No Recourse to Public Funds Network Response to the Transforming Legal Aid Consultation

Introduction

This response focuses on a local authority perspective on the transforming legal aid consultation, in particular taking account of how the proposals would work within the context of social services obligations to people subject to immigration control who have no recourse to public funds.

This response will address Question 4 of the consultation (introducing a residence test), Question 5 (paying for permission work in judicial review cases) and Question 6 (civil merits test – removing legal aid for borderline cases). We will also briefly comment on Question 1 (prison law matters).

The NRPF Network understands that LASPO broadly meets UK human rights obligations, but we have serious concerns that these new proposals, and in particular the proposed residence test, would not do so, and would instead prove to be unlawful and unworkable.

In addition we are concerned that the estimated savings that the proposals envisage for the reforms asked about in questions 4 – 6 are not adequately evidenced and instead these proposals are likely to result in much more limited savings and no meaningful saving to public expenditure overall, since the cost in many cases is instead likely to be shifted onto other statutory agencies.

The NRPF Network

The No Recourse to Public Funds (NRPF) Network is a network of organisations focusing on the statutory response to people with care needs who have no recourse to public funds. The Network, established in 2006, aims to share information and good practice amongst local authorities, work with government departments to raise practical and policy issues and to develop a strategic response to NRPF.

There are over 2,800 members of the NRPF Network representing local authorities, the voluntary sector, central government, the police and the NHS. The NRPF Network runs an information and guidance enquiry line, provides training to local authorities, researches the scale and nature of NRPF, works with government departments on a number of policy concerns and provides information on developments in case law, policy and good practice.

For more information the NRPF Network, please see: www.nrpfnetwork.org.uk.

Local authority duties to clients with NRPF

According to s 115 of the Immigration and Asylum Act 1999 (IAA) people in the UK who are subject to immigration control, meaning either without leave or with leave subject to a NRPF condition, will not be able to access social security benefits (such as income support or housing benefit). According to s 118 IAA people who are subject to immigration control are not entitled to social housing. Some

people with NRPF reside in the UK lawfully and are able to work (such as those on work, student and spousal visas) and others do not reside here lawfully (for example visa overstayers).

Since people with NRPF cannot access mainstream benefits, it is common for them to turn to local authority social services departments for support in times of crisis. Since most people with NRPF would be expected to return to their country of origin if they could no longer sustain themselves in the UK, local authorities are only able to provide support to destitute people in very limited circumstances.

The most common statutory duties that can require a local authority to provide accommodation/subsistence/other related services to a person with NRPF are:

- S 17 Children Act 1989 – duty to assess and support Children in Need, usually with their families
- Children in care and care leavers (under Children Act 1989)
- Adults with a need for care and attention (e.g. with community care/mental health needs) under s 21 National Assistance Act 1948.

In relation to adults who are not lawfully in the UK, refugees of an EEA state, EEA nationals or refused asylum seekers who have refused to comply with removal directions, Schedule 3 of the Nationality, Immigration and Asylum Act 2002 (NIAA) means that a local authority can only provide support under the provisions outlined above if not providing the support would breach Convention rights or Community Treaty rights.

This leads to a very complex situation where a local authority is required to: establish whether a person has NRPF, conduct a needs assessment, see whether the person is caught by Schedule 3 NIAA, if the client is caught by Schedule 3 then also conduct a Human Rights/Community treaty rights assessment and then make a lawful decision on what appropriate services the person might be eligible for.

The importance of legal aid with no residence test to the NRPF field

There is no national guidance on social services duties to clients with NRPF and so this is an area which has been entirely developed through case law.

The case law in this area is the sole reason why there are not gaping gaps in support for destitute children and extremely unwell adults (since case law has decided where the local authority is responsible and where the Home Office/asylum support would be the responsible agency). Case law is the reason why local authority decision-making and support is not highly arbitrary and why destitute families who cannot return to their country of origin and so literally have nowhere else to go can expect to be appropriately assessed by local authorities.

