

Ministry of Justice Consultation on Transforming Legal Aid Response of the United Nations High Commissioner for Refugees (UNHCR)

Introduction

The UN General Assembly has entrusted UNHCR with the responsibility for providing international protection to refugees worldwide and for seeking permanent solutions for them.¹ Further, under Article 35 of the 1951 Convention relating to the Status of Refugees ('the 1951 Convention'), the United Kingdom (UK), as a State Party, undertakes to: 'co-operate with the Office of the United Nations High Commissioner for Refugees in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention.' UNHCR has therefore a direct interest and responsibility for providing guidance in national legislation of signatory countries relevant to the application of the 1951 Convention. UNHCR welcomes the opportunity to respond to the proposed changes to publicly funded immigration and asylum work. Our comments refer primarily to the asylum-related components of the proposal and will focus on providing responses to Questions 4, 5, and 6 which are of direct relevance to persons who come within UNHCR's Mandate.

A. Residence Test/Strong Connection to the UK (Question 4)

UNHCR welcomes the Ministry of Justice's continuing commitment to provide legal aid to asylum seekers and to exempt them, in the main, from the residence test. However, UNHCR has concerns with the proposed introduction of the residence test in new claims for legal aid arising after recognition as a refugee by the UK authorities. It is noted that at paragraph 3.57 on page 29 of the consultation paper that:

'For any new claim for which the individual who was asylum seeker wished to obtain legal aid, they would need to satisfy the residence test in full like any other applicant.'

However, a refugee newly recognised by the UK authorities (including those resettled via the Gateway Protection Programme as well as the Mandate Refugee Scheme) would be unable to satisfy the 'resided lawfully' limb of the envisaged 'residence test' until 12 months have elapsed post recognition in the case of in-country UK recognised refugees or post arrival resettled refugees. Lawfully resident is a complex matter which is in itself often subject to litigation under housing and homelessness eligibility rules which often affect asylum seekers and refugees adversely. The residence test would affect trafficking victims or families with children and the mentally ill, all of whom may also fall under the rubric of persons of concern to UNHCR.

¹ See Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution. 428(V), Annex, UN Doc. A/1775, paragraphs 1, 6 (1950) available at <http://www.unhcr.org/3b66c39e1.html>

UNHCR believes that access to legal aid is of fundamental importance both for newly recognised refugees as well as those resettled to the UK.

UNHCR has previously also expressed its concerns pertaining to the withdrawal of legal aid for family reunification entry clearance applications, which were deemed to fall outside the scope of legal aid provision when the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force.² UNHCR consequently views the proposed introduction of the 12 month residence test on refugees as further eroding the support that refugees would need to fully integrate into the UK. Article 16 of the 1951 Refugee Convention enjoins States to provide refugees with access to courts and legal assistance on a par with the treatment granted to nationals of that host country. Consequently, while UNHCR appreciates that a small proportion of British nationals may also be subject to the residence test, the impact on refugees is likely to be considerably greater given the complexity of the UK legal system.

UNHCR strongly urges the Ministry of Justice to remove the proposed residence test for refugees and allow access to legal aid for new claims arising immediately after recognition or resettlement to the UK.

B. Civil Merits testing for asylum cases (Question 6)

UNHCR notes the suggested options for the 'prospects of success' test that are currently under consideration by the Ministry of Justice and additionally notes that asylum claims do not fall within the category of cases exempt from the prospects of success test. While UNHCR appreciates that some form of merits assessment may be inevitable, UNHCR wishes to reiterate its previous comments³ that in relation to the merits of their case, many asylum seekers find themselves in a 'borderline situation' where they are treading unknown and untested areas of immigration laws, rules and procedures.

As UNHCR has stated before, there are numerous reasons for this, including the factually unique nature of asylum cases, the personal vulnerabilities of applicants that may make explanations of events difficult, the obstacles often faced in evidencing past events, and the complications inherent in a forward-looking consideration of risk on return. UNHCR maintains that it is often difficult to rate the prospects of success in an asylum case, even in terms of whether or not likelihood of success is as high as 50%, let alone to a higher standard.⁴ Furthermore, any such assessment is also likely to be highly subjective.

UNHCR's concerns are particularly acute with reference to cases considered under the Detained Fast Track (DFT) procedure which involve much shorter time limits. Asylum

² UNHCR's comments general comments entitled 'House of Lords Briefing: Legal Aid, Sentencing and Punishment of Offenders Bill, Second Reading', November 2011

http://www.unhcr.org.uk/fileadmin/user_upload/pdf/Legal_Aid_Bill_Lords_Second_Reading.pdf

³ UNHCR's submission to the Constitutional Affairs Committee published in January 2005 in response to the UK Government's proposals contained in a paper entitled: "The Asylum and Immigration Tribunal- The Legal Aid Arrangements for Onward Appeals", November 2004.

⁴ Paragraphs 195 to 205 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*

applicants in the DFT face immense constraints accessing adequate legal advice and face challenges when it comes to obtaining the necessary evidence to support their asylum claim. In UNHCR's view, any merits testing under these circumstances will not give those providing legal advice sufficient opportunities to assess the prospects of success in a case fully.

UNHCR urges the Ministry of Justice to ensure that any merits test for legal aid funding is both set and applied in a flexible and humane manner.

C. Paying for Permission work in Judicial Review cases (Question 5)

UNHCR has noted the proposals to pay only for judicial review through legal aid after permission is granted. UNHCR notes from the previous consultation by the Ministry of Justice on judicial reviews⁵ that the greatest number of judicial reviews between 2005 and 2011 has been on asylum and immigration matters. UNHCR considers the availability of legal aid to make a judicial review permission application as an important element in ensuring that asylum applicants have access to adequate remedies to challenge unfair decisions. The primary consideration must be for a procedure that does not restrict access to review of the application of the 1951 Convention.

UNHCR's attention has also been drawn to numerous comments by experienced practitioners in the field as to how the proposed changes are detrimental to the principles of the rule of law and the equality of arms. Additionally, UNHCR is concerned that the already shrinking pool of specialist lawyers are likely to move away from asylum law altogether, in view of this new policy combined with other recent changes, whose cumulative effect is to make it increasingly difficult for an asylum legal representative to continue to work to a high standard or to run a viable business.

In UNHCR's view, it is important that the Ministry of Justice ensures that changes in the Legal Aid system do not have a detrimental effect on an asylum seeker's timely access to full and effective legal representation throughout the asylum process in the United Kingdom. While UNHCR fully appreciates the Ministry of Justice's aim to discourage unmeritorious applications for judicial review, our concern remains that the proposals will also harm the very deserving cases, by discouraging legal representatives from taking the risk in meritorious cases, or even by reducing the numbers of legal advisors in this area altogether. The loss of expertise will be detrimental to the legal profession as a whole.

UNHCR, June 2013

⁵ Judicial Review: proposals for reform: <https://consult.justice.gov.uk/digital-communications/judicial-review-reform>