



Ministry
of Justice

Government response to the Joint Committee on Human Rights

Legal aid: children and the residence test

September 2014



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Legal aid: children and the residence test

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

September 2014



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Contents

| | |
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| Introduction | 3 |
| United Nations Convention on the Rights of the Child (UNCRC) | 4 |
| Policy justification | 8 |
| Exceptional funding and the JCHR’s concerns relating to its adequacy | 10 |
| Unaccompanied children | 12 |
| Undocumented children | 13 |
| Children with special education needs and disabilities | 15 |
| Section 17 and 20 Children Act 1989 Cases | 16 |

Introduction

This is the Government response to the Joint Committee on Human Rights' (JCHR's) First Report of the 2014–15 Session, *Legal aid: children and the residence test*. The JCHR report made recommendations on the proposed civil legal aid residence test, with particular reference to the effect of the test on children.

This was the JCHR's second report considering the proposed test, following their Seventh Report of the 2013–14 Session, *The implications for access to justice of the Government's proposals to reform civil legal aid*. The Government's response to that report (Cm 8821) was published on 27 February 2014.

The Government remains grateful to the JCHR for their diligent work in scrutinising our proposals, and for the opportunity to provide both written and oral evidence. As the JCHR is aware, the overarching purpose of the residence test is to target limited public resources at cases that most justify it, ensuring that the public can have confidence in the legal aid scheme.

The Government has been particularly careful throughout the consultation period and since to listen and take into account concerns and questions that have been raised. The Government continues to believe that individuals should, in principle, have a strong connection to the UK in order to benefit from the civil legal aid scheme. However, as set out in our previous response, a number of modifications and exceptions to the test were introduced following the consultation and the JCHR report in December 2013. Exceptions were made for certain classes of applicants and also for certain categories of cases. In summary, the test would not apply to individuals in types of cases which broadly relate to an individual's liberty, where the individual is particularly vulnerable or where the case relates to the protection of children.

The Government believes that a requirement to be lawfully resident at the time of applying for civil legal aid and to have been lawfully resident for 12 months in the past is a fair and appropriate way to demonstrate such a strong connection. The proposed residence test for civil legal aid would comprise two limbs: (i) individuals will need to have been lawfully resident in the UK, Crown Dependencies or British Overseas Territories at the time the application for civil legal aid was made; and (ii) have resided there lawfully for a continuous period of at least 12 months at any point in the past (short breaks of up to 30 days, whether taken as a single break or several shorter breaks, would not breach this requirement).

The JCHR will be aware that the residence test was recently challenged by way of Judicial Review. The High Court handed down judgement on 15 July for this case, in which the Claimant was successful. The Government is appealing this judgement and exploring options for proceeding with the residence test. Whilst it is not appropriate to comment in detail within this paper on those proceedings which remain before the court, the Government's response to the recommendations made by the JCHR are nevertheless set out below, which are grouped when appropriate to avoid repetition.

The Government would like to thank the JCHR for their deliberations.

United Nations Convention on the Rights of the Child (UNCRC)

JCHR: If children are unable to satisfy the residence test and are therefore not eligible for civil legal aid, we agree with our witnesses that children will rarely be capable of representing themselves in legal proceedings in which their best interests are at stake, as they may be unable to access a litigation friend or a legal representative and will not have the capacity to represent themselves effectively. While the Minister made clear that other arrangements and bodies do exist to assist children in this regard, we were not made clear in oral evidence from the Minister what these other arrangements or bodies were that can practically assist children in this situation. We request that the Government provide Parliament with information about what these arrangements and bodies might be. (Paragraph 21)

Where any individual was unable to access civil legal aid as a result of the residence test, they would be entitled to apply for exceptional funding. Therefore legal aid would continue to be provided where failure to do so would breach the applicant's rights to legal aid under the ECHR or EU law.

In addition, there are a number of bodies that can practically assist unrepresented children, including voluntary sector support, support provided by law centres, and the possibility that a local authority may (at least in more complex cases) consider whether it is in the best interests of the child to obtain private legal advice.

