JCHR INQUIRY ON THE IMPLICATIONS FOR ACCESS TO JUSTICE OF THE GOVERNMENT'S PROPOSALS TO REFORM LEGAL AID

Dr Nick Armstrong, Barrister, Matrix Chambers, 25 September 2013

Introduction

1. This submission addresses the implications of the government's civil legal aid proposals generally, but with a particular focus on their costs implications. It updates an earlier paper, *Costing the Transforming Legal Aid proposals*[1], in the light of the MOJ's consultation response.

2. I am a barrister specialising in public law. Work on behalf of prisoners and those without residence in the UK represents a significant part of my practice. I also have a research background in civil justice reform.

Summary

3. My summary points are as follows:

   a. The proposed changes threaten the rule of law. The UK has not previously sought to remove people from access to the courts on grounds of status. That opens a very dangerous door. The judicial review proposals, particularly when combined with the parallel consultation, *Judicial Review: Proposals for Further Reform* (6 September 2013), will also significantly impair the ability of individuals to hold the state to account.

   b. The changes will cost a lot more than they save. This is particularly true where prisoners are concerned, because they will now be held in prison longer, and also in higher security prisoners for longer.

   c. These costs implications have not, so far, been substantially disputed. The consultation response takes issue with some of the points made in the *Costing the Transforming Legal Aid proposals* paper, but not the significant ones. Instead, the MOJ appears to be proceeding on "ideological" grounds. That is how the Justice Secretary put it to the Justice Select Committee on 3 July 2013[2]. That was in relation to prisoners but there was no suggestion he intended to confine those remarks and similar sentiments may be seen in his article in the Daily Mail on 6 September 2013. In that article he launched the judicial review proposals on the premise that judicial review was being used as "a promotional tool for countless left-wing campaigners"[3].

   d. The changes are therefore profound, and far-reaching. Introducing them on "ideological" grounds makes them all the more concerning. Yet they are to be introduced at speed, and by secondary legislation only. The attendant lack of Parliamentary scrutiny is very worrying indeed.

4. Turning now to the four areas in which the Committee has sought evidence:

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[1] Available along with a number of other key resources at legalaidchanges.wordpress.com.
[2] See transcript from Q198 onwards (in an exchange with Jeremy Corbyn MP).
[3] This article may also be found on the legalaidchanges.wordpress.com site.

Residence test

Substance

5. The residence test will exclude from all civil legal aid those who cannot show 12 months lawful residence, *and* those who are not currently present in the UK. This represents a profound change in the common law of the UK (see for example cases such as *Khawaja* [1984] AC 74 at 111G[4]) and is, in the view of many, abhorrent in constitutional terms. It raises the obvious question, if migrants and prisoners are to be excluded from meaningful access to the rule of law, who might be next?

6. The MOJ has introduced a number of exceptions to the residence test. However these are extremely narrow, and much narrower than the main section of the consultation paper implies. That main section refers to vulnerable persons generally, and to cases concerned with liberty[5]. It is only following a close reading of paragraph 125 of Annex B, and cross-referring (as it requires) that to Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), that the true scope of the exceptions may be seen.

7. Thus, asylum seekers, while they are seeking asylum, are protected. Serving soldiers are also protected. Current immigration detainees are also now protected, but *only* to the extent they are challenging the fact of their detention (detention is by no means a gateway to legal aid generally). Claims about mistreatment in detention, or past false imprisonment, or discrimination in detention, will therefore all be excluded. This would include the very serious case recently reported in the *Observer*, concerning sexual assaults by Serco officers in Yarl's Wood immigration removal centre[6]. That person would not get legal aid to bring such a claim under these proposals: "Tanja" would not be challenging the lawfulness of her detention.

8. This would be true even if Tanja were an acknowledged victim of trafficking, or of domestic violence. These persons are also said to be back within eligibility. However the relevant provisions of LASPO, to which para 125 of the consultation response refers, make it clear that even people who can show reasonable grounds that they are a trafficking victim, only then get legal aid for certain types of case (immigration claims; some employment claims; and damages claim connected with the trafficking (so against the trafficker)). Similar restrictions apply in the case of victims of domestic violence: once again, the exceptions are deceptively narrow.

