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Annette Cowell
Legal Aid Reform
Ministry of Justice
102 Petty France
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Your ref:

Our ref:

Date:

Tuesday 4 June 2013

Dear Ms Cowell,

Public Law Project response to *Transforming Legal Aid: Delivering a more credible and efficient system* consultation

The Public Law Project

1. This submission is made on behalf of the Public Law Project (PLP).[1] PLP is an independent national legal charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers. To fulfil its objectives PLP undertakes research, casework, training and policy work. PLP is based in London but has a national presence and standing. We run annual national conferences in London, Manchester and Cardiff, and an expanding range of subsidised training events across England and Wales. Much of our litigation is conducted in the higher courts and we have a high overall success rate, notwithstanding that we undertake complex and challenging work. In recognition of our successful work in promoting access to justice, PLP was named as one of the 2012 *Guardian* charities of the year and awarded the "Special Rule of Law Award" at the Halsbury's Legal Awards in 2013.

2. PLP is known for its expertise in public law. Sir Henry Brooke, former Lord Justice of Appeal, has described the work of PLP as fulfilling "a real public need", remembering "just how welcome [PLP's] interventions often were in ground breaking cases."[2]

3. PLP produces independent evidence-based research in the area of public law. Since its establishment in 1990, PLP has published the following academic reports:
   - *The effect and value of judicial review in England and Wales* (forthcoming: summer 2013) by Varda Bondy and Maurice Sunkin.

[1] www.publiclawproject.org.uk
[2] PLP Five Year Report 2006-2011, available at: www.publiclawproject.org.uk/documents/PLPReview_06-11web.pdf

- *Designing redress: a study about grievances against public bodies* (2012) by Varda Bondy and Andrew Le Sueur, the Public Law Project and Queen Mary University of London.[3]
- *Mediation and Judicial Review: A Practical Handbook for Lawyers* (2011) by Varda Bondy and Margaret Doyle, the Public Law Project.[4]
- *Mediation and Judicial Review: An empirical research study* (2009) by Varda Bondy and Linda Mulcahy with Margaret Doyle and Val Reid, the Public Law Project.[5]
- *Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (2009) by Varda Bondy and Maurice Sunkin, the Public Law Project and the University of Essex.[6]
- *Mediation pilot study* (2005) by Varda Bondy.[7]
- *The impact of the Human Rights Act 1998 on judicial review* (2003) by Varda Bondy.[8]
- *Third party interventions in judicial review* (2001) by Deana Smith, Karen Ashton and Professor Lee Bridges.[9]
- *Cause for complaint? An evaluation of the effectiveness of the NHS complaints procedure* (1999).[10]
- *Judicial review in perspective, investigation of the trends in the use and operation of the judicial review procedure in England and Wales* (1995) by Bridges, Meszaros and Sunkin, 2nd ed. Cavendish.

Introduction

4. At the outset, PLP raises two fundamental objections:

   (1) The time frame for this consultation was short: it ran for only eight weeks, including two Bank Holidays. The consultation paper runs to over 150 pages and is accompanied by no less than five impact assessments. It contains detailed and complex proposals which require significant attention. PLP has not had sufficient time to engage meaningfully with these proposals nor to consult fully with its client group. PLP is concerned that a number of individuals and organisations will be unable to provide a considered response in the short time that was made available. PLP's concern echoes that of the House of Lords' Secondary Legislation Committee report on the Government's new arrangements for consultation.[11]

   (2) The data provided in the consultation paper is incomplete, insufficient and, in places, misleading. The situation has been made worse by the Lord Chancellor's inaccurate

[3] Available at: www.publiclawproject.org.uk/documents/DRM%20Final%20with%20logo%20and%20colour.pdf
[4] Available at: www.publiclawproject.org.uk/documents/MJRhandbookFINAL.pdf
[5] Available at: www.publiclawproject.org.uk/documents/MediationandJudicialReview.pdf
[6] Available at: www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf
[7] See: www.publiclawproject.org.uk/MediationPilot.html
[8] Available at: www.publiclawproject.org.uk/downloads/HumRghts_JRRep03.pdf
[9] Available at: www.publiclawproject.org.uk/downloads/ThirdPartyInt.pdf
[10] See: www.publiclawproject.org.uk/CauseFrComplaint.html
[11] www.publications.parliament.uk/pa/ld201213/ldselect/ldsecleg/100/100.pdf

use of statistics in the media.[12] It is PLP's view that without proper statistical data on the subject matter of these proposals, it is impossible to engage meaningfully with the consultation. Furthermore, PLP is concerned that the proposals are in large part based on misconstrued or inadequate data, which fundamentally undermines their justification and their proportionality. It is for this reason that PLP wrote to the Ministry of Justice on 22 May 2013 requesting further information. At the time of writing (4 June 2013),[13] no response to that letter has been received and in the absence of the information requested PLP considers that it has not been afforded a fair opportunity to respond meaningfully to the consultation.

5. PLP's response to this consultation is without prejudice to those concerns.

6. PLP has profound concerns about these proposals, which it considers will inhibit access to justice, prevent government accountability and prove administratively unworkable and expensive. PLP's concerns are particularised below.

Judicial review: the facts

7. Judicial review is the primary means by which public bodies such as the Government can be held accountable to individual citizens of limited means. Restricting individuals' rights to judicial review risks undermining the culture of accountability before the law that has been brought about over centuries by judicial review.

8. The information provided to respondents to this consultation is incomplete and does not support the contention that there is substantial waste or abuse in the existing practice.

9. PLP is concerned that the information provided to respondents to this consultation about the statistical evidence on which the proposal is based does not afford a fair opportunity to respond. PLP has not received a response to its urgent request for further information to the Ministry of Justice, made on 22 May 2013. A copy of that letter is appended to this response. Those statistics that have been disclosed at paragraphs 3.65-3.68 of the

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[12] On the Today Programme on BBC Radio 4 on 23 April 2013, the Lord Chancellor made the following remarks:
"Chris Grayling: Well we've got two kinds of cases. If it's an individual who can't afford to bring the case but needs to for genuine reasons then there is legal aid available. We're changing the legal aid rules though so that you're not going to be able to, your lawyer won't get, legal aid unless the judge says "yep, this is a case that has merit and needs to be heard in court." That's reasonable because otherwise we end up paying for endless cases that are brought that have got no chance of success... Interviewer: Is that a sort of no win no fee thing though?
Chris Grayling: Well, I mean, it basically says to the lawyers: if your case isn't serious then it's not worth your while bringing it because you're not going to end up being paid which seems to me to be entirely sensible. And this is not about whether the case is right or wrong, it's about whether the judge, who takes an initial look at the papers, actually says "this case is so absurd that I'm not going to give it the time of day, it will not get a hearing."
Interviewer: And that doesn't happen at the moment?
Chris Grayling: That doesn't happen at the moment, that's one of our legal aid changes..."
These comments are of particular concern because the Lord Chancellor's remarks indicate a closed mind.

[13] The letter is available here: http://www.publiclawproject.org.uk/documents/PLP_Letter_to_MoJ_22_May_2013.pdf. A copy appended to this response under Annex 1.

consultation document do not support the Government's case that "substantial sums of public money" have been wasted through weak judicial review claims being brought by claimant lawyers. The figures relied upon by the Government are analysed as follows:

(1) The consultation document states at paragraph 3.65 that in 2011-12 "there were 4,074 cases where legal aid was granted for an actual or prospective judicial review. Of these, 2275 ended before applying for permission to the Court". From this it appears that all 2,275 cases were concluded before being issued. From PLP's research on settlement outcomes[14], it is likely that a majority of these 2,275 cases were settled in favour of claimants. Such resolution will have been speedy and cheap, and cannot form part of the group of cases in which the Government considers that there has been waste of public funds. So already at this point, 56% (2,275 of 4,074) of legally aided cases benefit from the efficiency of the judicial review process which encourages early engagement between the parties leading to a high rate of settlement and withdrawal.

(2) Paragraph 3.66 states that 1,799 cases were considered for permission of which 845 ended after permission was refused. This represents a success rate at permission of 53%, a very respectable[15] success rate in addition to the many cases that had already settled positively at the earlier stage.

(3) Paragraph 3.67 states that of the 845 cases that are known to have been refused permission, 330 were recorded as having had a positive outcome.

(4) This leaves only 515 cases out of the initial 4,074 legally aided cases (i.e. 13%) as having ended at permission without benefit to the client. So as at the end of the permission stage, 87% of the sample of legally aided cases relied upon by the Government had either been settled, had ended following the refusal of permission but with substantive benefit recorded to the client, or had been granted permission.

(5) On any reasonable view, therefore, the figures that have been made available do not support the assumption underpinning the consultation document that there is serious waste in the legal aid funding of judicial review claims at the pre-permission stage[16] on account of weak cases being brought by claimant lawyers.

Judicial review and the rule of law

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[14] See *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf)

[15] Particularly if it includes immigration and asylum cases which have a lower than average success rate at permission

[16] The consultation document is silent as to the number of legally aided cases in which permission was granted that concluded with a substantive benefit to the client, either by post-permission settlement, or by success at substantive hearing. It is likely that a significant number of cases settled favourably to the claimant following the grant of permission. Statistics released by the Ministry of Justice in April 2013 (which are not concerned solely with merits-assessed legal aid cases) indicate that 144 out of 356 judicial review cases succeeded at substantive hearing in 2011, a success rate of more than 40%.

