Annette Cowell
Ministry of Justice
4.38
102 Petty France
London
SW1H 8AJ

legalaidreformmoj@justice.gsi.gov.uk

4th June 2013

RE: Consultation on Transforming Legal Aid: Delivering a more credible and efficient system

Dear Ms Cowell,

Rights Watch (UK)

Rights Watch (UK) (previously British Irish Rights Watch) has the following mission, expertise and achievements:

Our Mission
Promoting human rights and holding governments to account, drawing upon the lessons learned from the conflict in Northern Ireland.

Our Expertise and Achievements
Since 1990 we have provided support and services to anyone whose human rights were violated as a result of conflict. Our interventions have reflected our range of expertise, from the right to a fair trial to the government's positive obligation to protect life. We have a long record of working closely with NGOs and government authorities to share that expertise. And we have received wide recognition, as the first winner of the Parliamentary Assembly of the Council of Europe's Human Rights Prize in 2009 alongside other honours.

Introduction

We note the short consultation period of eight weeks. Although the government has signalled that it is to take 'a more targeted approach to consultation'[1] eight weeks is not proportionate to the anticipated serious impact of these proposals on the legal profession, on other public bodies, and on those many people reliant on civil aid in our society.

Rights Watch (UK) responded to the consultation of the proposals for reform of Judicial Review in January 2013.[2] In that response we noted that the proposals risked undermining access to justice for vulnerable individuals such as those on a low income and those detained in prison or other forms of detention and custody. The proposals to transform legal aid would further undermine access to justice for vulnerable individuals and marginal groups in society.
In our response to the judicial review proposals we also noted the importance of the fundamental principle of administrative law that a person affected by a governmental decision ought to be afforded an opportunity to present their case to the decision maker. The legal aid proposals will further obstruct government accountability for public decision by making it prohibitively expensive for a wide section of the public and in particular those most at risk of marginalisation and discrimination.

In addition, apart from the potential increased costs to the Legal Aid Agency under these proposals,[3] the government has failed to recognise the knock-on financial effect the proposals will have on other public services and on civil society.

Our response to the present consultation is framed by two observations. First, the proposals are unfair, unjust and contrary to the rule of law. Second, the proposals suffer from a number of practical problems and will not achieve the results the consultation document envisages. We disagree with all of the proposals in questions 1-6 and have provided reasons for those questions where we have particular expertise: questions 4, 5 and 6.

Introducing a residence test

Q4. Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

No.

Unfair and contrary to the rule of law

Rights Watch (UK) works to ensure that government is held accountable for serious human rights violations such as torture, ill-treatment and unlawful killing. The residence test proposal will deny legal aid to foreign nationals who make such allegations in a national civil court against British soldiers. There have been a number of civil cases brought by Iraqi nationals claiming mistreatment by British soldiers in Iraq[4]. Some of these cases have led to the establishment of public inquiries and investigation mechanisms into the allegations, for example the Baha Mousa

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[1] See: https://www.gov.uk/government/publications/consultation-principles-guidance
[2] British Irish Rights Watch, Re: Judicial Review: proposals for reform (Consultation Paper CP25/2012) (CM815), available at http://adam1cor.files.wordpress.com/2013/02/birw-submission-jr-consultation.pdf
[3] Civil Credibility Impact Assessment, p2
[4] See: Al-Skeini and others v Secretary of State for Defence [2007] UKHL 26

Inquiry, the Al-Sweady Inquiry and the work of the Ministry of Defence Iraqi Historical Allegations Team. Under these new proposals these cases would not have been funded. This not only encourages impunity for the most severe human rights violations but also prevents exposure of such allegations in the international and national public interest, now embracing allegations in relation to Afghanistan. The UK has ratified a number of international human rights conventions which obliges the UK to effectively investigate all allegations of torture and inhuman and degrading treatment; denying the funding to do so in civil claims may amount to a violation of these obligations.