The Official Solicitor may also be able to represent a child who is unable to represent themselves, provided they met the Official Solicitor's criteria. The Official Solicitor will ordinarily only act for a person where there is funding for a solicitor to be instructed, either privately or through legal aid. An exception is made to this in Court of Protection cases involving decisions about serious medical treatment.

The Government does not agree with the Committee's conclusion that "children will rarely be capable of representing themselves in legal proceedings in which their best interests are at stake, as they may be unable to access a litigation friend". We respectfully do not consider that the Committee had the evidence before them to reach this conclusion.

There have always been cases where the child speaks for himself or herself directly or where a parent or guardian ensures that the views of the child are properly taken into account without publicly funded legal representation, for instance when they do not pass the means or merits tests for civil legal aid. The Government is not aware of any evidence before the Committee that indicated that in such cases the child is not able to express his or her views and participate appropriately in legal proceedings.

JCHR: We cannot see any way in which this proposal can be compatible with the UK's obligations to ensure that the views of children are heard in any judicial or administrative proceedings affecting the child under Article 12 UNCRC, or to ensure that the child's best interests are a primary consideration in such proceedings under Article 3. To comply with those obligations, which are owed to all children in the UK regardless of their residence or other status (Article 2), legal aid must in principle be available to make the child's rights under Articles 3 and 12 practical and effective for those who have no recourse to other appropriate means. As long as children have a legal right to take part in legal proceedings which affect their interests, it is wrong in principle, and unlawful, to make it more difficult for a particular group of children to exercise that right. (Paragraph 22)

Shailesh Vara MP set out in his letter to the JCHR on 30 June 2014 the ways in which the Government believes that the residence test is compliant with Convention Rights and in particular the ways in which the Government has given due consideration to the UNCRC articles when developing the residence test. This reasoning is also set out below.

The Government also recently submitted its report to the United Nations for the five yearly periodic review of the Convention on the Rights of the Child. This includes an explanation of our approach on legal aid and covers many other areas in which the Government has supported and progressed implementation of the UNCRC.¹

Article 2

The Government is entirely satisfied that the residence test would not constitute discriminatory treatment within the scope of the Convention. The Government recognises the potential of the proposed residence test to put non-British nationals at a particular disadvantage compared with British nationals. However in relation to the key provision of the UNCRC which relates to legal assistance, (article 37(d), which relates to the provision of legal assistance to children who have been deprived of their liberty and which is discussed further below), the Government has provided for exceptions from the residence test (see in particular the partial disapplication of the residence test to paragraphs 5, 9 and 19 of Part 1 of Schedule 1 to Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)). Of course, the residence test would not apply to a child who is deprived of his liberty, or at risk of such deprivation, in connection with a criminal conviction.

Article 2 also requires signatories to take all appropriate measures to ensure that the child is protected against all forms of discrimination. Again, the Government is satisfied that the residence test is compatible with this aspect of the Convention. There are anti-discrimination provisions in domestic legislation, in particular the Human Rights Act 1998 and the Equalities Act 2010. Under the Human Rights Act, a child or a person responsible for that child who believes that the child is a victim of such an unlawful form of discrimination may bring proceedings against the public authority, or rely on Article 14 ECHR in legal proceedings. The Government does not consider that the residence test impedes inappropriately the ability of a child to pursue and enforce these rights. In addition to the specific exceptions to the test which benefit children, the availability of exceptional funding under section 10 of LASPO ensures that individuals would be able to continue to access civil legal aid where there is a legal requirement under the ECHR for it, regardless of their residence.

¹ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGBR%2f5&Lang=en

The Government carefully considered the JCHR's December report and made further exceptions to the residence test, including for certain other types of cases involving the protection of children.

Article 3 UNCRC

In line with article 3 of the UNCRC, the best interests of the child have been a primary consideration in the development of the residence test. The best interests of the child were considered throughout the formulation of the policy. The Government has taken particular care in considering the consultation responses from bodies with a particular interest in the rights of children (including the Office of the Children's Commissioner and Coram Children's Legal Centre) and recommendations of the JCHR; the Government refined its original proposals to ensure that the test would apply in an appropriate manner to children.