9. Drawing all this together, the following are examples of people and cases that will still be excluded from legal aid as a result of the residence test:

    a. Anyone who lacks the documents to show the requisite period of lawful residence. This will include British citizens who do not keep documents, have lost them, or who cannot access them (the latter may include those fleeing their homes, and those who lack mental capacity. It may also include those who have simply never had to prove their immigration status before).

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[4] *Per* Lord Scarman: "Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection."

[5] See paragraph 2.14.

[6] http://www.theguardian.com/uk-news/2013/sep/14/yarls-wood-immigrant-sex-abuse-tanja.

b. It will exclude British citizens and residents who are currently abroad, even if they have been unlawfully removed or rendered there. This excludes from legal aid some of the most serious cases of recent years (including for example people held in Guantanamo Bay).

c. There is no general exception for children; there are only narrow exceptions for specific care proceedings and abuse cases. Children without status as a result of the actions of their parents will not be able to sue to secure support and accommodation pending their immigration status being investigated and resolved (something to which they are entitled under sections 17 and 20 of the Children Act 1989). Children thrown out by their parents, and who are litigating to be taken into care by social services, will also not receive legal aid unless they thought to bring with them evidence of 12 months lawful residence. Some children leaving local authority care will also be excluded.

d. Similarly, disabled people, and the mentally ill. They too are entitled to support and accommodation pending the regularisation of their status, subject only to them having an arguable immigration claims. No such claims will now be possible.

e. Claims about serious ill treatment, including deliberate ill treatment, at the hands of the state and its contractors will now fail the residence test. This will include claims about torture or unlawful killing in prison or by police, assaults, wrongful arrests, misfeasance in public office, and again the Yarl's Wood case mentioned above.

10. The significance of these exclusions is obvious. It will put many serious cases outside the reach of the rule of law. It also risks creating an underclass of people outside the reach of the rule of law.

11. The only possible way back in for such individuals is via an application for "exceptional funding" under s 10 of LASPO. A person is entitled to assistance under s 10 if it would breach their human rights or their EU rights not to have it. However, only six months after the introduction of that scheme, it is already clear there are serious problems with it. Research shows that out of an expected 5,000 to 7,000 applications, by July 2013 only 233 had been received[7]. That is thought to be because the form is 17 pages and no funding is available for solicitors to complete it. In addition, of those 233, only six applications were granted, four of them being inquest cases. It is understood this number has since risen to nine (total), of which six are inquest cases.

12. Very few cases are therefore getting through. This evidences no effective system. The obstacles to accessing it are far too great. It is almost certainly unlawful.

13. There is also a further point about the residence test which the Committee may wish to consider. It concerns the interaction between the test and the wider judicial review proposals. Those propose the curtailing of a number of matters, including judicial

[7] Martha Spurrier of the Public Law Project, note at http://legalaidchanges.wordpress.com/2013/07/08/martha-spurrier-exceptional-funding-does-not-protect-access-to-justice/.

reviews brought by representative bodies and charities (interventions by such organisations will also be curtailed). The concern about that is this: in the context of, say, immigration detention, or migrant access to healthcare (both very contentious areas of public policy), if an individual cannot challenge what the Home Office, or Serco, or G4S, is doing (because they fail the residence test), and a body such as Medical Justice, or Bail for Immigration Detainees, will also now be excluded, then how will these important matters be scrutinised?

Cost

14. Because the Legal Aid Agency ("LAA") does not keep residency data, the government has not been able to assign a figure to the savings associated with the introduction of the residency test. It is however clear that there would be significant costs associated with this proposal:

    a. On 18 September 2013 local authorities and other interested groups published a paper, including a shadow financial assessment, that showed on-costs to them of £26m (because of increased homelessness and vulnerable children duties)[8].

    b. The MOJ now accepts there will be an on-cost for the LAA of up to £1m for administering the residence test (see its impact assessment accompanying the consultation response).

    c. There will also be very significant costs associated with confirming the residence status of those who are eligible under the test. In 2011-2012, 140,996 civil certificates were issued by the Legal Services Commission[9]. The majority of people who received a certificate would have passed the proposed residence test, and most would have already been receiving some form of LSC-funded assistance with seeking a certificate (*eg* under Legal Help[10]) so the costs of establishing that the residence test is met in such cases would have been passed on to the legal aid fund. Assuming, very conservatively, that an average of 30 minutes is needed to verify past lawful residence at a cost of £50 per hour to the LAA and, again conservatively, this is passed on to the LAA in 75% of certificated cases in future, that will produce an additional cost of £2.6m.

    d. It should also be noted that in significant numbers of cases it will be impossible to verify past lawful residence or to secure any exceptional funding available immediately. Urgent hearings (for example, in family public law proceedings, homelessness, and some evictions cases) will inevitably proceed in any event, producing yet another driver towards greater numbers of litigants in person (an effect for all these proposals). The courts have already warned about this false economy in family cases[11], but these additional costs do not feature in the impact assessment beyond a statement that £290,000 of additional support for litigants in person will be made, and research about the impact has been commissioned[12].

