



**Asylum Aid's submission to
Transforming Legal Aid
(Ministry of Justice)**

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About Asylum Aid

Asylum Aid is an independent, national charity working to secure protection for people seeking refuge in the UK from persecution and human rights abuses abroad. We provide free legal advice and representation to the most vulnerable and excluded asylum seekers, and lobby and campaign for an asylum system based on inviolable human rights principles. The Women's Project at Asylum Aid strives to obtain protection, respect and security for women seeking asylum in the UK by providing specialist advice and research and campaigning on the rights of women seeking asylum.

Asylum Aid was highly commended in the Charity Awards 2010.

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Asylum Aid has contributed to the substantial submissions already made by Rights of Women and the Immigration Law Practitioners' Association (ILPA), and we support the arguments made by both these organisations. We would like to make the following submission in addition to this.

Asylum Aid is gravely concerned that the government is attempting to implement further Legal Aid reforms before the impact of the legal aid changes introduced by Legal Aid, Sentencing and Punishment of Offenders Act is known (these only came into effect in April 2013).

Such sweeping changes should be afforded patient and careful scrutiny. It is highly concerning that these reforms will not be subject to parliamentary scrutiny.

Q3: *Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.*

Asylum Aid is very concerned that the proposed ‘residence test’ is incompatible with human rights.

1.1. Fresh Asylum Claims

In particular, Asylum Aid is concerned that it will prove to be unlawful to withdraw Legal Aid for cases where legal proceedings are the only way to effectively safeguard other human rights. For example, the proposal to withdraw Legal Aid for advice and representation to undertake a fresh asylum claim, up to the point when the fresh claim has been submitted, combined with removing funding for judicial review, has the potential to deny asylum seekers access to justice. This will hit the most vulnerable hardest, especially those who must resort to fresh claims or judicial review because they faced barriers to full disclosure of information at an earlier stage of the asylum process.

It is unclear from the consultation document whether the Ministry of Justice proposes to grant access to Legal Aid as soon as a fresh claim for asylum has been submitted or, as it appears from the consultation proposals, whether Legal Aid will only be granted once an application has been accepted by the Government as amounting to a fresh claim. This needs to be clarified as a matter of urgency. If it is the latter, then in a situation where a person submits a fresh claim but the government refuses to treat it as such, the applicant would not have a right of appeal. Under the present system the only legal remedy open to a person in this situation would be to seek judicial review – but under these proposals, where a person has no right to reside, access to Legal Aid for judicial review would also be curtailed. This has the potential to deny access to justice for vulnerable asylum seekers and is therefore incompatible with human rights legislation.

Asylum Aid’s work advising destitute asylum seekers consistently finds that at least 50% of the clients advised have legitimate merits for accessing Legal Aid to reopen their cases. This could be to undertake fresh asylum claims or to commence judicial review proceedings as a result of the Home Office not following their own established policies and procedures.¹ This vulnerable client group already faces extreme barriers accessing Legal Aid for further advice on

¹ Asylum Aid has run a dedicated destitution project since 2009, working in co-ordination with the British Red Cross and the Notre Dame Refugee Centre.

their cases. This is why Asylum Aid has developed outreach advice surgeries to undertake this work, outside the scope of Legal Aid. Once we have established the merits of the case, we use this as evidence to persuade legal providers to take these people on because – despite the barriers they have faced – they should be entitled to access Legal Aid. This can then also assist to resolve destitution problems.

The proposals contained within this consultation would seek to establish further barriers for this vulnerable client group, making it more difficult for them to access justice and exacerbating their destitution. Moreover, preventing access to justice for people with legitimate human rights claims in this way may well be incompatible with human rights legislation to which the government has signed up.

1.2. Fresh Asylum Claims and Women

Making it harder to get legal aid for fresh claims has a disproportionate impact on women asylum seekers. This is because there are a range of factors that can make it harder for women to disclose their experiences at the time of their asylum claim and appeal.

