Shelter evidence to the Parliamentary Joint Committee on Human Rights

The implications for access to justice of the Government's proposed legal aid reforms

September 2013

Executive Summary

- Shelter welcomes the opportunity to submit evidence to the Joint Committee on Human Rights regarding the significant reforms that are being proposed to legal aid. More than one million people a year come to us for advice and support via our website, helpline and network of face-to-face services, including 25,000 people we see each year under legal aid contracts. At present we employ over 200 advisers and 40 solicitors to give advice and offer legal representation to the public. Our evidence is therefore rooted in the experiences of people we help every day, many of whom will be deeply affected by these changes. Shelter is extremely concerned about the current legal aid proposals and their effect on our homeless clients. These measures, if implemented, will take away a major part of the safety net that stands between families and the street.

- The proposed residence test will leave destitute children and families, victims of trafficking, refugees and victims of domestic violence unrepresented. The impact will be greatest on the children of parents with no recourse to public funds, who will face the prospect of being taken into care by Children's Services.

- The proposal that legal aid costs will not be paid in judicial review cases unless the Court gives permission to proceed with the case would make it incredibly difficult for Shelter and other housing law solicitors to challenge local authority decisions in homelessness cases. Legal aid lawyers will be unable to bring judicial review cases if they have to take the risk of permission not being granted. Local authorities have a financial interest in refusing assistance to homeless persons, but with no prospect of judicial review, they will be able to act unchallenged. Vulnerable families who are unlawfully refused assistance will have no redress.

- The Lord Chancellor's suggestion that an award of costs in such cases should be at the discretion of the Legal Aid Agency (LAA) is unworkable. No legal aid practitioner could take on a judicial review in reliance on the discretion of the LAA given the uncertainty of the payment.

- These proposals could have the effect of increasing the number of homeless people. They raise human rights issues of fundamental significance to access to justice and the rule of law.

Introduction

1. We would like to concentrate our evidence on the following:

    - the proposed introduction of a residence test for civil legal aid claimants; and
    - 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.

2. We proceed on the basis that the proposals may breach articles 3, 6 ,8 and/or 14 of the European Convention on Human Rights. We have not sought to argue this, as we have done in our Response to the first Government consultation paper[1], but rather to provide evidence on the ways in which our already severely disadvantaged clients will be affected by the proposals.

The residence test

3. The Lord Chancellor proposes the introduction of a two-part test of eligibility for civil legal aid, namely that (1) the applicant must be lawfully resident in the UK when the application for legal aid is made; and (2) he or she must have been *continuously* resident for a period of 12 months at any time prior to that application.

4. We note that some minor concessions have been made in the Lord Chancellor's response to the initial consultation, *Transforming Legal Aid: Next Steps* (September 2013), for example, the test will not apply to certain cases where the individual is particularly vulnerable such as victims of trafficking and of domestic violence, but this exemption only applies in relation to (broadly) immigration and family matters. Certain cases concerning the protection of children are also to be exempt from the residence test (Annex B, para 125). These include proceedings relating to the care and supervision of children, child abduction and clinical negligence cases, but they do ***not*** include cases concerning the powers and duties of local authorities in relation to `children in need', including homeless children[2]. Additionally, children under 12 months of age will not be required to have at least 12 months of previous lawful residence, although they will need to be lawfully resident at the date of application for legal aid (Annex B, para 127).

5. Among the people who will be left unrepresented by these proposals in relation to housing and homelessness will be victims of trafficking, those who have fled domestic violence or an abusive relationship, and people who have overstayed their leave but have now lived here for many years and whose children were born here. Some will typically have survived through the kindness of family and friends for some years, but that arrangement has now broken down, and they are now homeless. Often they have already applied to the Home Office for leave to remain, but in the meantime are not allowed to work or to claim benefits. They cannot apply to the local housing

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[1] http://england.shelter.org.uk/professional_resources/policy_and_research/policy_library/policy_library_folder/response_transforming_legal_aid

[2] under ss 17 and 20 of the Children Act 1989.

authority for mainstream homelessness assistance, so they have to ask Children's Services for accommodation of last resort.

6. The children in these cases are innocent victims and need to be protected from street homelessness and destitution. Where the parents seek assistance in these circumstances, the authority must carry out a `child in need assessment[3], which will include a human rights assessment, and should provide emergency accommodation. Yet Children's Services will often either offer no assistance at all or respond by threatening to take the children into care, even though they have loving parents and there are no child protection concerns other than the want of accommodation itself.

7. Our relevant clients often approach Shelter at this stage for assistance, which may lead to an application for judicial review to ensure that the family are able to stay together and have a roof over their heads. Where a social services authority refuses to assist, it is legal aid that enables us and other practitioners to hold them to account. Legal aid is therefore a vital safety net to protect children from destitution and street homelessness. All too often, it is only the threat or reality of legal action that forces a local authority to accept its obligations. These proposals take that safety net away.

