status (Article 2), legal aid must in principle be available to make the child's rights under Articles 3 and 12 practical and effective for those who have no recourse to other appropriate means. As long as children have a legal right to take part in legal proceedings which affect their interests, it is wrong in principle, and unlawful, to make it more difficult for a particular group of children to exercise that right... We conclude that the residence test will inevitably lead to breaches by the United Kingdom of the United Nations Convention on the Rights of the Child..."*

The Government's only answer to these criticisms (given to the Committee in evidence) is to say it has taken legal advice which it is unwilling to disclose.

## **7. A test that will leave disabled and mentally incapacitated people without legal aid for cases about their welfare**

The residence test will apply in full to a range of cases where vulnerable adults are wholly (and in many cases legally) incapable of asserting their rights without representation. This prompted the Official Solicitor to give [evidence to the Joint Committee on Human Rights](#) and for use in the PLP case that it would leave incapacitated adults without representation and that exceptional funding was no answer.

For instance, community care cases involving adults (LASPO schedule 1, paragraph 6) are fully subject to the residence test. Those affected include people who need accommodation because they are elderly, ill, disabled, or a nursing or expectant mother. In her evidence for the PLP case, Nicola Mackintosh of Mackintosh Law gave the example of P, a severely learning disabled adult, who had been *"forced to live in a dog kennel outside the house, had been beaten regularly by his brother and mother, and starved over an extensive period of time"*. Legally aided proceedings in the Court of Protection resulted in a determination that it was in P's best interests to live separately from his family in a small group home with his friends and peers and 24-hour care. As Ms Mackintosh explained, it would have been impossible to ascertain whether P passed the residence test as *"P did not know if he had a passport. It was also not possible to confirm that he had been lawfully in the UK for a continuous period of 12 months at some point in the past..."*

Mental capacity and mental health cases (LASPO schedule 1, paragraph 5) are also fully subject to the residence test, unless detention is being challenged. As Vicki Nash of Mind explained in her PLP evidence, patients may be discharged without adequate accommodation or aftercare, leaving them at *"serious risk of relapse and further admission if they have no adequate follow up care services or no suitable accommodation"*. Yet the symptoms of mental health problems *"make it particularly difficult for some people with those conditions to access the health and social care services, and housing that they need at a time when correspondingly they are likely to be more dependent upon, or have a greater need for, those services"*.

## **8. A test that makes it impossible for victims of abuse and crime to hold those responsible to account**

The Lord Chancellor is responsible for the [Government's Victims' Charter](#) which proclaims "[t]he proper protection and support for victims of crime is a fundamental part of a civilised justice system." Yet victims who fail the residence test will receive no such support.

For instance, the residence test applies fully to LASPO schedule 1, paragraph 39 sexual offence cases. A person who is a victim of such an offence committed in the UK can receive legal aid for a sufficiently strong civil claim against the perpetrator or against a person that negligently failed to prevent the crime. The Government proposed including them in LASPO in its [November 2010 consultation](#) because "*victims may well be vulnerable and need assistance in pursuing a claim. We do not consider that the alternative forms of advice or assistance which are available are sufficient to justify the withdrawal of legal aid*". That need is not qualified by residence.

The residence test applies fully to LASPO schedule 1, paragraph 3 cases too which are those specifically concerned with abuse of vulnerable adults. Highlighted in Southall Black Sisters' PLP evidence is the case of Paramjeet, who suffered severe abuse at the hands of her husband's family, including being made to live in a shed in the back of the house which had no washing or showering facilities following her discharge from hospital where she had been treated for pneumonia and tuberculosis and had become suicidal. She was clearly vulnerable during this period of abuse but as her immigration status had lapsed she would have failed the residence test and so would not have been eligible for legal aid to bring civil proceedings against her husband's family for the harm they caused her.