At the same time on multiple occasions case law in this area has clarified where people are not eligible for local authority support, which saves public money from being spent across the UK through a misunderstanding of the law. The subsequent saving to public money as local authorities

are able to adjust their policies following a judicial review case that clarifies the law can be very significant and would in our estimation easily amount to over a million pounds a year.[1]

Since the people seeking support in this complex area will usually be destitute and have additional needs, in many cases legal aid would be the only way for them to even find out what their basic rights are; many people in this area would not be able to find out about judicial review without legal assistance and would certainly not be able to bring a judicial review as an unassisted litigant in person.

Local authorities must use their limited resources carefully and appropriately and in this field they often adopt a 'wait and see' attitude: refusing people who present support until it is clear in law that they do in fact have a duty to provide that support. This makes judicial review a vital safeguard, particularly in urgent cases where a family are facing street homelessness and possible starvation if they do not receive an interim order for support.

Research from Oxford University estimates that there are 120,000 irregular migrant children living in the UK, with 65,000 of them born here.[2] Many of these children have significant community and social ties to the UK, may think of themselves as British and appear to have a very strong connection to this country.

In the case of Limbuela,[3] the House of Lords found that it breaches Article 3 ECHR (prohibition on inhuman and degrading treatment) for the state to refuse support a person would be eligible for but for their immigration status where the person is unable to return to their country of origin. In such situations a refusal of support amounts to enforced destitution. In an extreme case, where a family face starvation, there could also be a breach of Article 2 (the right to life).

From a broader public interest perspective, local authorities do not want to see an underclass of destitute migrants, who cannot leave the UK/return home, but cannot work or access any type of support either. This greatly harms the wellbeing of a local area with increased risks of street/hidden homelessness, domestic violence/forced labour, exploitation, mental health issues, substance abuse and crime.

Legal aid for judicial review is presently the only way to prevent enforced destitution where a local authority has wrongfully refused support. While judicial review is expensive for local authorities and the NRPF Network would offer overwhelming support for the production of national guidance in this area and a consultation on what options could be added to judicial review that might save costs, for example exploring the feasibility of the use of more evaluative mediation or an ombudsman service in this area, at present we do not believe that a residence test that would prevent access to judicial review for most local authority NRPF clients is proportionate or justified.

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[1] The NRPF Network undertook research in 2011 which found that approximately 4,160 people subject to immigration control with NRPF are being supported by 40 local authorities. This cost these local authorities at least £46.5 million per annum. There are 433 local authorities in England, so the actual annual costs will be much higher. For more information c.f. *Social Services Support to People with No Recourse to Public Funds* (March 2011) NRPF Network. Available online at: http://www.nrpfnetwork.org.uk/policy/Documents/NRPF_national_picture_final.pdf.

[2] *No Way Out, No Way In* (2012) University of Oxford and COMPAS, available online at: http://www.compas.ox.ac.uk/fileadmin/files/Publications/Reports/NO_WAY_OUT_NO_WAY_IN_FINAL.pdf.

[3] [2005] UKHL 66

Instead we believe the introduction of the proposed residence test would result in a position where the rights of NRPF clients would become illusory and completely unenforceable. In response local authorities could simply refuse support to all NRPF children in care, care leavers, families and adults with a need for care and attention without any risk of being held to account.

Historically there were concerns that local authorities would frequently refuse to carry out a relevant assessment, even in circumstances where the law is clear that an assessment would be required, and in family cases threaten to take children into care from destitute migrant families without any evidence that this was the appropriate or proportionate response. With a residence barrier to accessing legal aid we would return to these grim days, which harms the reputation of the UK internationally[4] and pushes destitute families with a right to support underground.

There would also be no further development in the law in this area, which is still in some areas unclear (such as in relation to EEA nationals' Community Treaty rights or the entitlements of care leavers with NRPF).

Key cases

Below is a list of some example cases that were 1) of immense importance to a destitute client and 2) have been of significant importance in developing and clarifying the law across the country. If the residence test had been in force at the time it is very likely these cases could not have been brought:

SL v Westminster [2013] UKSC 27 – refused asylum seeker from Iran with diagnosis of depression and PTSD with previous admission to hospital after suicide attempt. Although had a weekly meeting with social worker to monitor his condition, did not currently have a need for care and attention so no duty to accommodate under s 21 NAA

R (KA) v Essex [2013] EWHC 43 (Admin) – a Nigerian family with three children born in the UK, the eldest aged 8, who had their Article 8 immigration application refused without a right of appeal should not have their support withdrawn by the local authority, because they had requested removal directions be issued, so they could appeal against them on the basis of Article 8. This was an effective safeguard of their Article 8 rights and so constituted a legal barrier to return.

ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 – British national children with non-British mother at risk of removal; human rights assessments should take account of the best interests and wishes of the child and take account of the fact that a child is British, born here and has developed a private life in the UK.

R (VC) v Newcastle [2011] EWHC 2673 (Admin) – refused asylum seeker with two children born in the UK should be eligible for support under s 17 CA rather than s 4 Home Office support, since s 4 is a residual power. The local authority could only treat s 4 support as otherwise available if they could show the Home Office were willing or could be compelled to provide this support.

R (SO) v London Borough of Barking & Dagenham [2010] EWCA Civ – local authorities do have the power and can have a duty to accommodate care leavers in order to safeguard their wellbeing and human rights.

[4] C.f. the response to a 2012 Slovak documentary that suggested British social services departments arbitrarily take Roma children into care: http://www.childrenssociety.org.uk/news-views/our-blog/caring-roma-children.

R (Mwanza) v Greenwich and Bromley [2010] EWHC 1462 (Admin) – s 117 Mental Health Act does not usually overlap with s 21 NAA and should not usually be used to provide accommodation

Birmingham City Council v Clue [2010] EWCA Civ 460 – human rights assessments following a child in need assessment under s 17 CA should treat an outstanding Article 8 immigration application as a barrier to return and also consider a child/family's private life as separate from family life.

R (M) v Slough [2008] UKHL 52 – a 'need for care and attention not otherwise available' under s 21 NAA means a need for looking after, support with something a person cannot reasonably be expected to do for themselves.

N v Coventry [2008] EWHC 2786 (Admin) – HIV positive refused asylum seeker from South Africa refused support under s 21 NAA, because could reasonably be expected to return; if Article 3 ECHR is not breached in this type of case then Article 8 will not usually require subsistence payments.

Blackburn-Smith v Lambeth [2007] EWHC 767 (Admin) – court found a Jamaican mother with British children could be expected to return to Jamaica, where she had a family network, or if she chose to stay in the UK the local authority had adequate reason to believe that the children would be provided for by other family members.

R (Gnezele) v Leeds [2007] EWHC 3275 – s 21(1)(aa) NAA to provide accommodate for expectant or nursing mothers is a power not a duty, it does not overlap with s 21(1)(a) and if asylum support is available then this will be the most appropriate agency, not the local authority.

PB v Haringey [2006] EWHC 2255 (Admin) – Jamaican overstayer with 5 (non-resident) children in the UK applied for accommodation under s 21 NAA; caught found her mental health problems had not been properly considered and her Article 8 ECHR right to family life.

M v Islington [2004] EWCA Civ 235 – before a local authority can limit their support to an offer of tickets to return they need to assess whether the child would be a child in need on return, whether requiring return would breach the family's human rights and whether requiring a British citizen child to leave the UK would breach their human rights. Case brought by Guyanan mother with British child.

R (Kimani) v Lambeth [2003] EWCA Civ 1150 – if a person can reasonably be expected to return to their country of origin then it does not breach Article 3 to refuse support, since it is their choice to remain in the UK.

No financial justification for proposed residence test

The consultation outlines prospective savings of £220 million a year by 2018/19 for all the proposed changes in total. The consultation does not estimate or give any figure at all for the anticipated saving from the proposed residence test. The Civil Credibility Impact Assessment for this proposal is not able to even give a rough estimate of the current cost or envisaged financial benefit.

The NRPF Network would strongly recommend that before the proposed residence test is given any further consideration some basic research is done to ascertain whether it would actually result in any real financial saving. If this research has been done then it should be made available to the public as soon as possible.

Paragraph 3.42 of the consultation states: *"We are 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".*

There is no analysis of whether this ever actually happens and, if it does, why a person resident elsewhere would want to bring a case in the UK. This statement draws no distinction between cases where a person ordinarily resident abroad brings a civil suit in the UK (where legal aid would very rarely be available anyway since the introduction of LASPO) and cases where a person ordinarily resident abroad has little choice about involvement in a court case (such as in Care Proceedings) or is challenging a UK state abuse that took place in another country (such as torture by the British military abroad).

