Young Legal Aid Lawyers' representations to the Joint Committee on Human Rights

September 2013

ABOUT US

1. Young Legal Aid Lawyers (YLAL) was formed in 2005 and has around 1,700 members. We are a group of lawyers who are committed to practising in those areas of law, both criminal and civil, that have traditionally been publicly funded. YLAL members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales. We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law.

INTRODUCTION

2. This document contains YLAL's representations, for consideration by the JCHR as part of its inquiry into the implications for access to justice of the legal aid reforms contained variously in *Transforming Legal Aid: Delivering a more credible and efficient system* April 2013, *Transforming Legal Aid: Next Steps* September 2013 and *Judicial Review Proposals for Further Reform* September 2013.

3. We understand that the remit of the inquiry extends to human rights issues raised by the following proposals in particular: the proposed introduction of a residence test for civil legal aid claimants, so as to limit legal aid to those with a "strong connection" with the UK; the proposed restriction on the scope of legal aid available to prisoners; the proposal that providers of legal services in applications for judicial review against public bodies should only be paid for work done on the case if the Court grants permission for the application to proceed; the proposal that legal aid should be removed for all cases assessed as having "borderline" prospects of success.

4. These representations are split into three parts. The first part sets out our general concerns about the impact of the proposals on junior lawyers committed to working in legal aid, and the effect of this on access to justice. The second part provides a number of case studies from our members corresponding with the specific proposals being considered by the JCHR. The final part sets out some general observations about the constitutional importance of access to justice.

(1) THE IMPACT ON JUNIOR LAWYERS AND ACCESS TO JUSTICE

5. Any cuts to legal aid have a tendency to impact on junior lawyers. This impact may be direct, in the case of the proposed fee cuts in civil, family and immigration law[1]. Or it may be indirect, such as the proposal to restrict payment for judicial review work. This will require a significant body of work to be undertaken "at risk" i.e. with the possibility that solicitors and barristers will not be paid for doing the work if permission is refused. Such changes, in our view, threaten the financial viability of providers. In our experience changes such as this impact on junior lawyers since firms struggling to remain afloat are often forced into the position of relying heavily on junior lawyers, trainees and paralegals, frequently working on low salaries with relatively little in the way of training and supervision. This is problematic because it undermines the quality of representation which we provide to our clients.

6. To put this in perspective, in our most recent survey of our members[2], of those in employment, 56% of respondents indicated that they were earning less that £20,000 per annum and 20% were earning less than £10,000. And a number of respondents had reached the position where high levels of responsibility for little reward had made them leave or consider leaving the legal aid sector entirely. This can be seen in the following responses to the survey:

[1] There is to be a 10% cut to fees paid to family solicitors in public law cases, a 50% cut to barristers fees in civil proceedings and the 35% uplift which may be payable in immigration cases in the Upper Tribunal is to be removed.
[2] Undertaken for a report on social mobility in the legal profession to be published in October 2013.

- "I often feel like leaving. There are days when I cannot even get to my place of work because I don't have enough money to get there. I earn hardly anything."
- "I have actually had to leave the legal aid sector all together at the moment due to a training contact being offered at a private firm…The fact that there was no opportunity for progression [in legal aid] has forced me to leave the area for now. I have two young children and cannot afford to live on a paralegal wage forever."
- "Even the trainee minimum barely allows for us to meet basic living expenses whilst paying back course fees."
- "Seriously considered giving up on law due to the lack of positions and better paid opportunities in other sectors. I only stuck with it because I was desperate to help those less fortunate than myself."

7. We do not raise these issues out of self-interest. Our members generally work in legal aid out of a sense of vocation. But further legal aid cuts threatens their ability to do this. This places the sustainability of the profession at risk and, ultimately, undermines the quality of service which clients receive.

