

Transforming Legal Aid Consultation Response

Question 4 – Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

A police perspective on domestic violence and the proposed residence test

My name is Jim Blair. I was a police officer in the Metropolitan Police for 30 years, before retiring last spring as an Inspector. For many years I was a Metropolitan Police lead on equalities issues and particularly on the Metropolitan Police's response to race and gender. For example, I was a part of the Racial and Violence Crime Taskforce, which dealt with the pan-London response to domestic violence. Since retiring I have joined the Management Board of the Domestic Violence Intervention Project, a leading domestic violence charity.

I believe strongly that the proposed residence test could place a high number of victims of domestic violence at risk of serious harm and I am also concerned that restricting access to legal aid in this area will actually increase the cost to the public, since other statutory services, particularly the police will have to take over.

Introduction to the proposals

The Transforming Legal Aid consultation includes a proposal for a residence test that would “require applicants for civil legal aid to satisfy a residence test in order for civil legal aid to be available”. The test would require the applicant to be able to demonstrate to their lawyer that they are currently living in the UK lawfully and that they have previously lived in the UK lawfully at some point for 12 consecutive months.

The reason the consultation gives for this proposal is that the government is “concerned that individuals with little or no connection to this country are currently able to claim legal aid to bring civil legal actions at UK taxpayers’ expense” which “may encourage people to bring disputes here” (from paragraphs 3.42 and 3.44 of the consultation).

The proposal is phrased as a blanket ban with no exception for victims of domestic violence (although there are proposed exceptions for armed forces personnel and their immediate families and current asylum seekers). Paragraph 3.53 states that legal aid would still be available where necessary to comply with obligations under EU or international law, although this paragraph does not clarify whether it is envisaged that these international obligations include positive duties to protect victims of domestic violence.

Paragraph 3.54 refers to the exceptional funding scheme established by s.10 LASPO, which allows exceptional legal aid to be granted to prevent breaches of Convention rights or EEA Treaty rights in areas usually excluded from legal aid under Schedule 1 LASPO. However, since Schedule 1 does not exclude civil legal aid for victims of domestic violence I have assumed that victims of domestic violence would not be able to apply for exceptional funding in the normal way without an amendment of LASPO itself, which has so far not been proposed.

While domestic violence can take place in a wide range of different relationships, between different generations and genders, the majority of victims of domestic violence, particularly the victims of serious physical violence, are women. On this basis I will refer to 'women' as well as 'victims' or 'survivors' of domestic violence in this consultation response.

Civil legal aid in domestic violence cases and why it is needed for all victims

There are many reasons why civil legal aid is vital in domestic violence cases. During my 30 years with the Metropolitan Police I delivered domestic violence training to police officers across London, developed policy around domestic violence and represented the Metropolitan Police both in the UK and internationally (for example by sharing best practice on domestic violence as part of delegations to both India and Pakistan). Based on my experience, some of the most crucial benefits of the availability of the civil remedies to legal aid (such as non-molestation and occupation orders) which I believe are strongly in the public interest are set out below.

Many women distrust or are afraid of the police; indeed building up a fear of the authorities can form part of the domestic violence itself. There are many communities where a distrust or fear of the police is more likely, particularly among many migrant communities, who would be disproportionately affected by the proposed residence test. Therefore many women will not report domestic violence to the police. For these women a civil remedy is the only option.

Many women do not want to criminalise the perpetrator of domestic violence, sometimes for very practical reasons (such as where their child is partly dependent on the ex-partner's income, so they do not want him to lose his job or where they fear losing social housing); again for these women a civil remedy is the only one.

Incidents of domestic violence are likely to increase in severity and frequency over time. For women who do not feel able to/wish to engage with the police or who may not feel safe even after engaging with the police then civil remedies are the only way to prevent this increase in severity and frequency.