10. A serious fallacy running through the consultation document is to assume that judicial review claims that are unsuccessful have no wider beneficial effect on the rule of law. In practice it is public officials' awareness that they may be subject to challenge, and their consequent practice of careful, fair and reasonable decision-making that makes the United Kingdom a good place to do business in. Some Ministers may feel a natural sense of frustration when the courts uphold challenges to their decisions, but those that recognise the interests of the wider State as distinct from the interests of the Government of the day, will recognise that it is sometimes the "judge over your shoulder" that prevents them and other public officials from acting unlawfully. The importance of judicial review in the promotion of good administration and good practice has long been recognised, for example, in the Cabinet Secretary's foreword to the 2006 edition of *The Judge Over Your Shoulder*. This described judicial review as "a key source of guidance for improving policy development and decision-making in the public service."[17]

11. It is a disappointing and damning feature of the current consultation paper that there is no assessment of the benefit of judicial review claims (including those that are refused) over and above their cost[18], and therefore no true assessment of their value. Such an assessment is particularly important in light of the Lord Chancellor's erroneous statement on the Today Programme on 23 April 2013 (shortly after the consultation opened), that only 144 judicial review claims out of 11,539 issued in 2011 (i.e. approximately 1.5%) were successful: in fact, the figure is more likely to be over 40% in civil non-immigration/asylum judicial reviews[19].

12. What is proposed is that where a claimant's lawyer has satisfied the Legal Aid Agency that a claim for judicial review has merit, and should be brought, but does not obtain an order granting permission to apply for judicial review from the court, then the claimant's lawyers should not be paid. For reasons set out below, PLP considers that the proposals will have a chilling effect on claimant lawyers' willingness to bring judicial review claims generally, including those with good and very good prospects of success. The Government also anticipates this, yet fails to recognise that that is a threat to the rule of law.

13. Very few non-legally aided persons can take the risk of bringing a claim for judicial review, so it is publicly funded judicial review claims that provide the rigour to public decision-making referred to above. If lawyers are disincentivised (as they will be if the proposals are implemented) to bring good publicly-funded judicial review claims, judicial review, and the ability to hold the Government and other public body decision-makers to account before the courts, will largely become the preserve of corporations and the very rich. The true costs, including the cost to the rule of law, to good public administration, and to confidence in our system of government have not been considered in the consultation document, let alone assessed. But on any reasonable view, these costs cannot be justified by the proposed saving of £1million. The proposal is flawed in principle, based on incomplete statistics, unsupported by the statistics that have been published, and if implemented will result in fewer publicly funded judicial review claims

[17] Available at: www.tsol.gov.uk/Publications/Scheme_Publications/judge.pdf
[18] Paragraph 3.61 of the consultation document says that claims that are refused permission: "have little effect other than to incur unnecessary costs for public authorities and the legal aid scheme"
[19] See http://www.publiclawproject.org.uk/documents/PLPResponseChrisGrayling.pdf

being brought (including, as the Government envisages, fewer claims with good prospects of success, rather than just fewer weak cases the Government claims the proposal is intended to address). The price of this would be borne by all of us, as citizens, not by lawyers.

The uncertainty in assessing merits at the outset of judicial review cases (including the likelihood of being granted permission to apply), is greater than in any other type of civil litigation.

14. The reasons for this contention are considered below.

Uncertainty about the test that the court will apply at the permission stage

15. The consultation document states:

> "The Court will only grant permission if it thinks the case is "arguable" and merits full investigation by the Court".

16. This is a misleading simplification of the test (in fact, "tests") applied by judges on permission. There are in reality no express criteria by reference to which the court's discretion to grant or refuse permission to apply for judicial review fall to be exercised, whether in the Senior Courts Act 1981, delegated legislation or the Civil Procedure Rules. The courts have held that the test of "arguability" at the permission stage should be applied flexibly depending on the nature and the gravity of the issue. In addition the courts have made it clear that in certain situations the courts should apply a more onerous test than mere arguability.

17. Concern about a lack of clarity in the permission threshold is not new: in its 1994 report on Administrative Law: Judicial Review and Statutory Appeals (LAW COM. No 226), the Law Commission stated at 5.13-5.14:

> "5.14 A large number of consultees, although supporting a filtering requirement, criticised the lack of any clear criteria in the Rules for leave being either granted or refused. Concern was expressed about wide disparities in the rates of granting leave as between different subject matters of applications and as between different judges. In the consultation paper we referred to a survey which found that, although the majority of cases were determined on a "quick look" approach, a sizeable minority were subjected to a what was termed a "good look" with more consideration of the merits of the application [footnote reference to A Le Sueur and M Sunkin, "Applications for Judicial Review: The Requirement of Leave" [1992] PL 102]. Since then the Public Law Project has published the preliminary results of a statistical analysis of applications for judicial review which confirmed the disparities [*footnote reference to M Sunkin, L Bridges and G Meszaros, Judicial Review in Perspective (1993) Public Law Project pp 86-97*]

5.15 **In their response the nominated judges did not favour having their discretion to refuse leave fettered by legislative prescription**" (emphasis added)."

18. The passage highlighted above is significant because it confirmed that the judges who heard judicial review cases in the Crown Office list considered that they had discretion to operate the test on permission flexibly. Paragraph 5.15 of the report continued as follows:

> "However the majority of the consultees who commented considered that the threshold should be explicitly stated in the Rules. **For example, the Administrative Law Bar Association argued that an explicit formulation would remove any opportunity for suspicion that the stringency if the requirement for leave reflected the current state of the Crown Office List. It would also enable those considering making an application for judicial review to know in advance the threshold which any application (as a matter of principle) was required to pass**. We do not propose to depart from the existing grounds for the refusal to grant leave to apply for judicial review but we do consider that these criteria be explicated clearly in the Rules" (emphasis added).

19. Accordingly the Law Commission recommended that the test on permission should be whether "the application discloses a serious issue which ought to be determined". However the Law Commission's recommendation that the test to be applied by the court at the permission stage be made explicit was not implemented.

20. The Law Commission's recommendation was considered, and accepted (at paragraph 13 on page 64), by Sir Jeffery Bowman in his Review of the Crown Office List (2000). However, once again the recommendation was not implemented, and a flexible undefined test has continued to be applied to date.

21. Lord Bingham explained the need for flexibility in *Sharma v. Deputy Director of Public Prosecutions & Ors (Trinidad and Tobago)* [2006] UKPC 57 at paragraph 14, as follows:

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: *R v Legal Aid Board, Ex p Hughes* (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook, 4th ed (2004), p 426. **But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application**" (emphasis added).

22. What "arguability" means in any particular case is therefore a matter on which the claimant cannot be clear at the outset. To complicate matters further, the "ordinary rule" referred to by Lord Bingham is itself subject to exceptions. Lightman J considered this issue in *R (Federation of Technological Industries and Others) v The Commissioners of Customs and Excise* [2004] EWHC 254 (Admin) at paragraph 8, as follows:

> "The orthodox approach is to give permission to apply for judicial review if the claimant shows an arguable case. But the court in the exercise of its discretion whether to give permission may impose a higher hurdle if the circumstances require this. Factors of substantial importance in this context may include the nature of the issue, the urgency of resolution of the dispute and how detailed and complete is the argument before the court on the application for permission."

23. So where the court, in the exercise of its case management powers, orders that a permission hearing be listed for a lengthy oral hearing (or even as frequently happens in cases considered urgent, for a rolled up permission/substantive hearing, where the substantive hearing follows immediately if permission is granted), the claimant may be faced with a more demanding threshold to meet to obtain permission. This difficulty is manifest at the outset of the case when the claimant cannot know what case management decisions the court will take (as these will be informed by matters outside the claimant's knowledge such as the state of the court list, the existence in the list of other cases raises the same or similar issues, and the stance taken by the defendant in the Acknowledgement of Service).

24. A "significantly higher" threshold than arguability has been held to apply in cases where a grant of leave may cause expense and delay to an interested party[20]. Again this is a matter that is likely to be set out clearly for the first time at the Acknowledgement of Service stage, and about which the evidence is highly unlikely to be in the claimant's possession when the claim is issued.

Uncertainty caused by disparity in different judges' approaches to permission

25. As stated above, the claimant is faced with uncertainty concerning precisely the test that will be applied by the court on permission, particularly (for reasons stated at paragraphs 22 and 23) at the time that the claim is issued. The uncertain and varying tests applied by the court to permission applications may explain or partially explain the widely different grant rates at the permission stage of individual judges. As the Law Commission noted with concern in 1994 (see paragraph 17 above), PLP research showed that there was at that time an observed disparity in the permission grant rates as between different judges. Further research carried out by PLP and the University of Essex showed that as at 2005, the disparity in grant rates continued. The results were reported in *The Dynamics of Judicial Review*[21].

26. At page 2 of *Dynamics*, the research found that concerns about the permission stage identified by the Law Commission in 1994 remained:

> "The permission stage has raised concerns of principle and practice. The main issue of principle is whether it can be right to require claimants in public law to obtain permission to gain access to courts, especially when

[20] See for example, *R(Grierson) v Office of Communications (OFCOM)* [2005] EWHC 1899 (Admin) at paragraph 27

[21] http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf

this is not required in other types of proceedings, including those against public bodies. The main practical concerns relate to the clarity of the criteria used by judges when filtering claims, the consistency of their decisions and the fear that meritorious cases may be prematurely filtered from the system".

27. Judicial inconsistency was considered in detail at page 67 of the report, as follows:

"*Consistency: decision outcomes: statistical findings*

Perceptions of judicial inconsistency are compatible with our statistical findings. For the purpose of this aspect of the study, we recorded the names of judges against their permission decisions wherever possible and calculated the permission and refusal rates for each judge. Fifty-nine judges were included in our sample of civil claims (excluding immigration and asylum) during the period April–December 2005; although for the purposes of the current exercise we eliminated those with very small caseloads and only analysed the records of judges who dealt with more 25 or more paper claims for permission.