8. Our view is that the Government has failed to consider this impact in any meaningful way. For example paragraph 54 of the impact Assessment *Reforming fees in civil legal aid and Expert Fees in Civil, Family and Criminal Proceedings*[3], Ministry of Justice 5 September 2013 states that:

> All of the proposals assume that the quality of advice provided to legal aid clients remains unchanged. In the case of solicitors in public family and immigration law, we believe more junior professionals are able to provide a sufficiently high quality service to enable individuals to be adequately represented should more senior solicitors take on less of this type of work.

We find this assumption concerning.

9. When we have raised this issue with the Ministry of Justice we have frequently been met with the response that there are too many lawyers qualifying each year. This may be the case. However, this is not to say that these lawyers work or intend to work in the legal aid sector. And in any event, this does not provide an answer to our concern that overburdened junior lawyers may not be able to provide the high quality service which clients deserve.

10. Putting all this in the context of the human rights implications we would note that Art.6 European Convention on Human Rights (ECHR) entails both effective representation and equality of arms, see for example *Steel and Morris v United Kingdom* (2005) 41 E.H.R.R. 22 paragraph 72. If a second rate service is provided to legally aided litigants it is difficult to see how either of these requirements would be met. In our view, before any further cuts are implemented, rigorous consideration should be given to the impact of these proposals on the sustainability of the profession and the quality of service provided to clients.

(2) MEMBER'S CASE STUDIES

The residence test:

11. Client A was trafficked to UK to work as a domestic servant. She entered on a visitor's visa in December 2010. She was ejected from the house a few months later after a disagreement with the woman that brought her here and was forced onto the street. She started working as a prostitute just for somewhere to sleep and to get food. Almost two years later she was raped and came to the attention of the authorities then referred to Salvation Army. She claimed asylum in April 2013. In August she was granted refugee status and in September had a conclusive grounds decision that she is a victim of trafficking. She is no longer in NASS accommodation and her local authority have told her she will be made homeless from accommodation she has been placed in because they do not believe

[3] https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/supporting_documents/latcivilfeesresponseia.pdf

she has a priority need. She is someone who needs intensive support and continuing therapy due to abuse she has suffered throughout her life. These factors were an important part of making her case for protection in the UK. This matter raises Art.8 issues since the psychological integrity of the individual is at stake, see *Pretty v UK* 35 EHRR 1, [2002] ECHR 427 paragraph 61. She has not been in the UK for 12 months lawfully at today's date and would not qualify for legal aid for homelessness advice if the residence test is brought in. Note in particular that the Government's proposed exception to the residence test for victims of trafficking would not assist this client since homelessness work is not covered by paragraph 32 Part 1 Schedule 1 Legal Aid Sentencing and Punishment of Offenders Act 2012.

Prison law:

12. The following are cases that are currently funded under a relatively modest fixed fee of £220. Respectively, they involve resettlement and access to courses. They would no longer receive funding under the proposed cuts to funding for prison law. In the first case, this would impact on the individuals rights under Art.8 ECHR. In the second, the impact would be on the individual's rights under Art.5. Names have been changed.

13. Kevin was 18 and had been a child in care. In prison, he turned his life around and started to engage in education for the first time. But when it came to his release, no plans were in place for his accommodation or support. The local housing authority could not assist as he could not return to his home area due to his offence. In these circumstances the law was clear that he was entitled to help from social services. His prison lawyers wrote to the local authority reminding them of their duties and they agreed to provide a suitable placement so he could be released to a package of accommodation and support.

14. Andrew is serving a long sentence for public protection. He was recalled from his last period on licence for an alleged offence of criminal damage that was later dropped. Once in prison, it was decided that he needed to do a thinking skills course. Although he is entitled to a review of his detention every year until his final release date in around 4 years, the local prison service policy is to prioritise course allocation by final release dates. He was therefore told he could not do the course for two years. Andrew's prison lawyers were able to argue that he should be prioritised due to his need for the course and pending parole review. As a consequence of the representations, he was able to do the course and now stands a realistic chance of being released by the parole board.