The proposal will also disproportionately disadvantage vulnerable groups who are unable meet the residence test threshold such as (but not limited to) victims of trafficking, child migrants, detainees, the homeless and destitute, survivors of domestic violence and low income families who have no proof of residence status.

Practical problems

This proposal also has several practical shortcomings. It is noteworthy that no cost-saving figure for the residence test has been provided.[5] Jeremy Wright MP confirmed in Parliament that there is no central data collection on the immigration status of recipients of civil legal aid therefore it is impossible to estimate whether and to what extent any savings would be achieved by this proposal.[6] The proposal will require either the individual themselves or non-immigration lawyers to determine their residency status. This area of law is complex and it is imprudent to expect those without the requisite expertise to make these determinations. The residence test proposal is likely to result in satellite litigation for difficult cases, for example, to decide the meaning of a lawfully resident person for a continuous period of 12 months or to recover costs from the other party.

The proposal also encourages litigants to represent themselves as litigants in person, as the consultation document acknowledges.[7] Research by the Public Law Project demonstrates that half of what the government has called 'hopeless' judicial review cases are brought by self-represented litigants.[8] The number of 'hopeless' cases brought is likely to increase if legal aid is denied and more litigants represent themselves without sound legal advice. This is also likely to unnecessarily prolong the length of cases and place greater strain on the resources of the courts. The observation of Sir Alan Ward in a recent case should serve as a warning here:

> What I find so depressing is that the case highlights the difficulties increasingly encountered by the judiciary at all levels when dealing with litigants in person. Two problems in particular are revealed. The first is how to bring order to the chaos which litigants in person invariably – and wholly understandably – manage to create in putting forward their claims and defences. Judges should not have to micro-manage cases, coaxing and cajoling the parties to focus on the issues that need to be resolved. Judge

[5] Civil Credibility Impact Assessment p2

[6] Jeremy Wright MP, in answer to question put by Sadiq Khan MP, Hansard (HC Deb, 25 April 2013, c1304W)

[7] Civil Credibility Impact Assessment, p9 paragraph 24

[8] *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing,* Bondy and Sunkin, Public Law Project, 2009.

> Thornton did a brilliant job in that regard yet, as this case shows, that can be disproportionately time-consuming. It may be saving the Legal Services Commission which no longer offers legal aid for this kind of litigation but saving expenditure in one public department in this instance simply increases it in the courts. The expense of three judges of the Court of Appeal dealing with this kind of appeal is enormous. The consequences by way of delay of other appeals which need to be heard are unquantifiable. The appeal would certainly never have occurred if the litigants had been represented. With more and more self-represented litigants, this problem is not going to go away. We may have to accept that we live in austere times, but as I come to the end of eighteen years' service in this court, I shall not refrain from expressing my conviction that justice will be ill served indeed by this emasculation of legal aid.[9]

Paying for permission work in judicial review cases

(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.

No.

Unfair and contrary to the rule of law

As we emphasised in our judicial review consultation response judicial review plays an essential role in holding public decision makers accountable for decisions through independent courts. This proposal underestimates the importance of the judicial review process. It is often the only means by which vulnerable individuals can challenge and hold the state to account for unlawful decisions.

As we stated in our judicial review response, the Pre-Action stage of proceedings is a crucial part of the process and the threat of litigation often leads to settlement. Research conducted on behalf of the Public Law Project has estimated that over 60% of potential judicial review applications are resolved by mediation before the commencement of proceedings.[10] This proposal disincentivises settlement as lawyers are more likely to take the risk of going to court in order to secure payment which is counterproductive to the government's aims of reducing the caseload of the court.

