

**THE 'INS AND OUTS' OF TRANSFORMING LEGAL AID<sup>1</sup>:**  
**More outs and than ins**

**SUMMARY**

The results of the proposed changes would be that persons who have a good case with excellent prospects of success will

- Not be able to bring that case because they cannot pay
- Unable to find a legal aid lawyer to bring the case even if they are eligible.

The main proposals which will further limit access to justice are<sup>2</sup>:

- a residence test for civil legal aid claimants;
- a reduction of legal aid for judicial review;
- amendments to the civil merits test to prevent the funding of any cases with less than a 50% chance of success.

The proposed changes will deny legal protection to poor litigants and so directly undermine the rule of law<sup>3</sup>.

**I. THE RESIDENCE TEST: removing legal aid for those without 'strong connections' to the UK**

Legal Aid providers will be required to carry out the following residence test (and retain evidence on file for audit):

The individual applying for civil legal aid must:

- (i) be "lawfully resident" in the UK (etc.) at the date of the application for civil legal aid; **and**
- (ii) be or have been "lawfully resident" in the UK (etc.) continuously for 12 months.

*Asylum-seeker exception*

Asylum-seekers ("lawfully present") are exempt from the residence test. However, on the grant of leave to remain (e.g. as a refugee or person given humanitarian protection) an asylum seeker becomes "lawfully resident" and therefore although on-going civil legal aid funding will continue, the 12-month lawful residence test will apply to any post-grant application for funding. An asylum seeker whose claim is rejected and has exhausted all rights of appeal ceases to qualify for legal aid under the exception and funding will cease. Only where a fresh claim for asylum has been 'made' would they (again) benefit from the asylum seeker exception. They do not qualify for legal aid to make that fresh claim.

**II. JUDICIAL REVIEW: removing legal aid for permission applications**

Legal Aid providers will only be paid for work carried out on an application for permission (including a request for reconsideration of the application at a hearing, the renewal hearing or an onward permission appeal to the Court of Appeal), IF the Court grants permission. The work would be "at risk."

Legal Aid (subject to the residence test) would continue to be paid, as now, to investigate the strength of a claim and to engage in pre-action correspondence aimed at avoiding proceedings under Legal Help or Investigative Representation funding. Where a permission application was made the claimant would continue to be technically in receipt of legal aid for the permission stage of the case, and so would continue

<sup>1</sup> 'Legal Aid' refers to all publically funded legal advice and representation: Legal Help, Controlled Work, and 'certificated work'

<sup>2</sup> The detail can be found here: <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid>

<sup>3</sup> *The Rule of Law*, Lord Bingham, Allen Lane 2010, page 88

to benefit from cost protection, and would therefore not be personally at risk of paying costs if the permission application were unsuccessful. The successful Legal Aid provider could seek to recover their costs either as part of a settlement between the parties or through a costs order from the court.

Reasonable disbursements, such as expert fees and court fees, which arise in preparing the permission application, would continue to be paid, even if permission was not granted by the Court.

### **III. Merits test – removing legal aid for borderline cases**

Cases must generally have at least a 50% chance of success to receive legal aid funding for full representation (i.e. must have a moderate or better prospects of success). However, at the moment, there are certain housing or family cases, which receive funding with borderline prospects of success and in other cases funding will be available if there is a borderline prospect of success and the case has special features: it is of significant wider public interest or overwhelming importance to the individual). Funding may also be granted in public law claims, claims against public authorities and certain immigration and family claims which have these special features or if the substance of the case relates to a breach of human rights. It is proposed to abolish all borderline funding in including in asylum cases assessed as having 'borderline' prospects of success.

### **IV Other changes**

- (a) Cuts to legal Aid for prisoners will affect foreign national prisoners including the mentally ill.
- (b) Barristers' fees will be cut to the level paid to other advocates. The justification given is to harmonise fees but raising the payments, which have not risen since 2001, for all, is not considered.
- (c) Cuts to payments for immigration and asylum cases in the Upper Tribunal. The justification given is that there was originally a higher rate for these cases because they were 'at risk' (see comments on judicial review above) and now only asking the Upper Tribunal for permission to appeal is at risk, the uplift will be removed. This ignores the way the uplift has masked the low underlying payment.
- (d) Expert fees will be reduced by 20%.

### **COMMENT**

Those who will be excluded from legal aid under the proposals will include:

- trafficked persons, separated children, survivors of domestic violence and detainees
- trafficked persons who do not have a claim for asylum (which is about risk on return, not what has been suffered in the past);
- those whose claims for asylum have failed, but who cannot be removed. There will be no Legal Aid to assist such persons to make further representations (including a fresh claim for asylum), a claim for damages for false imprisonment, and/or challenge decisions denying support and accommodation;
- Those facing removal or deportation whose challenges are based on rights to private and family life, rather than asylum claims.
- Legal Aid practitioners will have to cope with the proposals against the background of mounting restrictions in Legal Aid Agency (LAA LAA) contracts. Legal aid firms and organisations, especially not for profits that cannot balance reduced earnings from legal aid with increased private work, are in many cases struggling to survive. Any chance disturbs whatever precarious equilibrium they have reached. Many have, however good they are and however good LAA LAA thinks they are, been able to secure a contract for only 100 legal aid cases at the initial stages, and have built the types of work now under attack into their survival strategy. With so little wriggle room it is difficult to do very much work at risk.

This is not an immigration problem or even a legal aid problem. It is a problem about access to justice, about equality of arms, about holding the State to account.

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