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[8] This paper may be found here: http://www.nrpfnetwork.org.uk/policy/Pages/default.aspx. The summary is also on the legalaidchanges.wordpress.com site.
[9] What is now the LAA. See the LSC *Annual Report* 2011-12. A legal aid certificate represents a grant of full legal aid funding.
[10] Legal aid for preliminary advice and assistance, usually administered on a low fixed fee.
[11] See *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234 *per* Lord Justice Ward at [2].
[12] Consultation response, Annex F, paragraph 4.8.

15. It follows that despite the residence test arguably being the most dramatic civil legal aid cut, it is far from clear that it will save any money. The local authorities' paper (above) calls for more, and much more thorough, research on the likely impact. That seems to be the least that is required.

Prisoners

Substance

16. The prison legal aid proposals have not materially altered from the original consultation proposals. The only real change here is that there will now be available a niche prison contract, so that prison law providers are not necessarily tied to having a criminal legal aid contract in order to do the work[13]. This brings its own risks, because the firms working in this area will be caught by the 17.5% rate cut that applies to crime. It is far from clear at the moment whether any supplier will be able to absorb that. It is however likely to be particularly difficult for prison law specialists to absorb it because this area of work has developed as a specialist part of civil public law. The specialists here tend to be small, and unable to cross-subsidise from other areas. There is therefore a real risk that the quality, experienced providers who prisoners trust, will be driven out.

17. The prison proposals concern the work done by solicitors making representations on behalf of prisoners, and resolving their cases without the need to resort to judicial review[14]. Save for work concerned directly with release on parole, and with those prison disciplinary charges that can result in prisoners serving additional time in prison, all such work will now be outside legal aid. This includes:

    a. Making representations that a prisoner should be held in a lower security category so they can progress and prepare for release. A large part of this is about moving prisoners out of Category A conditions (which is very expensive: see further below).

    b. Making representations that a prisoner should have access to offending behaviour courses, and that their risk should be properly assessed.

    c. Work preparing the ground for release on parole, including ensuring that work has been done, an appropriate release address found, and employment or support identified (this is commonly known as "resettlement" work).

    d. Representations and investigations concerning matters such as admitting new mothers into a mother and baby unit (so babies can remain with their mothers for the first few months of their lives); the lawfulness of segregation; and assaults in prison (whether committed by other prisoners or by staff).

18. The MOJ says all this work must now be done by way of internal complaints and the Prisons and Probation Ombudsman. No-one people working in the area think that is

[13] See paragraph 214 of the consultation response.
[14] Judicial review will remain possible, in prisoner cases, although there are serious doubts around how those will arise if solicitors are not able to act at the earlier stages, or are no longer doing prison work as a result of the 17.5% rate cut.

realistic, not least because prisoners do not regard the complaints system as reliable and effective. That in turn gives rise to a specific concern about the prison proposals: withdrawing access to the independent advice and assistance which prisoners trust carries any number of risks for the safe management of prisons. Lord Woolf's 1990 report into the disturbances at Strangeways prisons shows the link between those and prison conditions. Yet conditions cases will now be out of scope.

19. Perhaps the biggest point about the prison proposals, however, is cost.

Cost

20. The prison proposals carry very significant on-costs because excluding work that would have progressed prisoners towards release, or out of the highest security categories, will mean more people in prison longer, and more people in more expensive prison longer. This point has been put to the MOJ on a number of occasions, including in each of the Parliamentary debates and in the Justice Select Committee. The only answers so far given, however, are (a) that the true reason for the proposals is ideology not cost (see above); and (b) a slight reduction in the estimate for using the Prisons and Probation Ombudsman.