An overview of our results is shown in Table 4.6. As the table shows, there was a wide variation in the permission grant rates. The judge (A) with the highest grant rate on the papers granted 46 per cent of his claims, whereas the judge (H) with the lowest rate only granted permission in 11 per cent of the claims dealt with. In other words, claimants whose claims came before judge H had less than a quarter the chance of being granted permission than those whose claim came before judge A. There were no obvious factors to do with the nature or type of cases involved that would readily explain this wide variation."

...

Table 4.6: Grant rates by judge: paper considerations: civil non-immigration/asylum (April-December 2005)

Judge	**No. of cases**	**Percentage of grants**
A	26	46%
B	38	42%
C	26	42%
D	61	38%
E	52	35%
F	31	26%
G	29	14%
H	27	11%

A similarly wide spread of grant rates was observed in immigration and asylum cases.

28. Not only have this phenomenon been objectively observed, but so has the perception amongst claimant lawyers that permission criteria are vague (see *Dynamics* at page 64, section 4.5). This is relevant to the chilling effect of the proposal on claimants' solicitors' willingness to bear the financial risk that would be inherent in bringing every publicly funded claim (see paragraphs 41-51 below).

Uncertainty caused by claimant lawyers lack of access to relevant information

29. It is incorrect, and betrays a fundamental misunderstanding of judicial review, to assert, as the consultation paper does at para 3.72, that:

> "We consider that it is appropriate for all of the financial risk of the permission application to rest with the provider, as the provider is in the best position to know the strength of their client's case and the likelihood of it being granted permission" (emphasis added).

30. This is because (1) there is a duty of full disclosure on the claimant at the time the claim is issued; and (2) the claimant will very frequently not be in possession of all relevant documents. The disparity in access to information is reflected, in relation to judicial review claims brought against Government departments, in the Treasury Solicitor's January 2010 document, *Guidance on discharging the duty of candour and disclosure in judicial review proceedings*[22] which sets out a detailed procedure for discharge of the defendant's duty of candour and disclosure of relevant documents. While the guidance states that the duty is triggered when responding to a letter before claim, PLP's experience is that this does not happen in practice, either because the Government department concerned chooses not to give disclosure or because it is impracticable for it to do so in the 14 (or in urgent cases, fewer) days within which a response to the letter before claim must be sent. PLP's experience is that refusal and/or inability to provide timely disclosure is even more common on the part of other public body defendants such as local authorities.

31. This means that in practice, disclosure is given with the defendant's Acknowledgement of Service, or, frequently, with the defendant's evidence following the grant of permission. This reality is reflected in the Legal Aid Agency's standard limitations on funding certificates, which require the merits of a claim to be addressed by the claimant's lawyers in a further application to the Agency following the refusal of permission on the papers or, if permission is granted, following service of the defendant's evidence.

32. As a result of the disparity in information available to claimant and defendant, judicial review claimant lawyers are routinely unable to accurately assess the merits of a claim at the outset of a case. All that they can do is to give an assessment of the merits of a claim based on the information in their possession.

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22 http://www.tsol.gov.uk/Publications/Scheme_Publications/Guidance_on_Discharging_the_Duty_of_Candour.pdf

Uncertainty caused by the judicial review court's flexible approach to promptness and other matters

33. Other features of judicial review litigation that increase uncertainty in initial merits assessments include:

    (1) The need to sacrifice certainty in merits assessment for speed in order to comply with the duty on claimants to bring claims for judicial review promptly and in any event within 3 months (soon, in some cases, to be reduced to 4 weeks) of the decision, act or omission under challenge;

    (2) Lack of certainty as to the meaning of "promptly" in any given case. Whether a claim has been brought with sufficient promptness is frequently the subject of argument at the permission stage, and such argument is frequently raised for the first time with the Acknowledgement of Service.

    (3) The discretionary nature of judicial review remedies.

    (4) The defendant's ability to "shift the goalposts" by reconsidering decisions under challenge or taking further related decisions once proceedings have been issued.

34. By section 31(6) of the Senior Courts Act 1981, the court can refuse permission to apply for judicial review if it considers that there has been undue delay, and that granting the relief sought "would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person, or would be detrimental to good administration".

35. Whether or not a claim has been brought sufficiently promptly or whether granting the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person, or would be detrimental to good administration are matters on which it is frequently impossible to form a clear view without sight of the defendant's Acknowledgement of Service or, following the grant of permission, the defendant's detailed grounds and evidence. It is rare for evidence of the hardship that a defendant contends would result if the remedy sought by the claimant were to be granted, to be set out in full in response to the letter before claim. Similarly, claimant lawyers are likely to be confronted with full evidence of the detriment allowing the claim would cause to public administration for the first time on receipt of the Acknowledgement of Service.

Uncertainty caused by the need to issue promptly

36. The promptness requirement adds to claimant lawyers' uncertainty over merits assessment at the outset because it gives them less time to assess the merits of a prospective claim than other civil litigators, who may have years to pursue disclosure and to seek counsel's opinion.

37. Where the consultation document states that:

> "Legal aid would continue to be paid in the same way as now for the earlier stages of a case, to investigate the strength of a claim, for

example, and to engage in pre-action correspondence aimed at avoiding proceedings"

38. It should be born in mind that there are considerable limitations already in existence for funding investigation of the merits of a claim. The most common form of funding available pre-issue is Legal Help, which is limited at present to 15 matter starts per year for each public law contract holder (and so may not be available if all 15 matter starts have been used up), and which anyway does not generally fund legal research. A grant of Investigative Representation (pursuant to which counsel's opinion could in principle be funded) is frequently inappropriate in judicial review cases because there is insufficient time to apply for it to the legal aid authorities, wait for a decision on the application, (once a decision has been reached and communicated) take counsel's opinion, and thereafter prepare and submit a further application for Full Representation, wait for the result of that application, and only then issue the claim. Many (in PLP's experience, most) publicly funded judicial review cases therefore proceed straight from Legal Help, which in the vast majority of cases does not permit counsel's opinion to be taken, to Full Representation.

Uncertainty caused by the prospect of good claims being rendered academic through no fault of the claimant

39. Claims can also be rendered academic through the actions of the defendant to reconsider the decision under challenge and lawfully taking a new decision[23]. Claimant lawyers are in no position to weigh in the balance the risk that a further decision by the defendant will render a claim academic, and therefore liable to be refused at either the permission or substantive hearing stages. This is because claimant lawyers – like the courts – lack the expertise or the information to enable the risk that a further decision will render the claim academic to be properly assessed. All the claimant lawyer can do is to proceed on the basis that defendant decision makers will make any additional decision(s) following the issue of the judicial review proceedings, on a fair, reasonable and lawful basis.

40. In addition, judicial review claims are uniquely vulnerable to good claims being overtaken by events (including through the actions of third parties) and thereby rendered academic (for example, UKBA may take a decision to remove a migrant from the UK, thereby rendering academic a good claim for judicial review that had already been lodged by the migrant to challenge a local authority's unlawful refusal to provide support).

The risk that practitioners would be required to bear will have a chilling effect on claims with good prospects of success

<u>The chilling effect is enhanced by low existing remuneration rates</u>

[23] See *R(EHRC) v SSJ and SSHD* [2010] EWHC 147 (Admin) http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2010/147.html&query=equality+and+human+rights+commission&method=phrase

41. Remuneration rates for judicial review have fallen in real terms since 1994 (see Annex 2). Practitioners are already incentivised against bringing cases without merit because the rates that they receive from legal aid are insufficient to make their practice financially viable.

42. This was recognised by Lord Hope in *Re Appeals by Governing Body of JFS* [2009] 1 W.L.R. 2353:

> "24. As has already been noted, Ms Rose declined to seek an order that each side should be liable for its own costs in any event on the ground that to do so would be wrong in principle. As Scott Baker J observed in *R (Boxall) v Waltham Forest London Borough Council* (2001) 4 CCLR 258, para 12, the failure of a legally aided litigant to obtain a costs order against another party may have serious consequences. This is because, among other things, the level of remuneration for the lawyers is different between a legal aid and an inter partes determination of costs. This disadvantage is all the greater in a case such as this. It is a high costs case, for which lawyers representing publicly funded parties are required to enter a high costs case plan with the Legal Services Commission. It is a common feature of these plans that they limit the number of hours to an artificially low level and the rates at which solicitors and counsel are paid to rates that are markedly lower than those that are usual in the public sector. Mr Reddin has indicated that, as they are defending a win, E's solicitors would not be expected to be paid at risk rates. Nevertheless the rate of remuneration that is likely to be agreed for this appeal will be considerably lower than that which would be reasonable if costs were to be determined inter partes.
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> 25. It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful. If that were to become the practice, their businesses would very soon become financially unsustainable. The system of public funding would be gravely disadvantaged in its turn, as it depends upon there being a pool of reputable solicitors who are willing to undertake this work. In *R (Boxall) v Waltham Forest London Borough Council* Scott Baker J said that the fact that the claimants were legally aided was immaterial when deciding what, if any, costs order to make between the parties in a case where they were successful and he declined to order that each side should bear its own costs. It is, of course, true that legally aided litigants should not be treated differently from those who are not. But the consequences for solicitors who do publicly funded work is a factor which must be taken into account. A court should be very slow to impose an order that each side must be liable for its own costs in a high costs case where either or both sides are publicly funded. Had such an order been asked for in this case we would have refused to make it".