These factors include:

- Applicants submitting gender-related applications concerning, for example, sexual or domestic violence, forced marriage, honour crimes, female genital mutilation, forced prostitution and trafficking may feel unable or reluctant to disclose information for many reasons. These reasons include the effects of trauma, stigma and shame, other mental health problems, lack of trust in authorities and fear of serious harm as a reprisal. Because of this an applicant may be reluctant to identify the real reasons for the application, or the true extent of the persecution they have suffered and/or feared.
- Women may not know that such types of harm are relevant to their asylum claim if they have not been adequately advised about the merits of their claim.
- Psychological symptoms experienced during asylum interviews such as dissociative experiences, flashbacks, avoidance behaviours (eg avoiding thoughts or feelings associated with the trauma and not being able to remember details) have an impact on asylum seekers ability to disclose. Shame is particularly salient for people with a history of sexual violence preventing them from disclosing sexual issues. Indeed being forced to talk about a traumatic event could potentially activate shame reactions, and so people experiencing shame may engage in strategies to avoid this feeling, such as non-disclosure of sensitive personal information.²

² Bögner et al (2007) 'Impact of sexual Violence on disclosure during Home Office interviews', *The British Journal of Psychiatry*, London: Royal College of Psychiatrists, Online. Available HTTP: <http://bjp.rcpsych.org/content/191/1/75.full> (accessed 21 May 2013).

- The UK's own credibility guidance notes that mitigating factors for delays in providing details or material facts would include trauma and painful memories, particularly those of a sexual nature.³
- The gender, cultural and educational background of a female applicant may affect her ability to relate her account to the interviewer. She may be unaccustomed to communicating with strangers and/or persons in public positions due to a background of social seclusion and/or social mores dictating that, for example, a male relative speaks on her behalf in public situations.

For all the above reasons, it is also particularly important for women to have legal aid for dealing with the fresh claim applications.

2. Separated Asylum-Seeking Children

Asylum Aid works to ensure separated asylum seeking children are kept safe from harm.⁴ We are therefore deeply concerned about the potential impact that the residence test could have on this extremely vulnerable client group and believe that it is inconsistent with Articles 2, 3, 6, 12, 19, and 39 of the Convention on the Rights of the Child, which is used to interpret children's human rights in domestic case law.

3. Assessing the Residence Test

Asylum Aid believes that the ability to assess a client under the proposed residence test will be an extremely complicated process and that, as such, only specialist immigration lawyers would be competent to undertake this work. If this reform is implemented, it would be necessary to grant Legal Aid to advise on this process.

Notwithstanding this concern, this is a complex area of law with significant scope for wrongful interpretation, particularly in the absence of concrete evidence to prove or disprove the right to reside, and it is highly likely that people will be denied access to justice due to a misunderstanding of their eligibility.

³ UK Border Agency (2012) *Asylum Process Guidance: Considering Asylum Claims and Assessing Credibility*, para 4.31, Online. Available HTTP: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanddecidingtheclaim/guidance/considering-protection-.pdf?view=Binary> > (accessed 21 May 2013)

⁴ Asylum Aid has employed a dedicated Children's Caseworker in our Legal Team since 2010.

Q5: *Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, 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 permission is granted by the Court (but that reasonable disbursements should be payable in any event)? Please give reasons.*

The proposed changes to access to Judicial Review (JR) are likely to impact asylum seekers and refugees, as well as the charities who work with them, far beyond that anticipated in the consultation.

Work to research, prepare and present a JR is often substantial, especially to address concerns in the handling of the most complex asylum claims. If implemented, this proposal would act as a disincentive for providers to undertake JR work even where merits are established, as any work prior to permission being granted by the court would have to be undertaken pro bono. This will make it very difficult for people facing destitution to access JR, particularly to apply for urgent injunctions. It will also make it far more difficult to undertake strategic litigation work to test and develop the law, which by definition is work carried out at risk, with border line potential for success.

The government has emphasised that funding will remain in place for meritorious JRs, to be paid after the decision on merits; but few organisations will have the cash-flow resources to prepare a JR appropriately knowing that this work will not be recompensed for many months. As ILPA argues, after a succession of cuts many legal aid providers “cannot assume any more financial risk in their businesses”. In practice, it will become a lasting challenge to fund upfront the work needed to file a JR, even where the merits of the case are immediately evident.

Furthermore, the underlying motive to save public expenditure is at best questionable when one takes into account the fact that weak cases are already refused permission to proceed. This is a mechanism that is already in place to protect the public purse and strikes a fair balance. In urgent cases the merits of the case need to be kept under ongoing assessment, but the final decision on whether to grant legal aid always rests with the Legal Aid Agency, not the provider.