Other consequences of the residence test

8. Those excluded by the test will have no recourse to the law whatever their situation. They may be renting in the private sector and exploited by rogue landlords: they will have no protection against squalid conditions, harassment or unlawful eviction. This is a recipe for exploitation of vulnerable groups, with consequent effects on other public services and on social cohesion.

9. The test would inevitably also affect others who are here lawfully, including British citizens, who do not have the necessary paperwork to demonstrate 12 months' lawful residence. Whether a person is lawfully resident is in our experience far from a straightforward question. Many of our clients have a right of residence which exists by direct application of the law and does not depend on the grant of a residence permit or other formal evidence of immigration status by the Home Office. Such clients may have no document - passport, visa or otherwise – which actually grants them residence. Such a document may not exist, since their status is not determined by it but by their personal circumstances[4].

10. The proposal will require solicitors and legal advisers to act as gatekeepers to legal aid, by checking a person's immigration status. Yet there is a significant risk that those who are entitled to legal aid will not get it because they cannot provide adequate proof. Many people do not have a passport. It is hard to see how 12 months' lawful residence can be proved in many cases, even for those who have lived here for many years, especially where the client is mentally ill, vulnerable, or simply has not kept relevant paperwork.

11. In emergency cases the client often does not have proof immediately available. For example, unlawful eviction cases it is common for the landlord to dispose of or destroy the client's possessions, or simply deny access to them as they are still in the property from which the client

[3] under section 17(10), Children Act 1989

[4] such as having worker status under the Immigration (European Economic Area) Regulations 2006.

has been excluded. Likewise, where someone's passport has been retained by an abusive partner.

12. The proposal for a residence test would deprive large numbers of people – some British, many lawfully in the UK, many others who will be lawfully resident when the Home Office deals with their cases - from access to the courts. It will subject others to unnecessary and intrusive bureaucracy which may delay their case or wrongly exclude them from legal aid altogether. It is unlawful and discriminatory and will increase poverty, exploitation and destitution.

13. For example, a Jamaican national Ms B was referred to Shelter. She had leave to remain under a spouse's visa. The marriage broke down due to domestic violence and Ms B applied for further leave to remain in the UK. Whilst she was waiting for the outcome of her application she and her five year old daughter (a British citizen) became destitute and homeless, as she was not permitted to work or claim benefits and her ex-husband could not provide enough money to support them. She approached social services for help but they told her they would take her child into care. She and her daughter sought refuge at night in the waiting room of the A & E department at the local hospital, where it was warm. Shelter threatened judicial review proceedings but social services continued to offer accommodation for the child alone, despite the fact that the child's head teacher commended Ms B as a 'very good parent who has nurtured and cared for her daughter' and stated that 'any question of separating mother and daughter would be catastrophic for both.' We issued an application for judicial review against the social services authority, Permission was granted, but the case was withdrawn before the final hearing, as the client was granted leave to remain in the UK and was able to claim benefits. If the residence test had applied, our client (whose leave to remain as a spouse had expired following the breakdown of her marriage) would not have been granted legal aid, and it is likely that her daughter would have been taken into care.

Legal aid in judicial review cases

14. The original consultation paper proposed that providers should only be paid for work carried out on an application for judicial review if permission is granted by the court.

15. At Shelter we depend on our ability to take legally aided judicial review proceedings in order to ensure that local authorities carry out their duties towards homeless persons. The most common instances of judicial review in our work are where a challenge is necessary to require a local housing authority:

    - to accept an application for housing assistance from a homeless person;
    - to provide emergency interim accommodation for a homeless applicant or family who are street homeless;
    - to provide or continue temporary accommodation pending a review of an adverse decision; and
    - to provide suitable accommodation (where the accommodation provided is manifestly unsuitable, eg, it is infested or it is in a very different part of the country).

16. Much of our work involves emergency homelessness cases. Local authorities, both housing and social services, routinely operate `gatekeeping' practices, in which highly vulnerable people are turned away for spurious reasons or sent between departments. Where the client is actually or imminently roofless, an urgent application for an interim injunction to accommodate will need to be made: where the client has nowhere to stay that night, the application may have to be made out of hours to the duty judge. The question of permission will then come before the Administrative Court judge at a later time. But in many cases, the proceedings will already have served their purpose, and it will not be necessary to proceed even as far as permission. The client will have been placed in interim accommodation, and the authority will ultimately reach a decision on whether it accepts the `full' rehousing duty.