43. Remuneration rates for lawyers bringing publicly funded claims for judicial review are relevant for the following reasons:

    (1) They help to explain why there is so little room for further reductions to claimant lawyers' fees. Given the uncertainty inherent in assessing at the outset of a judicial review claim whether the case will be granted permission or will obtain an inter partes costs order, the proposal to make payment of lawyers' fees conditional on the grant of permission is tantamount to a significant reduction in fees.

    (2) They show that claimant lawyers are already incentivised not to bring weak cases, since they already rely on inter partes costs orders in order to make publicly funded litigation viable. A further cut to claimant lawyers' fees will not provide a further incentive not to bring weak cases – on the contrary it will provide an incentive not to bring cases at all.

    (3) They highlight a concern, articulated in greater detail at paragraphs 92-95, that by further cutting remuneration for claimant lawyers, including counsel, damage is being done to the principle of equality of arms, a key feature of our adversarial system of justice.

The chilling effect is enhanced by the knowledge that some cases will settle without permission being granted

44. The consultation document acknowledges at paragraphs 3.75 and 3.76 that good claims (in practice, many of the strongest claims) will be settled favourably to the claimant pre-permission or before or after permission is refused. In such cases, the consultation document acknowledges that the claimants' lawyers will not receive legal aid to cover their costs, but states that:

    > "[D]epending on the circumstances, the claimant may agree the costs of the permission application as part of the settlement, or if no costs are agreed, the claimant can seek a costs order from the court".

45. This smacks of complacency. It does not follow that a case settled on favourable terms to the claimant will necessarily attract an award of costs. In PLP's experience, notwithstanding the Court of Appeals' decision in *Bahta*[24], central Government departments, local authorities and other public bodies continue to argue that the default position is that there should be no order for costs where claims for judicial review are settled, even where that is on terms favourable to claimants. This is especially true in cases where permission has not yet been granted, and where the merits of the case may have not crystallised and will not have been subject to any judicial scrutiny. They very rarely agree to an order for costs, and routinely and aggressively resist orders made by the court. Further, our experience, and the experience of other claimant lawyers we have spoken to, is that high court and deputy high court judges decline to award costs in favour of the claimant in a significant number of such cases, even where recognising that the claimant has achieved the relief sought in the claim. For the present, at least, it

[24] [2011] EWCA Civ 895 (http://www.bailii.org/ew/cases/EWCA/Civ/2011/895.html)

cannot be said that, even where judicial review claims are settled on favourable terms, costs routinely follow the event. PLP's experience has been that, in reality, inter partes costs orders in cases settled on terms favourable to the claimant are often successfully disputed by defendants (as the consultation document recognises) "depending on the circumstances". The cohort of cases that would be affected by a failure to recover inter partes costs (and therefore the cases highly susceptible to a chilling effect on claimant lawyers' willingness to bring them) are the strongest claims, as these are far more likely to be settled pre-permission.

46. Furthermore, it is PLP's experience that some offers of settlement are made by public authorities on the condition that no order for costs is sought. At present, this does not create a conflict between the client and his/her representative because the representative will still be paid for the work on the case, albeit not at inter partes rates. However, the pernicious effect of the proposal to remove funding for cases that settle prior to permission will be to give public bodies who concede wrongdoing the power to make settlement conditional on the claimant's lawyers not seeking costs. This will put the interests of the lawyers in direct conflict with the best interests of the client. In terms of the regulation of the legal profession and the ethics that govern it, this conflict could only be resolved by the representatives agreeing to the settlement if it was in the best interests of their client. This will allow public bodies to go un-punished for their wrongdoing and will have a serious chilling effect on the ability of claimant lawyers to bring the strongest cases.

47. There will also be a significant number of cases in which lawyers will have brought a strong, or even very strong, claim, but where matters will have developed, unforeseeably, by the time of the permission hearing so as to make the claim academic (other than by reason of a concession by the defendant). Though the logic of the government's position is that lawyers will have acted properly in bringing such cases, and should be entitled to payment, it will be very difficult if not impossible to obtain a costs order in this class of case. The combination of this class of case with the general uncertainty about whether costs orders will be granted by the court even in cases where relief has been conceded means that there will be significant numbers of cases, including the most meritorious and straightforward cases, in which lawyers will have no possibility of being paid for the work which they undertake, or at best face uncertainty in each and every case.

48. This problem is further exacerbated because, once a claim is conceded, and though this may be on terms which are highly favourable to a claimant, the only opportunity for lawyers to be paid will be by obtaining a costs order. They may itself require significant work on their part, for example in the preparation of costs submissions, which will be paid only if they are successful. Thus, every claim will, in practice, involve running not a single risk (that the claim may or may not succeed on the merits), but a series of cumulative risks (whether or not the case will persuade a judge on the (flexible) permission test, whether or not it will become academic or be conceded pre-permission, whether or not the defendant will agree to pay costs, whether or not the court will be persuaded to order costs). The result will be that the likelihood of being paid even for a straightforward case, with very good merits, may well be considerably less than 50%.

49. All of this is, in turn, likely to distort the negotiating position of the parties to judicial review. Defendant lawyers will run no risk of not being paid for their work on a case. In negotiating with claimant lawyers, they will be aware of their very different position. They may well be able to force claimants into unsatisfactory compromises, for example that the claimants should receive a partial costs order for 50% of the costs, even though principle would appear to dictate a full costs order. Claimant lawyers will feel unable to run the risk of contesting costs before a judge because of the uncertainties involved, and because, if they are unsuccessful, they will have undertaken yet further unpaid work on the costs submissions. Thus, the effect of the Government's proposals is likely to be to further exacerbate the (already existing) difficulties which claimants face in obtaining costs orders, which, as recognised by the Supreme Court in the JFS case (see paragraph 42 above), risks making publicly funded claimant work unviable, and would gravely disadvantage the system of public funding.

The chilling effect is enhanced because costs in judicial review cases are front loaded

50. Judicial review is intended to be a flexible practical remedy capable of resolving complex legal disputes quickly and at low cost. Disclosure is usually given voluntarily by the defendant (i.e. without compulsion by the court), and although there are frequently disputes about whether adequate disclosure has been given, there is no need for disclosure and inspection of documents to be included as a routine stage in the litigation. Accordingly, a higher proportion of the claimant's costs is front-loaded to the initial stage of a judicial review claim than is the case in other types of civil litigation.

51. This means that claimant lawyers have proportionately more costs at stake at the time judicial review claims are issued, yet for reasons given above[25] do not have the information necessary to enable a clear analysis of the merits. The risk that claimant lawyers would be expected to bear if the proposal is implemented – uncompensated by any success fee - would cover a larger proportion of the overall costs than other types of claim that are typically brought under a Conditional Fee Agreement. PLP has no doubt that risk of this sort – uncompensated by any success fee following the reforms under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 - would represent an overwhelming chilling factor on claimant lawyers' ability to bring judicial review claims.

The proposal is unprecedented, and disproportionate to the problem that the Government claims it is intended to solve

52. The Government's proposal that funding for judicial review be provided at risk to the grant of permission without any compensating success fee is both:

    (1) Ill-suited to judicial review (because of the uncertainties inherent in judicial review litigation referred to above); and

    (2) Unique to judicial review litigation.

[25] Including defendants' routine failure to make full disclosure in response to letters before claim – see paragraphs 30-32 above.

53. PLP is unaware of any other area of law in which publicly funded litigation is carried out at risk without any potential success fee to compensate for that risk[26].

54. The Government has recognised that the chilling effect on providers may result in providers not bringing judicial review claims with good (as opposed to poor) prospects of success (see paragraphs 35 and 36 of the civil credibility impact assessment, which states:

> "35. We think that the risk of providers refusing to take on judicial review cases more generally will be mitigated by providers carefully assessing the risk of permission being granted and therefore no longer taking forward weaker cases only.
>
> 36. If this risk were to materialise, individuals may choose to address their disputes in different ways. They may represent themselves in court, seek to resolve issues by themselves, pay for services which support self-resolution, pay for private representation or decide not to tackle the issue at all."

55. This makes no sense. If claims for judicial review with good prospects of success are not brought because providers cannot bear the financial risk of bringing them, the result will be that public bodies' unlawful acts will go unchallenged. This is because the alternatives posited in the impact assessment, that:

> "[individuals affected by unlawful acts] may represent themselves in court, seek to resolve issues by themselves, pay for services which support self-resolution, pay for private representation or decide not to tackle the issue at all"

56. The consultation paper thus accepts that claimants will either not be available to those eligible for legal aid (paying for services which support self-resolution or paying for private representation), or else will not provide any or any adequate remedy (representing themselves in court, seeking to resolve issues by themselves, or deciding not to tackle the issue at all).

57. As it has not considered or measured them, the Government has not shown that the adverse consequences for claimants affected by unlawfulness, for good public administration, and for the rule of law can be adequately mitigated by the predicted reduction in weaker cases (whose number was assessed at "just over 500 cases" in 2011-12[27]).

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[26] The proposal to remove the success fee for work in the Immigration and Asylum Chamber of the Upper Tribunal, objectionable in itself, is not comparable to this proposal. That is because much of the preparatory work will have been done on the appeal to the First-tier Tribunal, so that a provider representing an immigration appellant will be familiar with the case and better able to assess the prospects of success. In addition, the provider's longstanding professional relationship with the client may make the provider readier to bear the financial risk of acting on the appeal (which will anyway be less in financial terms than on a typically far more expensive claim for judicial review).

