

ILPA information sheet

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New Legal Aid Proposals

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The Ministry of Justice is consulting on further changes to the current legal aid system. The consultation document and attachments can be found here: <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid>. The consultation closes on 4 June 2013. ILPA urges refugees and migrants and those who work with them to respond to the consultation and to make their views known. If you have any comments please contact Alison.Harvey@ilpa.org.uk.

The purpose of this information sheet is to set out some of the likely effects of these changes. The consultation has implications across immigration, criminal and family law for access to justice and the rule of law. This information sheet is concerned primarily with the impact on immigration.

Proposals

The proposals are in addition to the recent changes to legal aid which came into force on 1 April 2013 (see Legal Aid 13 information sheet <http://www.ilpa.org.uk/data/resources/16615/12.12.19-legal-aid-13-update.pdf> and Legal Aid 14 information sheet at <http://www.ilpa.org.uk/data/resources/17567/13.03.13-Legal-Aid-14-update1.pdf>). The main proposals are:

1. The Residence Test.

People wishing to claim civil legal aid will have to prove to their lawyers that they are living in the United Kingdom lawfully, and have been for at least 12 months. This is not just about immigration cases, it affects, for example, family or housing cases. All lawyers, including those who do not specialise in immigration, will have to decide if a person is lawfully resident in the UK. If a person has not been lawfully resident for at least 12 months then they will not be eligible for legal aid, even if they have a really good case and will be unable to bring that case without legal aid.

At the moment there is no residence test. Where a type of case is eligible for legal aid, a person must show that their income is below a set level and that there is merit in their case.

Asylum-seekers are exempt from the residence test until their case has been decided and any appeals finally concluded. Once an asylum seeker is granted leave to stay in the UK, they will no longer qualify under the exception for asylum seekers. This despite the 1951 Refugee Convention which states:

Article 16

...

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance....

...

They will have to wait 12 months from the date of grant before they are eligible for legal aid. Where they had legal aid as an asylum-seeker and are still getting it when given leave, they will continue to get it, although the limits of this are as yet unclear. An asylum-seeker who has been refused and has lost all their appeals will not qualify for legal aid to make a fresh claim for asylum. However once a fresh claim is made, they will again qualify for legal aid under this exception.

2. Judicial Review

At the moment, a person can apply for legal aid (subject to their financial situation and the merits of their case as above) for a judicial review except in immigration cases where the same, or substantially the same, legal questions have been decided by a court or tribunal within the preceding 12 months. This continues to be the case but with an added restriction. The first stage in applying to the High Court for judicial review is to apply to the High Court for permission to bring the judicial review. It is proposed that work done for the permission stage will only be paid if permission is granted. Lawyers risk not being paid for this work, which will limit the number of cases that they can/will do.

3. Merits test

Cases must generally have at least a 50% chance of success to receive legal aid funding (i.e. must have a moderate or better prospect of success). Certain housing or family cases receive funding where the prospects of success are lower than this: "borderline" cases. In other cases funding will be available if there is a borderline prospect of success and the case has special features (for example it is of significant wider public interest or overwhelming importance to the individual). The proposals will abolish funding for cases, including asylum cases, with only borderline prospects of success.

4. Other changes

Many of these changes are to payment for lawyers and experts. ILPA's concern is that the effect of these changes will mean fewer lawyers doing this work, which will make it more difficult for potential clients to find legal representation and thus to bring their cases and protect their rights.

- (a) Cuts to legal aid for prisoners will affect foreign national prisoners including the mentally ill.
- (b) Barristers' fees will be cut
- (c) Cuts to payments for immigration and asylum cases in the Upper Tribunal.
- (d) Expert fees will be reduced by 20%.

Summary

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

- Trafficked persons, separated children, survivors of domestic violence and detainees
- 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 to 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.

For further information on ILPA's work on these changes see

<http://www.ilpa.org.uk/resources.php/17792/transforming-legal-aid-delivering-a-more-credible-and-efficient-system-ministry-of-justice-ilpas-ini> or get in touch with Alison Harvey, Alison.harvey@ilpa.org.uk.