21. The costs therefore remain very much as set out in the earlier paper. The implications are therefore as follows:

    a. Releases being delayed. These delays may be incurred early in the sentence, and may accumulate/accrue. They may also be incurred when cases are not ready at the end of the process and hearings have to be adjourned. Some of these delays will be very substantial indeed (a year or more); other cases will be unaffected. Assuming an average delay of three months, in 2011/12 this would have affected 248 life sentence prisoners released after an oral hearing, and 273 IPP prisoners[15] at a total cost of at least £3.45m[16], this cost falling directly on the MOJ budget.

    b. This figure does not include the additional cost to the Parole Board of wasted hearings. The Parole Board's response to the original consultation said that this currently costs it £1.57m a year. It may be thought that could double under the proposals. There would also be on-costs to the probation service.

    c. This figure also excludes the cases where prisoners are released without the involvement of the Parole Board (so many determinate sentence, or

[15] Parole Board *Annual Report and Accounts* 2011/12.

[16] Based on the assumption that all lifers would be in the cheapest accommodation (open conditions), which costs £25,106 a year (see *Costs per place and costs per prisoner* (MOJ Oct 2012)), and IPPs would be either in open or in Cat C. It may be said that a three month delay overstates it. The present author's experience is that it is conservative, but more importantly, this figure has been seen and agreed by the Parole Board. At the same time, this figure gives no account of young and elderly prisoners, who may be delayed longer, and whose incarceration is much more expensive (a place for a child in a secure training establishment, for example, costs up to £215,000 a year. A Young Offender Institution place is £60,000 a year. There are at least 1,000 children in prison at any one time). Nor does the figure take account a further Parole Board concern, which is that it needs specialist solicitors to persuade prisoners not to make applications for parole when such applications are bound to fail. Factoring in these figures would drive the £3.45m figure up, perhaps significantly.

fixed term, cases). Early release on tag, for example, may be delayed if solicitors are not involved to ensure release addresses are available. It has not been possible to put a figure on these cases, but they will have an impact.

d. Prisoners remaining in too high a security category. The point here is that prison is expensive, but high security prison is very expensive indeed. A Category A prison costs £61,594 per prisoner per year, whereas a Cat B prison costs £33,576[17]. Cat A status is reviewed annually and at the moment, solicitors gather evidence and make representations in support of progressive moves. That work will now be out of scope. In 2011/12 there were 3,228 men in Cat A. If only 100 of them did not now move on because they have no solicitors to help them (so 3%, potentially a very conservative estimate) then that would cost an additional £2.8m. This is another cost that would fall directly on the MOJ.

e. Finally, as already indicated, the MOJ says that matters now outside the scope of legal advice and assistance could properly be taken up within the prison complaints system, and by the Prisons and Probation Ombudsman ("PPO"). This too, however, is expensive. The original costs paper put this at £1,000 for each PPO complaint. The government has now said the true figure is £830[18]. It is not clear how that figure was reached but even assuming it is right, it is £610 more than the £220 fixed fee for a solicitor doing this work. The current prison population is 86,000, and last year 5,300 of them complained to the PPO. If that figure doubles as a result of the propoals it would cost £6.47m (5,300 x 2 x £610). Even if only 3,200 prisoners complained (because every Cat A prisoner now has to pursue that route) it would add nearly £1.95m.

22. It follows that the prison proposals not only carry important constitutional implications about access to the rule of law, and safe prison management, the costs are potentially enormous. The total saving the MOJ hopes to make in this area is £4m. On the basis of even the conservative estimates set out here, the on-costs will be at least £10m.

Judicial review

Substance

23. The judicial review legal aid proposal is that lawyers will not be paid unless the court has granted permission to apply for judicial review. During the consultation, significant points were made about the extent to which this will impact on effective legal scrutiny of state action, and also the extent to which it will produce perverse incentives for practitioners. Part of the problem here is that the strongest cases never reach the permission stage because those are the cases where public bodies concede early. That means, perversely, the work on the strongest cases being unpaid, and work around negotiation and mediation also being unpaid[19]. Practitioners also told the MOJ that if they could continue to practise in this area at all, they would be

[17] MOJ figures, ibid.
[18] Annex B to the consultation response, paragraph 10.
[19] Which also undermines years of progress on promoting alternatives to litigation.

forced to issue many more proceedings than were currently issued. That carried costs implications.