Restricting access to JRs would have the effect of limiting essential access to justice, even where there is an overwhelming need to correct an error in a previous decision. Some of the most vulnerable asylum seekers and refugees would be left without recourse to help to which they are entitled, including:

- asylum seekers who have faced substantial and unreasonable delays without receiving any Home Office decision at all
- asylum seekers that have suffered detriment, including negative determinations, as a result of the Home Office not following their own established policies and procedures

- asylum seekers who have been unlawfully detained in immigration removal centres
- asylum seekers who have provided detailed new information in support of their claims, but whose claim has not then been considered by the Home Office

Asylum Aid is deeply concerned at this prospect.

Having borne witness over many years to the flaws and shortcomings in asylum decision-making, and the regularity with which the Home Office acts in breach of its own policies and procedures, the use of JR is paramount where there are legitimate concerns that the government has acted illegally or irrationally.

The government can maintain access to justice and more effectively save money by ensuring the Home Office takes a fair and competent approach to asylum claims earlier in the system.⁵ If the operation of the asylum system is aligned with the policies already in place, recourse to an expensive JR process will rightly become an exceptional occurrence.

⁵ The failure of officials to implement government asylum policy is recorded in relation to women seeking asylum in Asylum Aid's report by Christel Querton (2012), *"I feel like as a woman I'm not welcome": a gender analysis of UK asylum law, policy and practice.*

Further observations

1. Viability of quality legal representation

Quality providers of asylum advice have been hit by a series of financial restrictions: the introduction of the Graduated Fixed Fee in 2007; a 10% cut in remuneration for all legal aid work in 2010; the initial round of cuts through LAPSO to immigration legal aid in 2013 (including Article 8 and Family Reunion work so often necessary in asylum cases); and now further proposed cuts for JR work.

As quality legal firms contract in size and scope, or go out of business altogether, thousands of victims of torture, rape and human rights abuse overseas have been left with no legal advice. The further proposed changes are likely to make this situation still worse, forcing more firms away from quality work with some of the most vulnerable people in the UK.⁶ The government's focus should be on encouraging quality legal work from organisations of all sizes, but the current proposals will restrict this quality yet further.

The impact on individual asylum seekers and refugees will be hugely damaging. It is also unlikely to deliver the cost-savings for which the government hopes, as it is a lack of quality in early representation and decisions which give rise to expensive JR proceedings later in the process.

2. Innovation

In March 2013, Home Secretary Theresa May disbanded the UK Border Agency, calling it “closed and secretive”. Ministers evidently recognise that asylum and immigration work has, over many years, been cut-off from meaningful reforms with the potential to improve the system for both asylum seekers and the officials working within it.

Further cuts to the Legal Aid budget threaten to fatally undermine the limited progress already made in innovative reforms to the way asylum work is conducted. In-depth research published by Asylum Aid at the beginning of 2013 – in the reports *Justice At Risk*, *Rethinking Asylum Legal Representation* and *Right First Time* – indicated the lasting benefits across the system of incentivising higher quality asylum work. This included large-scale reform and smaller, incremental changes to address the very culture to which the Home Secretary referred.⁷

⁶ There is evidence of this loss of representation in different areas of the asylum process. See for example Asylum Aid (2011), *Unsustainable: the quality of initial decision-making in women's asylum claims* on the number of women with complex asylum claims forced to go to appeal without any legal representation; and Asylum Support Appeals Project (2011), *No Credibility: UKBA decision making and section 4 support* (2011) on the number of asylum support decisions overturned on appeal with and without legal representation.

⁷ All three reports are available from the Asylum Aid website at www.asylumaid.org.uk/publications.php

Asylum Aid is committed to working with its corporate partners in the Home Office and Ministry of Justice to find less adversarial ways of determining asylum claims correctly as early in the determination process as possible, which is paramount for the most vulnerable asylum seekers whom we represent. This would include, for example, incentivising more structured communication between decision makers and legal representatives before the decision on whether to grant or refuse asylum is made.

The proposals contained within this consultation threaten the provision of quality asylum legal representation and will therefore imperil the chances of taking forward discussions on any of this work, precisely when it is most needed to ensure our asylum system is fair, effective and sustainable, and at a time when government itself is seeking to find less expensive mechanisms to resolve legal proceedings.