[27] See paragraph 3.68 of the consultation document https://consult.justice.gov.uk/digital-communications/transforming-legal-aid

There are different measures, already or easily implemented, that will reduce the scale of the problem the proposal claims to address in a proportionate manner

58. As stated at paragraphs 30-32 above, it is uncontroversial that the party best placed assess the merits of the claim is the defendant. Yet it is routinely the case that permission is opposed by defendants even in cases that are clearly arguable and which go on to succeed. Defendants very rarely concede permission because there is no incentive for them to do so.

59. This represents a significant waste of public resources which has not been addressed in the consultation document. If saving money and improving efficiency are the aims of the consultation, it is surprising that no consideration appears to have been given to incentivising defendants to consent to permission in appropriate cases, so that such cases could proceed to a substantive hearing with reduced judicial resources being engaged.

60 Further, claims for judicial review are already subject to a certification procedure, whereby claims can be certified as "totally without merit", the effect of which is to require the claimant's legal representative to certify that he or she has considered the reasons for refusal of the paper permission application, but nevertheless considers the claim to be arguable. The Government has recently announced that this certification procedure will be implemented in all cases, and that the effect of such a certificate will be to deprive a claimant of the right to renew his or her permission application at an oral hearing. It is unknown whether how often the courts have certified claims as totally without merit, but in preventing such cases from going further, the cost of oral renewals of weak cases will be saved together with associated court time. This saving does not appear to have been factored into the Government's assessment of the proportionality of the proposal.

If implemented, the proposals will increase as yet unassessed costs, and may therefore fail to reduce – and may increase - overall costs to the public purse

61. The Government's impact assessment recognises that the proposal, if implemented, may result in an increase in litigants in person. This will drive up the costs to the court service and to defendants. These additional costs will tend to be unrecoverable (court time lost due to inefficiently conducted litigation cannot be compensated for, and it would be very rare for successful defendants to be able to recover their costs from claimants who were eligible for legal aid but who driven to become litigants in person by the absence of lawyers willing to take the financial risk of acting for them).

62. Concern at the additional costs to the court service caused by an increased number of litigants in person have recently been expressed by the Court of Appeal. In *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234[28], Lord Justice Ward stated, at paragraph 2:

> "What I find so depressing is that the case highlights the difficulties increasingly encountered by the judiciary at all levels when dealing with

[28] http://www.bailii.org/ew/cases/EWCA/Civ/2013/234.html

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 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" (emphasis added).

63. In addition, the proposals would result in the court being reluctant to apply a flexible (let alone enhanced) arguability test (see paragraphs 16-24 above), as to do so would lead to manifest unfairness to claimant lawyers. The resulting lowering of the permission threshold would be bound to result – paradoxically - in an increase in the number of cases granted permission that would be destined to fail. For similar reasons the proposal would lead to fewer rolled up permission/substantive hearings, even though in appropriate cases, these aid the quick resolution of claims in the parties' and the public interest.

64. The Government has not produced any assessment of these additional costs to the court and to defendants, and has failed by some degree to show that they will be offset by the legal aid savings (which are estimated at £1 million per annum – see paragraph 33 of the civil credibility impact assessment). The Government has also failed to recognise – let alone assess - the prejudice to the fundamental rights of individual claimants of modest means, to good public administration and to the rule of law that has been identified above.

Conclusion

65. The proposal will not meet the Government's stated purpose as:

    (1) the nature of judicial review litigation and the way it is funded means that a significant proportion of good cases will not to be funded, either because they are refused permission by the court applying a higher than arguable test (depending on the circumstances of the case) or because they are settled without getting permission in circumstances where the claimant does not succeed in getting an award of inter partes costs.

(2) In truth, as the consultation document appears to accept, the proposal is likely to reduce the number of judicial review claims generally - including successful challenges to the exercise of Government power.

66. The proposal is inconsistent with upholding the rights of individual claimants of modest means, good public administration, and rule of law. Imposing costs consequences on Defendants who unsuccessfully oppose permission, together with recently announced changes to the totally without merit certification procedure would significantly reduce the scale of the stated problem, without the serious adverse consequences identified above. Accordingly, the proposal has not been shown to be proportionate.

67. The Ministry of Justice is reminded of the words of Lord Justice Laws *In R (Evans) v Lord Chancellor* [2012] 1 WLR 838:

> "25.....For the state to inhibit litigation by the denial of legal aid because the court's judgement might be unwelcome or apparently damaging would constitute an attempt to influence the incidence of judicial decisions in the interests of government. It would therefore be highly inimical to the rule of law."

68. It follows from the analysis set out above that PLP does not agree with the proposal set out in chapter 3 of the consultation paper 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 (question 4).

The proposal to limit legal aid to those with a strong connection with the UK is contrary to the rule of law and discriminatory

69. The rule of law is based on the fundamental principle that everyone under the jurisdiction of the law is equal before the law.

70. This principle was articulated by Lord Scarman in *Ex Parte Khawaja* [1984] 1 A.C. 74 in the context of habeas corpus:

> "Habeas corpus protection is often expressed as limited to British subjects. Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic 'no' to the question. **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**. This principle has been in the last at least since Lord Mansfield freed 'the black' in Sommersettt's case (1772) 20 St.Tr.1." (emphasis added)

71. The proposal to restrict legal aid to those with a strong connection with the UK is fundamentally contrary to this principle.

72. PLP is part of a coalition of fourteen non-governmental organisations (PLINGO – public lawyers in NGOs): PLP, Reprieve, Liberty, Shelter, Mind, Just for Kids Law, Child Poverty Action Group, the Howard League for Penal Reform, Prisoners' Advice Service, Friends of the Earth, the Law Centres Network, Coalition for Access to Justice for the Environment and the World Wildlife Fund. That coalition instructed Michael Fordham QC, Ben Jaffey and Ravi Mehta of Blackstone Chambers to provide an opinion on the lawfulness of this proposal. A copy of this opinion is appended in Annex 3.

73. PLP does not propose to summarise the content of the opinion in its response, save as to quote from the paragraphs in which the barristers conclude that the proposed residence test is unlawful:

> "2. In our opinion, such a measure would be unlawful. In short, that is because (a) it would attract a justification test and (b) it would not survive scrutiny under such a test. It would not survive scrutiny given its nature and impact, as well as the paucity of the reasoning put forward, and the absence of anything approaching a proper assessment of its implications. The absence of any proper assessment of impacts is likely itself to be fatal for the purposes of the Equality Act 2010, were the decision to adopt such an exclusion challenged on that basis. Ultimately, the exclusion would itself fail a justification test because it denies practical and effective access to justice to what are essentially a group of 'foreigners', each of whom have (by definition) a meritorious case and who do not have the means to litigate without the benefit of legal aid.
>
> [...]
>
> 9. The Government in the consultation document devotes some 3 pages to the residence test. There is a paucity of reasoning. There is no analysis, and no impact assessment. There is no discussion of the sorts of claims which would be excluded from funding, nor the equivalent claims which will remain fundable because they are made by a resident. There is no mention, for example, of extra-territorial abuses of human rights at all. The idea of 'need' or 'justification' for access to justice being a function of non-resident status is one which is unknown to the rule of law. The law would pose a question of justification, and we cannot see how the Government could convincingly answer it. The measure would be contrary to law."

74. Given the draconian nature of this proposal, and its inevitable impact on the rule of law, PLP is profoundly concerned by the Government's intention to bring it in by way of secondary legislation. A measure that goes to the heart of our constitutional settlement as this does, should have the benefit of scrutiny by both Houses of Parliament in a full debate.

The proposal is an unjustified departure from the purpose of legal aid, which is to fund legal advice and representation for impecunious litigants with meritorious cases

75. The proposed residence test would be an unprecedented departure from the way that legal aid has developed in the UK. The first Act of Parliament introducing legal aid was

the Legal Aid and Advice Act 1949. It introduced a means and a merits test, both of which are rationally connected to the purpose of providing legal aid to impecunious people with meritorious claims. Those restrictions remained in place under the Legal Aid Act 1988, which moved responsibility for legal aid to the newly created legal aid board. In 2012 the landscape of legal aid was changed again with the Legal Aid, Sentencing and Punishment of Offenders Act. However, in spite of its far-reaching and unprecedented reforms in some areas, it did not go so far as to remove the means and merits tests and replace them with a test based on immigration status.

76. The current proposal thus represents a radical and unwelcome departure, which has no rational connection to the fundamental purpose of legal aid, namely to assist the impecunious to bring meritorious cases.

77. This interpretation of the purpose of legal aid is echoed in international standards. The sixth preamble to the European Legal Aid Directive 2002/8/ESC of 27 January 2003 states:

> "Neither the lack of resources of a litigant, whether acting as claimant or as defendant, nor the difficulties flowing from a dispute's cross-border dimension should be allowed to hamper effective access to justice."

The proposal to limit legal aid to those with a strong connection with the UK is administratively unworkable

78. The residence test proposal will force all legal representatives to act as immigration officers. Every lawyer, regardless of whether they have any experience in immigration, will have to investigate whether their client meets the residence test and retain the evidence to demonstrate this on their file. This is beset with insurmountable problems, including:

    (1) The question of lawful residence is not a straightforward one. As the Immigration Law Practitioners' Association point out, the UK Border Agency guidance for employers on preventing illegal working, which is concerned with verifying immigration status, runs to 89 pages.

    (2) The question of lawful residence is already the subject of a significant amount of litigation. If proving lawful residence became a prerequisite for obtaining legal aid, it is inevitable that satellite litigation on the question of whether a person is lawfully resident would proliferate. This would result in increased costs to the Legal Aid Agency and, by extension, the tax payer. The consultation paper and the impact assessments fail to take this into account.