Since LASPO has restricted legal aid very closely to the types of case where international and European obligations are likely to require legal aid, it is not at all clear which areas of civil legal aid that are still in scope could lawfully have a residence test applied (we outline some of the human rights implications of the proposals in more detail later in this response).

Paragraph 3.42 does not distinguish between those with 'little connection to the UK' because they are ordinarily resident somewhere else and those who could be considered actually resident in the UK, but are foreign nationals/stateless people who are not here lawfully. This is important because in different circumstances many people who live in the UK but who would not satisfy the residence test might still be the most in need of legal aid, in order to bring a case that most justifies public spending

Paragraph 4.2 of the consultation Equality Impact Assessment states that the proposals aim to meet their primary objective to save money "*in ways that ensure limited public resources are targeted at those cases which justify it and those people who need it".* It seems likely that even members of the public who might be in favour of some sort of residence test would still consider children in care, victims of trafficking and victims of domestic violence to be among the most in need in the UK. In order to meet the objectives set out in the Equality Impact Assessment the proposal for a residence test needs far more nuanced analysis.

Paragraph 3.44 of the consultation states: "*We are also concerned that the availability of legal aid for cases brought in this country, irrespective of the person's connection with this country, may encourage people to bring disputes here*." Again, 'may' should not be the basis for creating a far reaching change in the law.

We would recommend that increased monitoring of nationality, length of time spent in the UK, country of residence and immigration status is introduced by the Legal Aid Agency. After an appropriate period of time this data could be analysed to see how much of the civil legal aid budget is being spent on people who have a limited connection to the UK and, if there is any significant proportion of the budget being spent on this group, in which areas it is being spent.

This research should help the Ministry of Justice to identify whether there is a rational basis for concern that would make the introduction of some form of residence test appropriate.

Residence test would cause cost shift to statutory services

The NRPF Network is extremely concerned that any savings made by a residence test would be wiped out by a cost shift to other statutory services. The entire annual saving estimated for the proposal to only pay for permission work for judicial review in successful cases is £1 million a year and this saving could be obliterated by the public expense of introducing a residence test.

Paragraph 4.2 of the consultation Equality Impact Assessment states that: "*the primary objective of the proposed reform package 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 respect of the public*". As discussed above, it has not been established in the consultation that the residence test would reduce the cost of legal aid and the NRPF Network highlights below some areas where the residence test is likely to instead increase the cost to the local and national taxpayer.

In certain situations where legal aid is unavailable, the local authority could potentially be required to underwrite the cost of independent legal advice for a client with NRPF. This is most likely to occur where the client is a child in care, because s.22(3) Children Act 1989 states:

> *"It shall be the duty of a local authority looking after any child—*
>
> *(a) to safeguard and promote his welfare; and*
>
> *(b) to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case. "*

Where legal proceedings would relate to an issue that is fundamental to a child's wellbeing, so for example if the child were a victim of trafficking, sexual abuse or were involved with Care Proceedings it seems very likely that it would be necessary for the local authority to ensure the child received independent legal advice, even if this meant they had to pay private legal fees that are much higher than legal aid rates. This could be devastatingly expensive for local authorities, at a time when their own budgets have been reduced.

This is extremely problematic, because it raises very difficult risks of a conflict of interest for the local authority, while at the same time opening them up to risks of judicial review or, if that were unavailable to a child who did not meet the residence test, then costly negligence litigation. Whilst a duty to pay for private legal advice is most likely to arise in relation to a child in care, in certain cases other local authority clients (including families and care leavers) could have strong grounds for requiring similar support.

Even where a local authority does not themselves have to pay for a client's legal advice, there will still be an impact on public bodies where they are involved with legal proceedings with litigants in person. In such cases, where only the state party is represented, the court is likely to require the represented party to undertake the vast majority of the case preparation, which their lawyer will then charge the state body for, so this is likely to substantially reduce any overall saving in the residence test.

Moreover, cases where there are litigants in person are likely to take longer, leading to a sharp increase in court time. For example, at present the standard listing time for a permission hearing for judicial review is 30 minutes. It seems extremely unlikely that a litigant in person would be able to put their case adequately in this time.