24. The MOJ has responded with a further consultation and, in particular, a proposal that *where a case has been issued* (but not otherwise)[20], and settles without permission having been granted, the LAA may nevertheless pay the lawyers provided there is a good reason why the defendant has not been ordered to pay. It is said this mitigates the proposal.

25. This is however unlikely to achieve anything at all. Those experienced in this area know that public bodies faced with judicial reviews do not back down in the period between the issue of proceedings and the grant of permission. They tend to wait to see what the judge will do. Rather, public bodies tend to back down just before a case is issued, knowing that it is coming, and often whilst the substantial work preparing the case for issue is on foot. All this work is crucial, effective work. There is also a lot of it, particularly in the bigger and more important cases. Making it unfunded will seriously undermine the ability of individuals to hold the state to account.

Cost

26. The government said in its original consultation paper that it hopes to save £1m from the introduction of this proposal[21]. That was based on 800 cases at £1,350 per case[22]. That means 800 cases which are currently *seeking* permission for judicial review but not getting it (out of a total of 1800 such cases[23]). However:

    a. The consultation paper also said that in 2011-12 there were *an additional* 2,275 cases where permission was not even sought. It is very likely that in a sizeable number of these cases, this was because the relevant authority did what they were asked to do without the need for proceedings. If even 50% (a conservative estimate) of these cases now seek permission, because the incentives have changed, then that is 1,138 more cases for the system to deal with. Using the government figure of £1,350 that means an increased cost of £1.5m. The projected gain has therefore immediately disappeared.

    b. In addition, however, if more cases are issued, there are then court costs, and costs to defendants, to be taken into account. Those appearing for defendants estimate that filing initial responses to straightforward judicial reviews (so many immigration claims) costs about £500 - £1,000 per claim, but other cases – including local authority cases[24] - cost an average of £5,000 (solicitors and counsel). There is then court time to be taken into account, and the possibility of applications for costs against defendants[25].

2. Assuming on-costs of only £3,000 (reflecting a conservative average for the court costs and defendants' own costs), and 1,000 affected cases, this amounts to an

[20] *Judicial Review – proposals for further reform,* paragraph 119.
[21] See the impact assessment accompanying the *Transforming Legal Aid* paper.
[22] Ibid, §31.
[23] Which means there is a success rate, on issued cases, of over 50%.
[24] Again, it is likely that these are particularly susceptible to a change in incentives. Social welfare and education cases tend to settle early because they concern failures to assess and provide services and compromise can usually be found. At the moment, therefore, very few of these cases fight.
[25] As the consultation paper accepts: §3.76.

increased cost of £4.5m, or 4 ½ times the projected savings. That figure, however, is likely to substantially increase again if costs orders are made against defendants. At present, in judicial review, these ("*inter partes*") orders are relatively rarely sought, certainly at or close to the permission stage, but the new consultation paper seems to actively promote this. Where such orders are obtained, however, the payment rates treble because they are now calculated at something close to commercial rates. If that happens in, say, half the new 1,000 cases, the additional cost to defendants (central government but also local authorities and other public bodies) would be £1.35m.

Borderline cases

27. This proposal remains entirely unchanged from the consultation. It is not intended to save much money (£1m). It will however impact significantly on cases which are intended to test the law. I have nothing to add to the submission, which I have seen, from Richard Drabble QC. I would adopt all the points made there, in particular the equity of allowing the government to test judgments which it considers to be wrong, but not affording the same opportunity to individuals.

Conclusion

28. The government's proposals therefore carry very profound, and deeply worrying, constitutional implications. They are being introduced at great speed, without proper analysis, and on the back of many other related proposals including LASPO, earlier judicial review proposals, and now a further judicial review paper. None of this has been given the chance to bed down. It is far from clear what the cumulative impact will be. It is however hard to doubt that the effect will be substantial.

29. Perhaps the most surprising aspect of all this, however, is that the government is prepared not just to take these risks, but that it is prepared to pay significantly to do so. More and more people and organisations, including now local authorities, are looking at the costs associated with these proposals. All are finding the same thing: the on-costs will be substantial: £47m or more if this paper is right, against projected savings of just £6m (£4m for prison; £1m for judicial review; and £1m for the borderline case test). As already said, the government has not, for the most part, even attempted to dispute these figures.

30. The civil legal aid changes may therefore be driven by ideology, which is worrying enough. It is also however very expensive ideology.