    (3) The consultation document fails to engage with the fact that lawful residence in some circumstances vests by operation of law, and not by documentary evidence. It is impossible to see in those circumstances how a lawyer could be expected to determine and evidence lawful residence.

(4) Where a dispute arose between a lawyer and the Legal Aid Agency as to the lawful residence of a client, the resolution of that dispute would be costly for the Legal Aid Agency because it would have to conduct its own assessment of lawful residence, which could involve ancillary litigation.

79. These problems are not only of concern because of the administrative burden, risk and cost they will impose on providers and the Legal Aid Agency alike, they are also of concern because as a result of this burden, the residence test will disincentivise providers from taking on clients who cannot quickly and definitively prove that they are eligible. This will mean that providers are forced to make quick, and likely discriminatory judgments, about prospective clients. It will also mean that people with meritorious cases who do in fact satisfy the residence test but cannot satisfy a provider, will be left without legal aid. This is not what is intended by the proposal, but it will be what happens. As a result, the right of access to the courts will be further undermined.

Exceptional funding will not cure the proposal of its discriminatory effect or its administrative unworkability

80. The consultation paper suggests that exceptional funding will be available for people who fail the residence test but whose human rights of EU law rights would be breached if they were not provided with legal aid. PLP has a number of fundamental concerns about the effectiveness of exceptional funding as a safeguard.

81. PLP is currently running a project dedicated to assisting individuals whose legal problems are out of scope to apply for exceptional funding under section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The first observation to make is that it is clear to PLP that providers are routinely refusing to make these applications, regardless of how meritorious the client may be. This is because providers are not paid for completing an exceptional funding application unless funding is granted. The ECF1 form for applying for exceptional funding is long and detailed. It has to be accompanied by a means form and either a CIV APP1 or a CIV APP8 depending on what type of legal service is being applied for. Completing these three forms requires an in-depth knowledge of the case so that the merits can be assessed, an in-depth knowledge of the client's circumstances and personal circumstances so his/her eligibility for exceptional funding can be assessed and an assessment and evidence of the client's means. The process is an extremely onerous one that takes hours. For many cases, it will simply be to apply for legal help – a fixed fee of approximately £220. It is abundantly clear why providers are refusing to make these applications: they are lengthy, onerous and complex, and they are undertaken at risk. If funding is refused, providers can apply for an internal review of the refusal. Grounds must be submitted within 14 days of the refusal and again, this work is undertaken at risk.

82. PLP's experience of assisting 14 clients in the last eight weeks clearly demonstrates that for litigants in person the process of applying for exceptional funding is impenetrable. There is no accessible, foreign language or disabled-friendly information about exceptional funding provided by the Government. This is in spite of the fact that the Lord Chancellor's own guidance accepts that questions of literacy, English language ability and disability will be relevant to the assessment of whether someone is eligible for

exceptional funding, thereby admitting that the vast majority of exceptional funding applicants will have at least one protected characteristic.

83. Applicants in person are not able to obtain a definitive view on their eligibility for exceptional funding because they cannot submit valid means and merits forms. An applicant in person is simply given a 'preliminary view' of their eligibility which they can then take to a provider in the hope that it persuades the provider to re-submit the application with the means and merits form. There is no way of internally reviewing a preliminary view and so a negative decision is likely to be the end of the line for a litigant in person because no provider will take on their case.

84. In light of how the exceptional funding scheme is operating, PLP is of the strong view that it is fundamentally flawed and that it is currently preventing eligible people from accessing the legal aid that they need. To propose that this scheme is fit for purpose for a whole class of people being removed from the scope of legal aid is totally implausible, particularly considering the scheme has only been operating for two months and has not therefore been the subject of proper monitoring, data collection or review.

85. This view is made all the stronger by the absence of exceptions in the residence test proposal, including for victims of domestic violence, people who lack capacity, immigration detainees, children under 1 year old, children who are not lawfully resident, destitute families of failed asylum seekers and victims of trafficking. To suggest that these highly vulnerable groups will be able to navigate the exceptional funding process set out above is completely misconceived. Instead, the most vulnerable members of society will be completely barred from accessing justice.

86. For completeness, PLP reminds the Ministry of Justice that section 10 of LASPO would not actually enable people who fail the residence test to apply for exceptional funding in most cases. Section 10 provides a route to exceptional funding only for those whose legal problem is not listed in Part 1, Schedule 1 of LASPO. This would mean that for people with cases involving judicial review, community care, mental health, immigration detention, actions against the police, discrimination, Article 2 inquests (such as deaths in custody, in psychiatric institutions or at the hands of the UK Border Agency), to name but a few, exceptional funding would not be available at all.

87. Furthermore, PLP is not persuaded that an amendment to Part 1, Schedule 1 of LASPO in order to enable people falling foul of the residence test to apply for exceptional funding would fall within the power to amend under section 149 of the Act.

The residence test will result in increased numbers of litigants in person, which will be costly and cause delays in the court system

88. One inevitable result of the proposed residence test would be an increase in the number of litigants in person in the courts. This will result in delays and will impose an increase cost and burden on the courts, their staff and the judiciary.

89. PLP notes the comments of Sir Alan Ward in *Wright v Wright and Wright* [2013] EWCA Civ 234 regarding litigants in person:

> "2. 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 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."

90. Mr Justice Richards agreed:

> "32. Although with far less experience than Sir Alan Ward and only at first instance, I would unreservedly endorse his comments on the difficulties posed for and by litigants in person in their conduct of all but the most straightforward cases. Their involvement on one or both sides in complex cases has in the Chancery Division, where I sit, grown from virtually nothing to being a commonplace in only a few years. Judges do all they can to help, but these cases impose great burdens on the time and resources of the court and the parties."

Conclusion

91. PLP has seen nothing in the consultation paper that justifies this proposal, not least because no evidence is provided as to how much cases brought by non-UK nationals cost the legal aid budget, nor how much this proposal is anticipated to save. In the absence of this evidence PLP is of the strong view that this draconian and discriminatory proposal has no rational connection to the aim of reducing the legal aid budget, departs unjustifiably from the fundamental purpose of legal aid and runs contrary to the rule of law. Furthermore, it is PLP's view that the proposal would be administratively unworkable, costly for the Legal Aid Agency and costly for the courts and tribunals service.

The proposal to reduce counsels' fees in civil cases undermines the principle of equality of arms

92. It is fundamental to the rule of law that parties to a dispute have equality of arms. This is recognised by the courts in England and Wales and by the European Court of Human Rights in its jurisprudence on Article 6 of the European Convention on Human Rights, which guarantees the right to a fair hearing, a component part of which is the right to equality of arms.

93. It is our experience that the fees currently paid to self-employed counsel in the High Court on behalf of legally aided claimants are broadly comparable to the fees paid to those self-employed counsel representing public authority defendants.[29]

94. If the proposed cut is implemented, it will lead to publicly funded claimant counsel being paid significantly less than publicly funded defendant counsel. This leads to an obvious inequality of arms because it will result in claimant counsel being both less experienced (and thus willing to work for a lower fee) and less well-prepared (because s/he cannot dedicate sufficient time to the case on reduced rates). This amounts to significant unfairness.

95. Furthermore, legally aided public law cases (following the reduction in scope under the Legal Aid, Sentencing and Punishment of Offenders Act 2012) largely involve those issues that have a significant impact on an individual's life, liberty, home or family, engage the Human Rights Act 1998, involve constitutional principles and matters of public importance and are directed at securing the accountability of public bodies. In these areas it is not possible for there to be equitable and effective representation for publicly funded claimants unless their representative has a significant degree of expertise and experience.

The proposal to reduce counsels' fees in civil cases will result in the loss of specialist advocacy and lead to increased costs as cases are poorly prepared and poorly argued

96. The consultation paper states that Crown Court advocacy is not included in its proposals for competitive tendering because it recognises, at para.2.8, that:

> "This would likely affect the long-term sustainability of the Bar as an independent referral profession. The Bar is a well-respected part of the legal system in England and Wales, and we will have due regard to the viability of the profession in reaching our final decision on the model for competition."

97. No such recognition is made about the publicly funded civil Bar and its sustainability in the face of fee cuts, and cuts to the funding of judicial review. PLP's real concern is that the publicly funded civil Bar, and in particular those who specialise in judicial review, will not be sustainable in the face of the proposed fee cuts.

[29] The fees paid to Treasury counsel are published on the Treasury Solicitor's website: http://www.tsol.gov.uk/PanelCounsel/appointments_to_panel.htm

98. Judicial reviews are complex, detailed and frequently urgent. Specialist barristers are essential for the proper preparation of a judicial review, the assessment of its merits and the making of good quality arguments. In PLP's view, these proposals will force barristers to diversify and merely 'dabble' in public law. The knock-on effect of this will be poorly prepared judicial review claims that take longer for the courts to deal with, both because the arguments will be poorly presented and thought through and because the case will not have been properly prepared. The increased cost that this will impose on the courts system is not recognised in the consultation paper.

99. PLP also considers that the result of the proposed fee cut will be to disincentivise barristers from specialising in public law in the first place, thereby leading to a problem with supply which will inevitably impact on legally aided clients in the future.

100. In addition, the consultation paper fails to take into account the fact that public law specialists have already been hit by the reduction of scope for legal aid and the removal of the success fee in conditional fee agreements in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The consultation paper fails to assess the impact of the present proposals in the light of these recent changes, which PLP considers will have an additional chilling effect on the expertise and availability of the publicly funded civil Bar.