Finally, where a client finds the restrictions on legal aid to be a complete barrier to them accessing the courts, in crisis situations they will have no choice but to turn to other statutory services. For example, where a victim of domestic violence is unable to apply for a non-molestation order because they are caught by the residence test and cannot get legal aid, they will have little choice but to instead rely more heavily on support from the police. Non-molestation orders allow a victim of domestic violence to receive protection from police officers and the civil courts immediately in urgent situations, they discourage harassment and stalking and they clarify the situation to the

police (who otherwise are more likely to arrest both parties or at least have to spend a lot more time trying to work out the context of an incident).

Where a social services client cannot obtain legal advice in a case that is of vital importance to their wellbeing (for example in relation to being made wrongfully homeless) then they will turn to their social worker for assistance. This staff time is unlikely to be less expensive than arranging legal advice would be, since support from people who are not legally qualified and competent in the particular legal area is likely to take significantly longer to reach an appropriate outcome.

Where a parent would be caught by the residence test and therefore be unable to apply for/to amend court-ordered child contact, the local authority or schools will end up having to step in to work with families where the court process would be quicker, more appropriate and less expensive.

Over centuries our justice system has developed an infrastructure designed to uphold the rule of law and arbitrate civil disputes and disputes with state bodies. These disputes will not go away simply because a person cannot access court in any meaningful way and instead the responsibility to ensure public order and local wellbeing will be shifted to local authorities, schools and the police.

In many instances, and perhaps overall, a residence test could in fact cost the public purse more than it would save. This irrationality could form part of a public law challenge to the residence test.

Human rights and the residence test

LASPO takes account of the need to safeguard fundamental human rights (both in the types of case kept within scope in Schedule 1 and through the s 10 exceptional funding provision) and, as such, seems to us to be broadly compatible with fundamental rights.

On the other hand, the proposed residence requirement does not seem to strike the right balance required to safeguard human rights. In particular, we are concerned that the proposed residence test is likely to be struck down by the courts as incompatible with human rights obligations:

a) There are categories/types of case where there the European Court of Human Rights has found that the Article 6 right to fair trial requires legal aid in civil proceedings, such as legal aid for children and family members in Care Proceedings.[5]
b) The European Convention of Human Rights requires states to guarantee not rights that are theoretical or illusory but rights that are practical and effective.[6] A residence test in cases where legal proceedings are the only way to effectively safeguard human rights (such as forced destitution in breach of Articles 2 and 3 as protected by the Limbuela case) is likely to provide an insufficiently effective safeguard.
c) The residence test is inconsistent with Articles 3 and 12 of the Convention on the Rights of the Child, which is used to interpret children's human rights in domestic case law.[7]

If robustly implemented the s.10 exceptional funding scheme could potentially safeguard human rights in matters where legal aid is not included in Schedule 1 LASPO. On the other hand we are concerned that it will be manifestly inadequate for cases caught by the proposed residence test:

[5] P, C and S v United Kingdom (App.No.56547/00) (2002) 35 EHRR 31
[6] Airey v Ireland Series A, No.32,(1979-80) 2 EHRR 305; para24
[7] ZH (Tanzania) v SSHD [2011] UKSC 4; from paragraph 21 of Lady Hale's judgment.

a) Since s.10 LASPO refers to excluded matters not included in Schedule 1, not categories of people more generally, it may be impossible for people caught by the residence test to even apply for exceptional funding without LASPO itself being amended.
b) A refusal to grant legal funding by the Legal Aid Agency comes with no right of appeal. A refusal to grant legal aid to someone otherwise caught by the residence test could only be challenged by way of judicial review, which would also be subject to the residence test. This hugely weakens the effective safeguard of Convention rights in the UK and is far less likely to be accepted by the courts than the scheme established by LASPO.
c) The exceptional funding scheme requires separate applications in each case, which will then be considered individually for exceptional funding. There are whole classes of case, such as Care Proceedings, Homelessness cases, Detention cases/Habeas Corpus, Trafficking cases, Domestic Violence civil cases and Domestic Violence Rule applications where human rights case law may require a presumption in favour of legal aid: the current scheme is not set up to cope with this and this does not seem like a cost effective approach.
d) It is doubtful whether the current scheme is robust enough to adequately safeguard rights in practice (for example the Lord Chancellor's guidance on the scheme includes only a single page on child applicants and makes no mention at all of children in care).[8]

