

**Residence test for civil legal aid
Coram Children's Legal Centre briefing, July 2014**

This briefing outlines how the Government's proposed residence test for civil legal aid will impact on children and young people. The Government intends to introduce the residence test on 4 August 2014, subject to approval of the draft Order by both Houses of Parliament. The policy is also subject to legal challenge, with the High Court's judgment in the judicial review expected imminently.

The draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014 was debated by the Fifth Delegated Legislation Committee on 1 July, in which Labour voted against so there is now a deferred division, and it will be debated in the House of Lords on 21 July.

PLEASE VOTE in the deferred division vote on WEDNESDAY, 9 JULY between 11am and 2pm. This vote is vital in the fight to protect access to justice, the rule of law and children's rights.

AN UNCOSTED AND UNCONSCIONABLE POLICY

The Ministry of Justice has been unable to estimate any financial savings from the residence test. The proposed test has met with significant opposition from many quarters. A group of 145 Treasury Counsel, the Government's own senior lawyers, warned Dominic Grieve:

This risks creating an underclass of persons within the UK for whom access to the courts is impossible. Persons in the UK who cannot meet a residence test are subjected to government action which cannot, by definition, be imposed on British citizens. For example, such persons are liable to indefinite administrative immigration detention, are prohibited from working, and have, at best, entitlement to subsistence levels of maintenance well below mainstream benefits. Judicial review is important, not because such individuals have more rights, but because they have fewer. To deny legal aid altogether to such persons, so that even the minimal rights provided to them by the law cannot be enforced, is in our view unconscionable. By the same token, to prevent people bringing legal proceedings who are subject to the actions of the UK acting abroad, often in ways which are alleged to be contrary to the most fundamental human rights, is in our view impossible to reconcile with the rule of law.¹

THE JCHR CALLED FOR THE INSTRUMENT TO BE WITHDRAWN

On 30 June 2014 the Joint Committee on Human Rights published its second report on the residence test, focusing on children. It said:

'We conclude that the residence test will inevitably lead to breaches by the United Kingdom of the United Nations Convention on the Rights of the Child. ... As a result, we urge the Government not to seek affirmative resolution of this draft instrument before Parliament, and to reconsider their position.'

¹ <http://legalaidchanges.wordpress.com/2013/06/06/46/> and <http://www.independent.co.uk/news/uk/politics/it-will-create-an-underclass-government-lawyers-warn-justice-secretary-chris-grayling-over-proposed-unconscionable-changes-to-legal-aid-8648133.html>

BUREAUCRATIC BARRIER FOR EVERYONE WHO NEEDS CIVIL LEGAL AID

A judge recently commented, ‘Solicitors are being required to deal with a level of bureaucracy that is almost impenetrable.’² Those applying for civil legal aid already need to provide their prospective lawyer with evidence of their financial eligibility and sometimes evidence to prove that their case is still in the scope of legal aid following drastic cuts in April 2013. Now applicants, legal aid providers and the Legal Aid Agency will face an unnecessary bureaucratic hurdle that will be impossible for some children and vulnerable people to overcome even if they meet the test.

The Legal Aid Agency reported that there were 497,000 acts of assistance in civil law in 2013/14.³ In every one of these, the lawyer will have to consider the residence test before they begin any work, even in very urgent cases, otherwise they risk not being paid at all. There is a highly complex system of exempted persons and types of case from which the test is disapplied, with draft guidance at 40 pages. Unless the case type is one where the test is disapplied, the lawyer will have to demand evidence to try to ascertain either that the applicant is an exempted class of person or that they meet the test, with specified documentation to show that:

- 1) The person needing legal support currently lives in the UK;
- 2) They live lawfully in the UK (note that many people, especially those likely to be applying for civil legal aid, do not have passports);
- 3) They have lived in the UK for a continuous 12-month period at some point in the past; and
- 4) During this past 12-month period they were lawfully resident.

CHILDREN UNABLE TO ENFORCE THEIR RIGHTS

Children who do not pass the test, or cannot provide evidence to prove they pass the test, will not be able to enforce rights that they hold in law. The Government made certain limited concessions in cases concerning the protection of children, but there remain hugely significant areas of civil law where children will be unable to access legal assistance to protect their rights, including:

- **Special educational needs** (a British or otherwise lawfully resident child could be denied legal support based on their parent or carer’s immigration status because it is the parent or carer who has standing in the Tribunal)
- **Judicial review**, including for example in a case of unlawful treatment by a local authority of a child in their care
- **Abuse of position or powers by a public authority**
- **Breach of Convention rights by a public authority.**

Unaccompanied asylum-seeking children will be exempt while seeking asylum, but if granted limited leave to remain under the Immigration Rules, will then have to wait up to 12 months before becoming eligible again, disrupting any ongoing proceedings. **Trafficking victims** are exempt only for immigration applications, employment law cases and civil damages claims; not for any other case, including judicial review – the sole means of challenging a wrong decision on their status as a victim.

This policy will not only affect individual children who cannot enforce their rights; it will leave whole areas of government policy involving people vulnerable to human rights abuses – such as the treatment of destitute children in families with no recourse to public funds – where there is no check on executive power at all.

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² *R (Children: Temporary Leave To Remove From Jurisdiction)* [2014] EWHC 643 (Fam)

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325921/legal-aid-statistics-2013-14.pdf