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[9] Wright v Michael Wright Supplies Ltd & Anor [2013] EWCA Civ 234

[10] See Varda Bony and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (London: Public Law Project, 2009) at page 30 paragraph 2.6. Available at http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf This research demonstrates that most claims are settled, and most settlements satisfy the claims made in the challenge. As noted 62% of potential cases are either settled or abandoned as soon as a letter before claim is sent. 34% of claims which are issued are withdrawn before the permission stage, the vast majority in favour of the claimant; where permission is granted 56% are withdrawn before further action. See also Varda Bondy, Linda Mulcahy with Margaret Doyle and Val Reid, *Mediation and Judicial Review: An empirical research study* (London: Public Law Project, 2009) available at http://www.publiclawproject.org.uk/documents/MediationandJudicialReview.pdf See also Advice Now Service analysis of this research at http://www.asauk.org.uk/go/SubPage_96.html.

This proposal overlooks the fact that a significant amount of time and work occurs at the pre-action and permission stage. Under this proposal, civil lawyers would be expected to undertake a significant amount of unfunded work, an expectation which is not sustainable in the long-term and likely to undermine access to legal services for those who lack the resources to pay. Furthermore, there is a clear inequality of arms as the proposal does not apply to government lawyers and experts.

Civil merits test – removing legal aid for borderline cases

Q6. Do you agree with the proposal that legal aid should be removed for all cases assessed as having "borderline" prospects of success? Please give reasons.

No. This proposal misunderstands the nature of the borderline test. The consultation document explicitly recognises that the fact that a case is designated as borderline does not mean that there is less than a 50% chance of success, only that there is a factual, legal or expert issue which needs resolution first.[11] The consultation uses the example of a domestic violence case which is assessed as having a "poor" prospect of success as evidence of the principle that 'even those which concern issues of great importance must be sufficiently meritorious to warrant funding'.[12] However, assessing a case as unlikely to obtain a successful outcome is substantially different to a "borderline" case; in fact some cases are assessed as borderline because there is not enough evidence to designate it as "poor".

Unfair and contrary to the rule of law

As the consultation document acknowledges, borderline cases may raise questions of significant wider public interest[13]; involve public law claims[14] and claims against public authorities. These cases often pose complex issues which have a significant impact on the life of the individual concerned. Such "difficult" cases are often crucial in encouraging a public conversation about the direction and the development of the law.

The proposal fails to recognise that the merits of a case often fluctuate over time, especially once disclosure of evidence has been made, and it is premature to deny funding to a case which is likely to become more meritorious as the case progresses. Denying legal aid in these cases as a blanket rule is disproportionate and will shield the government from challenges to public decisions.

Furthermore, these cases are relatively rare: the consultation document estimates that 100 cases a year are "borderline" suggesting that any financial savings made from denying legal aid in these cases is likely to be minimal.

The right to a remedy

Human rights law protects the right to an effective remedy. The provision of legal aid is integral to this right. The United Nations Special Rapporteur on the independence of judges and lawyers has recently emphasised that

[11] Transforming Legal Aid Consultation Document, para 3.84
[12] Transforming Legal Aid Consultation Document, para 3.87
[13] Regulation 43 Civil Legal Aid (Merits) Regulations 2013
[14] Regulation 56

> Legal aid is both a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the rights to a fair trial and to an effective remedy…it represents an important safeguard that contributes to ensuring the fairness and public trust in the administration of justice.[15]

The Human Rights Act 1998 did not incorporate Article 13, the right to an effective remedy into domestic law but the government should recognise that pursuing these proposals is likely to lead to future litigation in international and regional courts, in particular before the European Court of Human Rights, challenging the changes as a denial of an effective remedy in law. These challenges could conceivably cost more than the anticipated savings in making these changes. While we recognise the financial context in which these proposals are being made, access to justice is a necessary pre-condition for other public services and the rule of law is not a principle which should be dispensed with in times of financial need.

The proposals are unfair, unjust and do not respect the rule of law. A stable and sustainable system of legal aid is essential for the rule of law to work in practice. The proposals are unworkable and do not demonstrate cost-effectiveness. We urge the government to urgently rethink the proposals.

Yours Sincerely,

Rights Watch (UK)

[15] UN Special Rapporteur on the independence of judges and lawyers, Legal Aid – A right in itself, Geneva 30 may 2013 available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13382&LangID=E