101. It follows from the analysis set out above that PLP does not agree with the proposals contained in chapter 6 of the consultation paper that fees for self-employed barristers appearing in civil (non-family) proceedings in the County Court and High Court should be harmonised with those for other advocates appearing in those courts (question 31).

The proposal to reduce expert fees undermines the principle of equality of arms and will reduce the availability of experts for publicly funded claimants

102. For many publicly funded claimants in civil proceedings the availability of expert reports is key. For example, in asylum cases a country expert is frequently required, in housing disrepair cases a disrepair surveyor is frequently required, in mental health cases an independent psychiatrist's expert opinion is frequently required.

103. The reduction in fees for experts will mean that publicly funded claimant experts will be paid less than defendant experts. As a result, defendants will be able to obtain the support of experts with greater levels of expertise and specialism than claimants. This is an unacceptable infringement of the right of equality of arms, recognised both under the common law and under Article 6 of the European Convention on Human Rights.

104. The Impact Assessment states that a reduction in the fee paid to experts is considered unlikely to have any negative equality impact on legal aid clients.

105. PLP is of the view that this is not a plausible assessment of the effects of a cut in expert fees. Common sense dictates that a reduction in fees will lead to fewer experts

making themselves available. By definition, experts' primary source of income comes from their work in whatever area they are expert in. That work would routinely be better paid than undertaking expert work at legal aid rates under this proposal. It follows that experts will be disincentivised from volunteering for expert work on behalf of legally aided claimants. In areas of law such as housing, asylum, community are and mental health, the unavailability of an appropriately qualified and specialist expert will have the practical effect of making it impossible for a claim to be brought. This has serious access to justice implications for legally aided claimants, which are not recognised or justified in the consultation paper.

106. It follows from this analysis that PLP does not agree with the proposal to reduce the fees paid to experts by 20 per cent (question 33).

The impact of these proposals has not been adequately assessed so as to discharge the obligations under the Equality Act 2010 or enable respondents to meaningful engage with the implications

107. First and foremost, PLP considers that it is impossible to properly assess the impact of these proposals when the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 has not yet been fully felt, let alone assessed. That Act makes the fundamental and unprecedented changes to the legal aid system and its scope in England and Wales. That these proposals were published a mere eight days after LASPO came into force fundamentally undermines any attempt to assess their impact.

108. The impact assessments provided with the consultation paper demonstrate a paucity of reasoning and evidence that render them wholly inadequate. Furthermore, the anaemic nature of the impact assessments makes it impossible for the respondents to the consultation to meaningfully engage with the implications of the proposals.

109. It is PLP's view that these proposals will have a significant adverse and disproportionate impact on people with protected characteristics. PLP works with disadvantaged groups and individuals to assist them to access public law remedies. These remedies are crucial to our clients accessing services, protecting their rights, fighting discrimination and fighting for accountable decision making. The result of the proposals on funding judicial review and the residence test will be that these clients will find it extremely difficult to find publicly funded legal representation. This means that meritorious cases will go unheard. The victims of these proposals will, in large part, be people with protected characteristics whose lives are particularly affected by public body decision making (for example, recipients of local authority housing and community care) and who are most likely to live in poverty.

110. PLP is particularly concerned by the following statement in the impact assessment:

> "Civil legal aid claimants are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution (e.g. resolve the issue themselves or pay privately to resolve the issue."[30]

111. No reasons are offered for this assumption, which PLP considers is wholly misconceived and, without evidence to the contrary, risks victims of unlawful conduct by public bodies being unable to pursue their meritorious claims.

Prison law proposals

112. PLP does not practice in prison law but it has read and considered the prison law proposals. PLP does not support the proposals and adopts the Howard League for Penal Reform, the Prisoners' Advice Service and the Association of Prison Lawyers position on these issues in their entirety.

We urge the Government to take these proposals no further.

Please do not hesitate to contact the Public Law Project if you require any further information about the points made in this response.

Yours sincerely,

Martha Spurrier
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Public Law Project
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[30] At paragraph 9 (iv).

Annex 1

Ministry of Justice
102 Petty France
London
SW1H 9AJ

22 May 2013

Sent by email to: admin.justice@justice.gsi.gov.uk
legalaidreformmoj@justice.gsi.gov.uk
CC: Michael.Odulaja@justice.gsi.gov.uk

Dear Sir/Madam,

Public Law Project: data relating to judicial review

The Public Law Project ("PLP") is an independent national legal charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers. To fulfil its objectives PLP undertakes research, casework, training and policy work.

In our response to the Ministry of Justice's Judicial Review Consultation CP25/2012, submitted on 23 January 2013, PLP requested that the Ministry of Justice publish the data underpinning its proposals in order that consultees could make an informed and reasonable response to the consultation. At paragraph 7 of our consultation response, we stated:

> "7. As with any consultation exercise, the proposals in the consultation paper clearly fall to be considered by consultees by reference to the evidence on which they are based. In this case, however, objective evidence justifying the proposals is conspicuous by its absence (whether because it does not exist or because the Government has chosen not to publish it). It is submitted that the lack of an objective evidence base for the proposals renders the consultation exercise flawed, and that in order to afford consultees a proper opportunity to submit an informed response, it will be necessary for the Government to publish the evidence-base for the proposals, and then allow a further period of engagement with consultees. These representations are made without prejudice to that contention."

No data was produced by the Ministry of Justice in response to this. The data is of fundamental importance because the reforms proposed in that consultation paper, and in the Government's response to the consultation, claim to be justified by statistical data. Without making the relevant statistical data available, the public are unable to meaningfully engage with the issues, which are of great public importance.

b. F : Permission not granted, concluded at first application stage
c. G: Permission not granted, concluded after renewed application
d. H: Permission granted, no final hearing took place
e. Permission granted, determined at final hearing
f. Permission granted, determined on appeal

7. In 2011/2012 how many judicial review cases recorded the following reasons for the case ending on the Certificate Outcomes – Checklist:
   a. A: Case withdrawn on solicitor or counsel's recommendation
   b. B: Client withdrew or ceased to give instructions
   c. C: Case otherwise withdrawn/not proceeded with on merits
   d. D: Settled
   e. E: Determined by court/contested hearing
   f. F: Funding withdrawn, not merits related
8. How many judicial review cases recorded the following results on the Certificate Outcomes - Checklist?
   a. N: Substantive order in favour of client
   b. O: Settlement – with significant benefit for the client
   c. P: Explanation or apology secured
   d. Q: Outcome not known/client proceeding by other means
   e. R: None of the above (i.e. concluded with no favourable order or settlement).
9. How many judicial review cases recorded a significant wider public benefit having been achieved i.e. outcome P on the Certificate Outcomes - Checklist.

PLP is aware that the date for submission of responses is 4 June 2013. In light of the need for further information to be published by the Ministry of Justice so as to enable respondents adequately to address the proposals, PLP requests that the information be published urgently and in any event within 14 days, and that the deadline for responses be extended.

Please do not hesitate to contact us should you wish to discuss this in more detail. Please contact Martha Spurrier by email (m.spurrier@publiclawproject.org.uk) or by telephone (020 7243 1267).

Please acknowledge receipt of this letter at your earliest convenience and we look forward to receiving your views on the substantive concerns that we raise.

Martha Spurrier
Barrister, PLP Casework Team

Annex 2

I. Licensed Work - Non Family Prescribed Rates (High Court)[1]

Contract/year	Prep and attendance (per hour)	Attendance at court or conference with counsel (per hour)	Advocacy (per hour)	Travelling and waiting time (per hour)	Routine letters out (per item)	Routine phone calls (per item)
The Legal Aid in Civil Proceedings (Remuneration) Regulations 1994 – in force 25 February 1994	£78.50 (London) £74.00 (non-London)[2]	£36.40	£74.00	£32.70	£7.40	£4.10
2000 General Civil Contract (find out franchise rates)	Governed by the 1994 Regs					
General Civil and Immigration Contract Specifications 2004 (Solicitor and Not for Profit)	Governed by the 1994 Regs					
2007 Unified Contract Civil[3]	£79.50 (London) £75 (non-London)	£37	£75	£33.25	£7.50	£4.15
2010 Standard Civil Contract (extended to the contract period and of contract amendments that take effect from 1 April 2013)[4]	£71.55 (London) £67.50 (non-London)	£33.30	£67.50	£29.93	£6.75	£3.74
2012 Standard Civil Contract[5]	£71.55 (London) £67.50 (non-London)	£33.30	£67.50	£29.93	£6.75	£3.74
2013						

[1] Different rates apply for County and Magistrates Courts, work not carried out with Schedule Authorisation in each Court and the First Tier Tribunal.
[2] http://www.legislation.gov.uk/uksi/1994/228/schedule/made
[3] Available at http://ftp.legalservices.gov.uk/docs/civil_contracting/Unified_Contract_Payment_Annex_October_2011_.pdf. For additional documents, see also http://ftp.legalservices.gov.uk/civil/unified_contract_civil.asp.
[4] Available at http://www.justice.gov.uk/downloads/legal-aid/civil-contracts/Civil_October_2011_Payment_Annex.pdf.
[5] Available online at http://www.justice.gov.uk/downloads/legal-aid/civil-contracts/payment-annex-2012.pdf.