17. Shelter's Children's Legal Service has a Hardship Fund which enables us in extreme cases to provide one or two nights' accommodation for families who would otherwise be street homeless, where there is insufficient time or capacity to prepare a legal challenge the same day. Only this month we have used the Fund to pay for a weekend's accommodation for a couple with a 3 week old baby who was born two months prematurely. The couple had applied for assistance to the housing authority, whose statutory duty[5] was to provide them with temporary accommodation pending full enquiries into their circumstances. Despite being told that the family had nowhere to go, the Council said that they had no appointments for two weeks and that they should make their own arrangements. Upon being discharged from the hospital's intensive care unit, the family spent the night sleeping in a field before being referred to us the following day.

18. **The threat itself of judicial review is often sufficient to bring about a decision to provide temporary accommodation, but often not before substantial work has been done, including a detailed judicial review pre-action protocol letter and extensive negotiations with housing officers and local authority lawyers.** The threat itself of judicial review is often sufficient to bring about a decision to provide temporary accommodation, but often not before substantial work has been done, including a detailed judicial review pre-action protocol letter and extensive negotiations with housing officers and local authority lawyers. The Government state (para 119 of `Judicial Review – Proposals for further reform) that "legal aid would continue to be paid in the same way as now for the earlier stages of a case…". But assistance under the Legal Help scheme does not include the preparation of court papers where no response is received to the pre-action letter; and a certificate for Investigative Help is paradoxically not available where the grounds of the proposed challenge are strong. Where proceedings are started, it is stated (also in para 119) that payment would be made for work carried out on an application for interim relief, regardless of whether the provider is paid on the substantive claim for judicial review. This is a totally unworkable formula. By far the greater part of the work relates to the drafting of grounds for judicial review, and it would be impossible to disentangle the section of the claim form which relates to the injunction application from the main grounds.

19. It cannot be stressed too much that judicial review provides the only legal safety net for homeless persons who are faced with the immediate prospect of street homelessness. It is also important to stress that judicial review, alongside the availability of urgent interim orders, is by and large an effective remedy, despite the fact that its cumbersome procedures are not best suited to emergency cases. It is precisely because local authorities are aware of its effectiveness that they

[5] under s.188 Housing Act 1996.

concede and settle cases. Where the authority relents and provides accommodation on a final warning of judicial review, even though many hours' work have gone into the preparation of the papers, we cannot claim our costs from the authority. In other cases, where proceedings are issued and are subsequently settled, we will do our best to obtain our costs from the authority, as indeed we are obliged to do under the terms of our contract with the LAA. However, the authority will often make it a condition of their accepting a housing duty to the family that we agree to withdraw the proceedings with no order for costs. We take the view that our duty to our clients means that we cannot insist on pursuing costs when it is in the clients' best interests to settle the matter on the basis of the terms offered.

20. In the further consultation paper `Judicial Review: Proposals for further reform" (September 2013), the Lord Chancellor has made a revised proposal that, where a case settles after proceedings have been started (though not when settlement is achieved before the proceedings begin), payment in such cases should be at the discretion of the LAA. The LAA's decision would be based on four criteria which are set out in para 125 of the paper. Despite the fact that the case has been successful, the provider would have to do yet more work in submitting a request for payment together with evidence in support (para 129), and there is no appeal against an adverse decision, other than an internal review. The suggestion that payment should be at the discretion of the LAA, whose restrictive approach is familiar to all providers, is completely unacceptable. No legal aid practitioner could take on a judicial review in reliance on the discretion of the LAA.

21. This proposal is likely to make it impossible for homeless people to find solicitors to bring judicial reviews. The risk and uncertainty that the claimant's lawyers will have to bear will be unsustainable. We cannot see how our service, or that of other housing law practitioners, could survive on this basis.

22. The outcome will be to create an intransigent attitude among authorities, who will come to realise that there is no reason to concede even a strong case during pre-action correspondence. Some local authorities will feel free to turn away homeless applicants for entirely spurious reasons, safe in the knowledge that they are either immune from challenge or able to concede in an individual case without any costs consequences.

Refusal of permission

23. If the case does reach the permission stage, and permission is refused, does that necessarily mean that the provider should be denied payment for all his/her work in bringing the case? The context is that of a solicitor who needs to make a decision at the start of a case whether there are grounds for bringing a challenge by way of judicial review. This will often be in an emergency, with a street homeless family in the solicitor's office. The solicitor will of course need to make an assessment of merit at the outset, in order to justify to the LAA why legal aid should be granted at the outset. But whether permission is ultimately granted by the Court depends on many factors, including disclosure of the defendant authority's case, which will not have happened until after proceedings are issued. The Government's view that "it is appropriate for all of the financial risk of the permission application to rest with the provider" is inappropriate in such cases.

Disadvantaged groups

24. It is evident that those who need to avail themselves of judicial review in the context of homelessness are already in an impoverished and diminished condition. Any proposals to restrict access to judicial review are therefore bound to affect people with protected characteristics within the meaning of the Equality Act 2010, who are disproportionately represented among the homeless. These proposals, if implemented, will have a marked impact on vulnerable individuals and families who are already at risk of discrimination because of their personal characteristics.

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