Judicial review:

15. A mother and her two young children without immigration status sought accommodation and assistance from social services. They had been accommodated by a charity but this had been a short-term measure only; they had been sleeping on the floor of a communal area in one of the charity's offices. The charity told them that they would have to leave. They were facing street homelessness without any access to work or benefits, and no support available to them. Social services refused to help indicating that they could get help elsewhere. They challenged this decision. Until the local authority had carried out a lawful assessment under s17 Children Act 1989, as they were required to do, they could not rationally conclude that the family could manage when homeless without any support. Social services refused to change their position. Judicial review proceedings were issued. Social services then agreed to accommodate the family pending an assessment. The family's lawyers withdrew the judicial review since a settlement had been reached. The local authority refused to pay costs. Despite the applicable principles on costs being clear, the High Court has not yet made a costs order. Since permission was never granted it is possible that this case would not receive funding under the Government's proposals. The case involved a young family facing street homelessness and raised clear Art.3 issues, see *Limbuela* [2005] UKHL 66.

Borderline cases

16. Liz (name changed) and her family applied to their local authority as homeless. The local authority accepted a duty to house them since they were eligible and in priority need for accommodation. They were offered accommodation on the other side of London. Liz was not able to move in straight away as she had no transport and she could not move her family's possessions across London on her own

while her children were at school. But, after several weeks and with the help of a friend, Liz was able to arrange a car to carry out the move. She arrived at the property with her children but the locks had been changed. She called the council. They informed her that they had changed the locks without informing her since she had "voluntarily ceased to occupy" the accommodation within the meaning of s193(6) Housing Act 1996. As a result the duty owed to her and her family as homeless persons had come to an end. Liz sought to challenge this decision on the basis that she had not ceased to occupy the property as she had never been able to start occupying the property in the first place. The legal point is a simple but novel one relating to the interpretation of s193(6). There is no authority on point. There are sound legal arguments both for and against Liz. Because of this prospects of success can only be described as borderline. The point is clearly important to her since it will determine whether or not she and her family become homeless again; Art.8 is engaged. And it is important to the local authority who are entitled to know when and how their duties come to an end. This case would no longer receive funding under the new proposals.

(3) THE CONSTITUTIONAL IMPORTANCE OF ACCESS TO JUSTICE

17. The points we have made above have been framed in the context of the ECHR since we understand this is the primary remit of the JCHR. However, in our view, the proposals also run counter to fundamental constitutional principles.

18. Access to justice has been described as a "constitutional right", see *R v Secretary of State for the Home Department ex parte Leech* [1994] QB 198, 201 per Steyn LJ: "it is a principle of our law that every citizen has a right of unimpeded access to a court… Even in our unwritten constitution it must rank as a constitutional right". The imperative to allow unimpeded access to justice may be traced to Magna Carta.

19. In *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1925 (Admin) para. 45 Silber J observed that this right must be genuine and effective meaning that where necessary it should entail access to a lawyer who is willing and able to provide advice "which might also entail ensuring that the provider of the advice would be paid". It also requires that where legal representation is necessary, legally aided clients should not be at a disadvantage compared to a private client, *R v Legal Aid Board (Ex Parte Duncan)* [2000] All ER (D) 189, paragraph 488.

20. Further, access to justice, is a right which applies to all within the jurisdiction. It applies to prisoners: "under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication", *Raymond v Honey* [1983] 1 AC 1, 10 per Lord Wilberforce. And it applies to migrants. As Lord Scarman put it in *ex p Khawaja* [1984] A.C. 74, 111 "[h]e who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed "the black" in Sommersett's Case."

21. The proposals contained within Transforming Legal Aid, and the subsequent papers, would prevent access to justice for migrants and prisoners, would inhibit the ability of citizens to hold the state to account for unlawful acts by restricting funding for judicial review, and would combine to contribute to a two-tier system where those who cannot pay privately receive a second rate service. In our view these changes are unconstitutional and should not be implemented.

Young Legal Aid Lawyers
September 2013

ylalinfo@googlemail.com
www.younglegalaidlawyers.org
Twitter: @YLALawyers