A woman can apply for a civil injunction in circumstances where the criminal justice system would be very unlikely to pursue a domestic violence situation as a crime, either because the police might not record an incident as a crime (as frequently still occurs in cases of emotional/financial abuse) or because the CPS does not think there is sufficient evidence in the case to pursue with a charge. This means civil remedies protect victims of domestic violence even where the criminal justice system would be ill-equipped to perform an equivalent function and civil remedies can step in before incidents of domestic violence increase in severity.

While police engagement with victims of domestic violence only tends to last as long as the police are working on the crime reported to them, civil injunctions can last a lot longer. At the same time in civil cases the victim will be able to instruct a specialist domestic violence family lawyer, whereas in criminal cases they are merely a witness, reliant on whatever experience of domestic violence an individual police officer or CPS lawyer might have.

There are ongoing serious concerns about conviction rates in domestic violence and sexual violence cases in the UK. In domestic situations, particularly cases of historic violence, it can be very difficult to secure a conviction beyond reasonable doubt. On the other hand, in civil cases an injunction can be granted on the balance of probabilities. It does not take much common sense to realise that this means the civil justice system is likely to protect more women from domestic violence.

During my time with the Metropolitan Police we developed some sophisticated responses to domestic violence and, while cuts to police budgets risk a roll-back for equalities issues, the UK still has much to be proud on in this area. However, even with our very best practice, the police simply do not have the flexibility of the civil courts. In the civil courts it is very quick for a lawyer to seek an emergency injunction for a victim of domestic violence, which can include a wide range of conditions.

These conditions have been used by the courts to effect very sophisticated outcomes over the years; before the Forced Marriage (Civil Protection) Act came into force lawyers were already using domestic violence conditions to gain significant protection for victims of forced marriage through the courts, for example by requiring families to produce passports, which mitigated the risk of abduction abroad.

The financial burden the residence test would place on the police

The UNESCO Chair of Gender Research, Sylvia Walby estimated in 2004 that the cost of domestic violence to the UK was around £23 billion a year with £3.1 billion for the criminal justice system alone.¹

At present in the UK 1-2 women are murdered each week by a current or former ex-partner. A single homicide investigation costs over £1 million pounds. A single extra death due to domestic violence, caused by the residence test barring access to civil legal aid for women in crisis, is likely to cost the state more than they hope to save from imposing the test as a whole.

As mentioned above civil court orders are powerful preventatives for domestic violence. Court orders are very strongly worded and so they may prevent a domestic violence incident altogether. Even if they do not then they are of enormous assistance to the police when dealing with a domestic violence incident. Where a victim has a civil court injunction the police will be made immediately aware of the risk to the victim and should arrest the perpetrator for breaching the court order.

Without a civil court order it can take a significant amount of police time for an officer arriving on scene to identify what is occurring and this is at the public expense. It is not always obvious who is the victim of a domestic incident and so the police may end up leaving only to be called back again repeatedly (for example I have come across cases where the police have been called out five times in one evening) or the police may even arrest the wrong party/both people, which can obviously be very distressing for many victims.

Where the proposed residence test would bar many victims of domestic violence from accessing civil legal aid, the problem of domestic violence will not go away. Instead the cost will shift to other

¹ C.f. <http://www.ndvf.org.uk/files/document/1081/original.pdf>

statutory services. A clear example of this would be in cases of harassment or stalking. The Protection From Harassment Act 1997 provides for both a civil remedy (section 3) and criminal offences (e.g. section 2); where a person could not access the civil remedy then the full burden of cases in this area will fall on the criminal justice system, which will save the public no money and in some cases will be less appropriate.

I am very concerned that the Ministry of Justice's Civil Credibility Assessment does not actually quantify the amount of money this proposal is intended to save. Taking into consideration how much increasing rates of domestic violence would cost the UK financially it seems to seriously damage the credibility of the residence proposal that there is no evidence provided that the Ministry of Justice knows they would save any money.