Annex 3

THE LEGALITY OF THE PROPOSED RESIDENCE TEST FOR CIVIL LEGAL AID

JOINT OPINION

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1. In a Consultation Document entitled *"Transforming Legal Aid: Delivering a more credible and efficient system"* dated 9 April 2013, the Ministry of Justice proposed to introduce a *"residence test"* for applicants for civil legal aid (at §§3.42-3.60). The proposal involves the anticipated introduction of a two-part test in order for a person to be eligible for civil legal aid (§§3.49-3.50): (1) a person must be lawfully resident in the UK, Crown Dependencies or British Overseas Territories when the application for legal aid is made; and (2) the person must have been *continuously* resident in any of these territories for a period of 12 months at any time prior to that application. This rule would not apply to (a) serving members of the UK armed forces and their immediate families (§3.55) and (b) asylum seekers unless they have *"had their claim for asylum rejected and their appeal rights had been exhausted"* (§3.58). The proposal *"would be implemented through secondary legislation, to be laid in autumn 2013"* (§3.60). We are instructed (*pro bono*) by fourteen NGOs[1] to advise on the legality of that proposed measure.

2. In our opinion, such a measure would be unlawful. In short, that is because (a) it would attract a justification test and (b) it would not survive scrutiny under such a test. It would not survive scrutiny given its nature and impact, as well as the paucity of the reasoning put forward, and the absence of anything approaching a proper assessment of its implications. The absence of any proper assessment of impacts is likely itself to be fatal for the purposes of the Equality Act 2010, were the decision to

[1] Liberty, Howard League for Penal Reform, Reprieve, Friends of the Earth, Prisoners Advice Service, Disability Law Service, Mind, Child Poverty Action Group, Shelter, World Wildlife Fund, Law Centres Network, Just For Kids Law, Coalition for Access to Justice for the Environment and the Public Law Project.

adopt such an exclusion challenged on that basis. Ultimately, the exclusion would itself fail a justification test because it denies practical and effective access to justice to what are essentially a group of 'foreigners', each of whom have (by definition) a meritorious case and who do not have the means to litigate without the benefit of legal aid.

3. It is not difficult to test the logic. When the Government used immigration detention powers for preventative detention, the measure was unjustified discrimination against non-nationals (*A v SSHD [2004] UKHL 56*), because there was no justification for singling out foreigners when the same problems (suspected terrorism) arose from nationals too (§§53-54, 63). When the House of Lords addressed the availability of *habeas corpus* for non-nationals, it was noted that everyone within the jurisdiction enjoys *"the equal protection of our laws"* (*Khawaja v SSHD [1984] AC 74, 111*). The Government has identified foreigners - whether they are present on British soil but lack regular immigration status (or 12 months' presence with such status), or whether they are not present on British soil - and proposes to exclude them from public funding. Unlike the State's own nationals, foreigners have to meet a further, exceptional, test. It is not enough that they have legal rights, legal merits and the absence of means. They must show that the refusal of funding in their individual case is itself a violation of the Human Rights Act 1998 or EU law. That is unequal treatment which is unjustifiable. The prohibition does not focus on legitimacy of the resort to the Court, the nature of the issue, the viability of the argument. Being a foreigner does not indicate a lesser need, or a lesser justification, for effective access to the Court. When an 'overstayer' is unlawfully denied a right or benefit to which they are legally entitled under the law, their access to the Court is no less worthy than that of the British resident denied the same right or benefit. The flaw in this proposal is fundamental. It is unequal and unfair.

4. There are at least three routes by which this prohibition would attract scrutiny under a principle of justification. They are: (1) the Human Rights Act 1998 (giving effect to the European Convention on Human Rights); (2) EU law; and (3) common law. As regards the HRA:ECHR, the issue arises because it can cogently be argued that the general exclusion of funding for non-residents unjustifiably discriminates against a

class of persons. As such, the proposed measure would need to be justified in light of the combined effect of article 6 ECHR and article 14 ECHR. A key component of article 6 is effective access to the court (eg. *Steel and Morris v UK* (2005) 41 EHRR 22 §59), indeed article 6 can be violated by the unavailability of legal aid where it is "*indispensable*" for effective access to justice (eg. *Airey v Ireland*, (1979-80) 2 EHRR 305 §26). It can be persuasively argued that a prohibition of legal aid is within the "*ambit*" of article 6, for the purposes of engaging article 14 and so precluding unjustifiable discrimination. That is enough. Suppose the Government were proposing an exclusion for civil legal aid for women, or for people under the age of 25 or over the age of 65, or for people for whom English is a second language. Such exclusions would need to be justified for the purposes of article 14, read with article 6. The question would not be whether article 6 was violated in any individual case. In the same way, the answer could not be that legal aid is exceptionally available for any individual where the refusal in the circumstances of that individual case would violate article 6. The fact is that a prohibition would be being imposed, and additional exceptionality threshold applied, to a class of individuals protected from unjustified discrimination. The measure - and the unequal treatment - would need to be justified. It could not suffice to say that not all access to the law involves a 'determination of civil rights and obligations' such that a direct violation of article 6 could be sustained. It is not therefore a question of a direct and individual violation of article 6. That is a different question. The point is broader and more far-reaching. As the European Court of Human Rights said in the context of article 8 and social benefits, although article 8 does not require a state to grant particular social benefits, if the state chooses to do so it must not discriminate between persons who are similarly placed, including on the basis of their residence status (*Okpisz v Germany* (2006) 42 EHRR 32 §34). It is difficult to see why the logic should be different as regards civil legal aid. Where the State chooses to provide legal aid for civil proceedings, it cannot unjustifiably discriminate between the recipients of such aid. Article 14 requires States to guarantee the enjoyment of ECHR rights without discrimination "*on any ground*" including "*national or social origin*". A residence test is plainly more likely to apply to non-UK nationals. Moreover, residence is a "*status*". The proposed residence test draws a line between persons who are similarly placed,

invoking the same rights against the same parties in the same Courts under the same laws.

5. As regards EU law, and leaving aside cross-border disputes and the direct application of Article 4 of the EU Legal Aid Directive 2002/8/EC, Article 18 of the Treaty on the Functioning of the European Union prohibits *"any discrimination on grounds of nationality"*, and a well-established body of cases has found a residence requirement to be a natural proxy for nationality discrimination. In enforcing rights arising under EU law, EU nationals or residents must be treated equally with own nationals and residents (see eg. Case C-279/09 *DEB v Germany* [2010] ECR I-13849 §28). Again, however, the legal scrutiny goes much further. The EU Charter of Fundamental Rights applies in all cases within the scope of EU law. It specifically prohibits nationality discrimination (article 21(2)). Insofar as a restriction is perceived under ECHR article 6 based on when cases involve 'determining a civil right or obligation', Article 47 of the Charter has no such limitation.

6. This is also an area where the common law has an important role to play. The principle of legality protects access to justice and effective judicial protection under the rule of law. The common law, moreover, will itself not permit a partial and unequal measure (see eg. *R. v Immigration Appeal Tribunal, ex p Manshoora Begum* [1986] Imm AR 385, 394). Access to justice includes a right of access to legal representation. Although the door of the Court is not shut to the poor, in that in theory individuals could seek to act in person (compare the issue of court fees, in *R v Lord Chancellor ex parte Witham* [1998] QB 575), effective judicial protection in our adversial system where the law is often complex is intimately linked to effective representation. This prohibition would sever that link for a class of persons. We find it impossible to see how the exclusion of public funding for non-residents would not engage a question requiring proper justification at common law. Indeed, it could well be an issue which prompts the application of a development invoking proportionality standards at common law.

7. The problems with justification have been identified above. Government would be unable to take refuge in the provision for *"exceptional"* funding under section 10 of

the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. This provision applies in two circumstances, the first of which is that an individual failure to provide legal aid would itself be an infringement of a person's rights under the ECHR or under EU law (s.10(3)(a)). The second is that there is a risk of such breaches, in which case funding may also be granted as matter of discretion (s.10(3)(b)). However, funding granted under s.10(3)(a) is designed to be *"limited to the minimum services required to meet the obligation under ECHR or EU law"* (Lord Chancellor's Exceptional Funding Guidance (Non-Inquests), §35). Moreover, section 10(3)(b) *"does not provide a general power to fund cases"* and is designed for *"rare cases"* (§6). The problem is that the exceptional funding regime requires non-residents to establish a separate and distinct individual violation, quite apart from the merits of whatever case they would be receiving legal aid funding for. That high-threshold additional requirement is imposed only on non-residents. So, it cannot justify the differential treatment. It is the differential treatment.

8. To return to *Witham*, there the observation was made that rigid court fees were different in nature from public funding (such as legal aid) as they police the door to the Court to all and sundry - even to a claimant acting in person (586D-E). In contrast, a regime such as that envisaged by the proposed measure would not prevent non-residents from *any* access to the court whatsoever. However, it is impossible to read *Witham* as ruling out any prospect that a public funding restriction would engage the principle of legality, or the principle precluding partial and unequal arrangements. The question therefore arises whether public funding restrictions *can* engage the principles of the rule of law and access to justice. We can see no reason why not. In our view, the principle of legality is capable of applying to a measure such as that envisaged, particularly where it is discriminatory and no justification of that measure is apparent. Even if it could not, the points made about the HRA:ECHR and EU law would hold good.

9. The Government in the consultation document devotes some 3 pages to the residence test. There is a paucity of reasoning. There is no analysis, and no impact assessment. There is no discussion of the sorts of claims which would be excluded from funding, nor the equivalent claims which will remain fundable because they are made by a

resident. There is no mention, for example, of extra-territorial abuses of human rights at all. The idea of 'need' or 'justification' for access to justice being a function of non-resident status is one which is unknown to the rule of law. The law would pose a question of justification, and we cannot see how the Government could convincingly answer it. The measure would be contrary to law.

MICHAEL FORDHAM QC

BEN JAFFEY

RAVI MEHTA

Blackstone Chambers

29 May 2013