LASPO schedule 1, paragraph 21 makes funding available to challenge abuse of position or powers by public authority, but the residence test will apply fully to such cases. In [November 2010](#) the Government's justification for retaining legal aid was that a claim *arising "out of a serious abuse of state power, has an importance that goes beyond a simple money claim... the determining factor is the role of such cases in ensuring that the power of public authorities is not misused"*. An example of such a claim discussed in Mark Scott's PLP case evidence is that of JS, a Thai woman who suffered persistent sexual harassment over many months at the hands of two male members of HMP Holloway staff. Harriet Wistrich of Birnberg Peirce and Partners referred in her evidence to a case of two women held in immigration detention who were subjected to sexual abuse.

These claimants would all fail the residence test.

## **9. A test that immunises the state from the Rule of Law**

When identifying the legal aid priorities for LASPO in [November 2010](#) the Government acknowledged it was important that individuals can "*hold the state to account*", and "*seek to check*



*the exercise of executive power”, as a “crucial way of ensuring that state power is exercised responsibly”. Yet LASPO schedule 1, paragraph 19 judicial review cases will be subject to the residence test, save for some very narrow exceptions.*

This has profound implications for accountability of UK public authorities under UK public law standards. As the Bingham Centre for the Rule of Law said in its [response to the proposals](#):

*“... the function of public law transcends the protection of individuals’ rights and interests: as the Supreme Court has recently reiterated, the role of public law proceedings extends to ensuring government according to law. There is, then, a public interest in ensuring that standards of legality are upheld, and it would be anathema to the rule of law, in effect, to permit those standards to be breached with impunity merely because the immediate victims were unable to satisfy the residence test.”*

The kind of case where legal aid will be unavailable to those who cannot meet the residence test but who may be in very urgent need of legal assistance includes challenges to the denial of life-saving medical treatment, described by the Government during the consultations on LASPO as being “*of great importance as their life is at risk*”. An example given in the PLP case was that of O, a man stranded in the UK following a military coup in his home country, suffering from chronic kidney failure, and wrongly refused urgent medical treatment which was necessary for his survival, until a judicial review pre-action letter was sent.

The residence test will exclude individuals resident abroad who, or whose family members, have been subject to serious abuses at the hands of UK forces. Examples include cases such as those brought by Mr Al Skeini, who established important principles relating to the jurisdiction of the ECHR in the case of British armed forces operations overseas and Ali Zaki Mousa who successfully challenged on Article 3 grounds the independence of the Iraqi Historic Allegations Team set up to investigate allegations of abuse by British forces ([2011] EWCA Civ 1334). Other such cases relate to the alleged involvement of British authorities in serious abuses by other states such as extraordinary rendition, transfer into the custody of other states where they are at risk of very serious human rights.

A further group of important judicial review claims which will be affected by the residence test are those brought by British nationals and residents detained abroad seeking assistance from UK authorities such as the Foreign and Commonwealth Office in making representations for their release or disclosure of documents which might assist them in securing their release, such as the claims brought by Binyam Mohamed, Bisher Al-Rawi and Shaker Aamer while detained at Guantanamo Bay.

## 10. A test that mocks a fundamental British value: equality before the law

The Belmarsh case (*A & Others v SSHD* (No.1) [2005] 2 AC 68) concerned irregular migrants whom the Secretary of State could not deport but wished to detain. Lord Bingham addressed the fundamental importance of equal treatment in the legal system, quoting Jackson J of the US Supreme Court, Lord Hoffmann in the Privy Council and Lord Scarman in the House of Lords: Jackson J, “Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation”; Lord Hoffmann, “Their Lordships do not doubt that [the principle of equality] is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour”, Lord Scarman: “Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection.”

The residence test mocks these principles. If implemented will deny legal aid to those who:

- lack the means to afford legal help by paying privately, tested against rigorous financial eligibility requirements;
- meet the published, objective criteria for eligibility, designed by reference to the factors identified by Parliament in section 11 of LASPO;
- have the need for legal help in a priority area of human need for which advice and representation were prioritised by this Government through LASPO;
- with that help, would be able to secure effective access to justice, to protect and vindicate their legal rights under the Rule of Law;
- would be granted legal aid if, now and for more than 12 months in the past, they had regular resident status; and
- whose greatest need for legal help, to secure the protection of the rights which domestic law gives to them, is in no way a lesser or different need than that of a regular, 12 months plus resident.

Parliament should reject this discriminatory test.

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