Above I have outlined the financial cost of domestic violence, but statistics and figures are completely inadequate for capturing the social impact of domestic violence. Domestic violence kills people, destroys the lives of those around them, including children who witness domestic violence, and it perpetrates gender inequality. I believe the UK has a moral duty to do everything it can to eliminate domestic violence and I would strongly hope that this sentiment would receive cross-party support in Parliament.

Equality impact assessment for the residence test

I have looked at the Ministry of Justice's EIA at Annex K to the consultation. As part of my work for the Metropolitan Police I worked to explain the function and role of EIAs. I would not have been impressed with a Metropolitan Police EIA that examined the impact of a change as far-reaching as a restriction on all civil legal aid in less than a single page. I would strongly recommend that the Ministry of Justice produce an EIA with far more detailed analysis of this proposal.

The one paragraph of the EIA entitled 'impact on clients' only foresees a disadvantage to 'non-British nationals' without any mention of victims of domestic violence or women (who are disproportionately likely to be victims of domestic violence).

In a crisis situation even a British woman who has lived in the UK all her life may flee her house with no evidence at all as to her 'residence'. Would this mean she would be barred from accessing any civil legal aid also? What about a victim of domestic violence, including forced marriage, who has been kept completely in the dark about their legal status in the UK as part of the controlling behaviour of a perpetrator?

The EIA foresees discrimination against non-British nationals, but states that this would be justified to pursue a legitimate objective, which paragraph 4.2 says is to:

“bear down on the cost of legal aid, ensuring that we are getting the best deal for the taxpayer and that the system commands the confidence of the public. Our aim is to do so in ways that ensure limited public resources are targeted at those cases which justify it and those people who need it”.

It is not clear to me as a member of the public, as an ex-police inspector or as a person with expertise working to eliminate domestic violence that trapping vulnerable women in violent

relationships, when they are amongst the people in society who most need access to justice, would meet this objective at all. As I have set out above I do not think a residence test would save public money in respect to victims of domestic violence, instead I think it would be extremely expensive and damaging to Britain's identity and reputation both in the UK and overseas.

Domestic violence and obligations under EU or international law

Signatories to the European Convention on Human Rights have a positive obligation to protect victims of domestic violence. Not to do so breaches Articles 2 (right to life), 3 (prohibition on torture and inhuman or degrading treatment) and 14 (non-discrimination on Convention rights).²

Moreover the discrimination against migrant women inherent in the proposed residence test would likely be found unlawful under our own Equality Act 2010, as well as under Article 14 and 6 (right to fair trial) ECHR.

The UN Convention to Eliminate all forms of Discrimination Against Women (CEDAW), to which the UK is a signatory, requires non-discrimination against women in all areas of life (Article 1), including when guaranteeing other fundamental rights (Article 3) and before the law (Article 15). CEDAW also requires that states ensure effective protection against violence against women in General Recommendation Numbers 12 and 19, and effective protection for migrant women workers in General Recommendation Number 26.

While CEDAW is not directly enforceable in the UK, the British courts can and do use international human rights standards/treaty obligations to interpret obligations that are directly enforceable under the Equality Act, Human Rights Act or by way of judicial review. I understand that the courts have the power to strike down secondary legislation if it is unlawful and if this happened to the proposed residence test then this would increase its cost.

As it stands, with no exception for victims of domestic violence to access the necessary and basic civil legal aid that is enshrined in Schedule 1 LASPO, it seems very unlikely to me that the courts would find the blanket residence test lawful.

I do not believe the proposed residence test is in the public interest because I think it will put women's lives in danger, damage work to promote gender equality in the UK and increase pressure on the criminal justice system, rather than resulting in any real saving to public money.

I would be happy to be contacted to discuss the concerns I have raised further.

Jim Blair

June 2013

² C.f. the leading case in this area *Opuz v Turkey* (Application no. 33401/02): [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{\"dmdocnumber\":\[\"851046\"\],\"itemid\":\[\"001-92945\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{\)