Unlawful discrimination and the residence test

While the residence test is phrased in such a way that it could affect British nationals, it seems likely that in practice it would be indirectly discriminatory in several very clear ways, as is partially recognised by the consultation Equality Impact Assessment (paragraph 5.3.1). As it is anticipated that these proposals would be passed in secondary legislation, the residence test could then be struck down by the courts. The residence test would:

a) Disproportionately affect migrants and therefore indirectly discriminate against race/nationality in contravention of the Equality Act 2010 and Article 14 ECHR (when taken with the Article 6 right to fair trial).
b) Disproportionately disadvantage refugees when compared to British nationals in the equivalent position, in contravention of Article 16 of the Refugee Convention 1951.[9]
c) Indirectly discriminate against other groups, for example in domestic violence cases against women (again in contravention of the Equality Act 2010 and Article 14 ECHR potentially alongside Articles 2, 3, 6 and 8).[10]
d) Directly discriminate on the basis of age against all children who are under a year old in conflict with the government's duty to promote equality and in breach of Article 14 ECHR alongside Article 6.
e) Indirectly discriminate against EEA nationals, who will disproportionately be more likely to be affected than British nationals, which may contravene Community Treaty obligations, since the European Courts treat legal aid as a social advantage.

[8] Available online at: http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf.
[9] For example, refugees would have no access to legal aid when a rogue landlord made them homeless when they have an extremely strong connection to the UK and the vast majority of British nationals could seek legal aid in the same position.
[10] C.f the case of Opuz v Turkey (App.No.33401/02) (2009)

The Equality Impact Assessment for the consultation does not include any adequate in-depth analysis of the true effect of this discrimination (in total the analysis is less than a page). At paragraph 5.3.1 it does state that the discrimination against non-British nationals is justified. The justification says the proposal "*is a proportionate means to achieving the legitimate aims set out in section 4*".

Section 4 sets out these legitimate aims as: "*The primary objective of the proposed reform package 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*. ".

As this response discusses above, there is no evidence included in the consultation or the Civil Credibility Impact Assessment to suggest that the residence test would reduce expenditure of the legal aid budget. Moreover, we have raised concerns above that the residence test would in fact increase costs for the taxpayer. At present there is no reasonable or rational basis to argue that the proposed residence test would meet the first two parts of the consultation's objective.

The third part aims to ensure the 'system commands the confidence of the public'. It is not clear how a system that discriminates in the ways set out above could rationally be said to command the confidence of a reasonable member of the public and this could form a significant part of a public law challenge to this legislation.

In order to be 'proportionate' any discrimination in the proposal would need to be the minimum necessary to pursue a lawful objective. The blanket restriction proposed by the residence test in this consultation would apparently apply to all civil legal aid, with concerning procedural/practical barriers to accessing exceptional funding (as discussed above) and so it would seem to be far from proportionate.

The 'credibility' of the legal aid system is referred to in the title of the consultation and in the Ministerial Forward; damage to public confidence in the legal aid system is referred to in the introduction. There is no evidence given as to the basis of the suggestion that there is a widespread public view that the legal aid system lacks credibility. If this is to be the 'legitimate aim' in pursuit of which the proposals suggest a discriminatory residence test, then this position needs to be robust, real and evidenced.

The Ministry of Justice should make available their evidence for believing that there is a lack of public confidence in the legal aid system that requires a residence test to be introduced and provide a fair opportunity for stake-holders to respond to this.

Care Proceedings and the residence test

There are many categories of case (particularly those included in Schedule 1 LASPO) which will nearly always require legal aid to be available since they raise extremely intense human rights issues, are complex, emotional, of overwhelming importance to the parties and are greatly important as a matter of public policy.

However, from a local authority perspective we are particularly concerned about the suggestion that a residence test could be imposed on Care Proceedings. Such cases are not instigated by the parents/carers or child, but by the state, they go to the heart of Article 8 ECHR, often involve relatively complicated expert evidence and they are sensitive and emotional (with serious allegations made about a parent or carer).

It would be of no benefit and instead extremely harmful to the public interest to have children removed from their parent or carer's care when this is not appropriate.

Moreover this would not meet our obligations to safeguard children's best interests under Articles 3 and 12 of the Convention on the Rights of the Child. Children in Care Proceedings are currently independently represented and this is the only way that they can fairly participate.

The NRPF Network, from the perspective of social workers and local authorities, would be appalled at the potential for grave injustice if children and parents/carers could not access legal representation in Care Proceedings due to a residence test. Nationality/residence is irrelevant to local authority child protection duties and so it must remain equally irrelevant in related legal proceedings.

The residence test would be unworkable

In practice we believe the residence test is likely to be unworkable:

a) In many cases the Home Office holds a client's passport and/or a person will still be lawfully resident because they made an in time application, but they will have no evidence of this. There is no immigration-checking service currently available to lawyers and, in our comprehensive experience, where local authorities have contacted Home Office centralised or local teams to ascertain a person's immigration status the initial answer is often inaccurate.
b) In some cases, for example where a person is a British national or has an enforceable EEA right of residence, they may have no evidence that they have been here lawfully for 12 months.
c) Even where a person has evidence of their status their position can still be far from clear. For example there is ongoing case law about the scope of certain EEA derived residence rights that apply to migrants from outside the EEA and it will only be possible to know for certain whether a person is lawfully resident after their case has been to the High Court. Will the Legal Aid Agency provide legal aid in cases where a person may be lawfully resident, but the law is unclear?
d) Only specialist immigration lawyers would be competent to assess a client under the proposed residence test, so lawyers in other areas of law (such as family law) will end up turning away clients due to a misunderstanding of their eligibility. This should be given strong consideration as part of the Equality Impact Assessment of this proposal, since it could later form a part of a public law legal challenge.
e) The current exceptions proposed (for asylum seekers and members of the armed forces) are insufficient. The NHS charging regulations for overseas visitors have tried to implement a not dissimilar residence requirement, but have had to include so many exceptions in order to comply with EEA, human rights and non-discrimination law[11] that they have been extremely poorly implemented and many hospitals have found them to be unworkable.
f) The residence test in relation to EEA nationals would need to take account of any periods of lawful residence in other EEA countries when calculating 12 months previous residence. At present the student finance rules are required to take account of residence in another EEA state and this has proved to be an

[11] C.f. the NHS guidance: https://www.gov.uk/government/publications/guidance-on-overseas-visitors-hospital-charging-regulations.

extremely messy and unworkable system. This is the case even though Student Finance England is a centralised body, in a better position to run this type of system than individual lawyers would be.

Paying for permission work in judicial review cases

It seems disingenuous to suggest that the responsibility for the permission stage of judicial review should rest with individual providers; the final decision on whether to grant/pay legal aid rests with the Legal Aid Agency. If more needs to be done to tighten up the merits test in public law cases then surely this is again something that is the responsibility of the Legal Aid Agency.

The NRPF Network has had the opportunity to see the consultation response from the Immigration Law Practitioners' Association (ILPA) in draft and we would strongly support their comments on this topic.

We would particularly emphasise their assessment that this proposal could have a devastating impact on access to justice, while at the same time in fact saving far less than the estimated £1 million a year (since according to ILPA's analysis of the statistics in fact only 13% of judicial review claims appear to be refused permission with no verifiable benefit to the client).

From the perspective of community care cases concerning clients with no recourse to public funds, we would emphasise again that judicial review is the one fundamental safeguard that allows vulnerable people to enforce their rights and in this context it genuinely does save lives. Local authority practice varies widely, but in our extensive experience over the past seven years it is not uncommon for a local authority to refuse to even assess a client until they have issued a protocol letter threatening judicial review.

For example see the recent judicial review case of R (ES) v Barking and Dagenham [2013] EWHC 691 (Admin), where a local authority were ordered to reassess a mother, who had fled sexual violence in Albania, and her two year old son after they were made homeless; originally the local authority had refused to reassess and instead suggested that the mother should call the police if she found that she and her son would have to sleep on the streets.

Furthermore, judicial review is not just vital to the NRPF and community care sector, but to the rule of law more broadly. If the Ministry of Justice has concerns about the credibility of the legal aid system then we would strongly recommend that they reconsider passing amendments to the availability of judicial review through secondary legislation.

From a local authority perspective, it has been very difficult for local residents and community representatives to engage with this consultation process, partly because it has been brief (only lasting eight weeks, including two bank holidays), but also because this has not been a consultation relating to primary legislation, perhaps with a draft bill available.

The NRPF Network has participated in awareness event hosted by several NGOs and members of the public have expressed shock that such a vast change could be passed without a proper Parliamentary debate.

Furthermore we are concerned that the proposal to only pay for permission work in successful cases will mean fewer lawyers will take on judicial review work if they are not paid for it, particularly fewer barristers, so it will be very difficult for people facing destitution to access judicial review to apply for

urgent injunctions (especially when the merits of an urgent case may be less clear initially) or test and develop the law.

Weak cases are already refused permission to proceed, which protects the public purse and strikes a fair balance. In urgent cases the merits of the case will need to be kept under ongoing assessment, but the final decision on whether to grant legal aid rests with the Legal Aid Agency, not the provider.

The proposal to no longer make legal aid available for applications for judicial review does not seem to be a proportionate or sensible way to save public money, since it is very difficult for litigants in person to access the High Court.

As mentioned above, we would be very happy to explore lower cost possibilities that could be supplementary to judicial review, but this proposal would reduce the availability of an important remedy, with no alternative, which may do great harm to the rule of law and public interest.

Removing legal aid for borderline cases

Unlike many other jurisdictions that are signed up to the European Convention of Human Rights the UK has a common law legal system, which relies on case law to develop the law. In many cases where there is not already clear precedent, the law itself will be unclear until it has been tested.

At the moment many such cases would be classed as borderline, but they may also have enormous public importance. For example, until 1992 there was no law against rape within marriage, but in 1992 the common law was developed by the case of R v R.[12]

Therefore, while the case law of the European Court of Human Rights permits a merits test for civil legal aid, the UK legal system has always required a more sophisticated analysis of merit than simple chance of success.

For no recourse to public funds cases a person's immigration status can be far from clear. For example the Court of Justice of the European Communities judgment in Zambrano appeared to rule that a carer from outside the EEA of a dependent British child has the right to live and work in the UK to protect the British child's right to European Citizenship.[13] Two years later there is ongoing litigation to work out the parameters of this case, for example in 2013 the case of Ahmed v SSHD established that the dependent child need not be British so long as they have European Union citizenship and would have to leave the EEA if their parent did.[14]

This is just one example of the types of complex case where the law, and whether a person is lawfully resident or not, is not at all clear until the case comes to court.

At present the European Courts rule on few cases from the UK compared to the number brought by some other jurisdictions and this is because of our robust internal legal system. If the UK's legal system is damaged in a way that excludes people from even having their case heard then we can expect an increase of cases to go to international appellate courts or for an increase in complaints to be made to the European Commission.

The state usually instructs specialist lawyers for European cases and this could easily wipe out any saving that would otherwise be made in this area. The NRPF Network would urge the Ministry of

[12] [1992] 1 AC 599
[13] Ruiz Zambrano Case C-34/09, [2011] CMLR 46
[14] [2013] UKUT 00089 (IAC)

Justice to avoid causing the UK long-term expense and damage to our reputation and the rule of law in order to make short-term savings.

Restricting the scope of legal aid for prison law

The work of the NRPF Network is primarily connected to civil law, but we would like to briefly express our concern that the removal if legal aid from certain prison law cases will have a disproportionate impact on children in care/care leavers.

Legal advocates at present help children who would be looked after by the local authority or fall within the scope of the care leaver provisions if they were not detained to make arrangements with the local authority to access appropriate services upon their release from detention.

We understand from the Howard League for Penal Reform that legal aid for this type of advocacy would no longer be available under the proposed reforms.

It is vital that children/care leavers receive the assistance they need to safely access appropriate services as soon as they are released from detention. This is important to child protection, but it is also a key way to provide young offenders with a secure plan after their release so that they can move forward without re-offending.

We would like to emphasise the importance of explicitly addressing the needs of this category of detained young people in any future plans to restrict legal aid for prison law, so that young people with no support networks do not fall through gaps in provision.

We would be very happy to meet with the Ministry of Justice to discuss the impact of the consultation proposals on local authorities in more detail and we would also like to recommend that this consultation be read alongside the local authority statement that the NRPF Network has submitted jointly with the Association of Directors of Children's Services and the Local Government Association.

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