The Government has considered whether it would be appropriate to exclude all children from the residence test. For the reasons given in the Government's response to the Committee's Seventh Report of the 2013–14 session, and discussed when Shailesh Vara MP gave evidence to the JCHR, the Government did not consider that was an appropriate way forward.

Article 12 of the UNCRC

The Government considers that the proposed residence test does not prejudice the ability of a child who is capable of forming his or own views the right to express those views freely in matters affecting the child, including in any judicial or administrative proceedings affecting the child in accordance with Article 12. Article 12 does not require a child to be provided with publicly funded legal representation in all cases. There are a number of avenues for a child to be able to express his or her views including via a parent or guardian acting as a litigation friend. In any event, the Government has made specific exceptions to the residence test for certain proceedings which have a particularly acute impact on the interests of the child (including for example proceedings relating to the unlawful removal of children that are within the scope of paragraph 10 of Part 1 of Schedule 1 to LASPO).

Article 37(d) of the UNCRC

Article 37(d) provides that every child deprived of his or her liberty shall have the right to promote access to legal assistance and the right to challenge the legality of the deprivation of liberty. The Government considers that the residence test is wholly compatible with this provision; the residence test will not apply in cases relating to the deprivation of liberty within the scope of Part 1 of Schedule 1 to LASPO.

For these reasons, the Government believes that the proposed residence test is compatible with the UK's obligations under the UNCRC.

JCHR: We conclude that the residence test will inevitably lead to breaches by the United Kingdom of the United Nations Convention on the Rights of the Child, and in particular Articles 3 and 12, in individual cases, because it will in practice prevent children from being effectively represented in legal proceedings which affect them. As a result, we urge the Government not to seek affirmative resolution of this draft instrument before Parliament, and to reconsider their position. (Paragraph 23)

As set out above, the Government does not accept that the residence test would lead to breaches of the UNCRC. The UNCRC is an international treaty which is not part of our domestic law. However it can properly be considered when construing rights which are part of domestic law, in particular the Convention rights.²

The Government would ensure that legal aid would continue to be available where necessary to comply with the obligations under EU law or international law set out in paragraphs 17 and 18 of Schedule 1 to LASPO. In addition, under section 10 of LASPO, legal aid can be granted in certain circumstances where a case is excluded from the scope of the civil legal aid scheme, where failure to provide legal aid would breach the applicant's rights under the European Convention on Human Rights or EU law (or, in the light of the risk of a breach, it is appropriate to provide legal aid). This would continue to be the case, including in respect of children who do not meet the residence test.

² See for example the dicta of Munby J in R (Howard League for Penal Reform) v Secretary of State for the Home Department and Department of Health [2002] “*The European Convention is, of course, now part of our domestic law by reason of the Human Rights Act 1998. Neither the UN Convention nor the European Charter is at present legally binding in our domestic law and they are therefore not sources of law in the strict sense. But both can, in my judgment, properly be consulted insofar as they proclaim, reaffirm or elucidate the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the European Convention.*”

Policy justification

JCHR: The Government’s principal justification for this policy is to ensure that only individuals with a strong connection to the United Kingdom can claim civil legal aid at United Kingdom taxpayer’s expense. They do not, however, know the size of potential savings or the number of children that may be affected. We are concerned by the Government’s failure to provide any data which would support their position that excluding all children from the residence test will result in a cost to the taxpayer. We request that the Government take steps to collate this data and estimate the cost to the tax-payer. Furthermore, we are concerned that any saving in this area could result in an increase in costs for the Courts and Tribunals Service as it is forced to deal with cases concerning unrepresented children. We remain concerned at the lack of a robust savings justification for not exempting all children from the residence test. (Paragraph 32)

The Government does not currently record the residency status of civil legal aid clients so cannot accurately estimate the amount of funding currently received by those who would not satisfy the residence test. However, it is likely there would be a reduction in legal aid volumes and expenditure from imposing residency restrictions on civil legal aid, resulting in savings to the legal aid fund. It would not be practical for the Government to begin to record the residence status of civil legal aid applicants or claimants.

As set out above, there have always been cases where the child speaks for himself or herself directly or where a parent or guardian ensures that the views of the child are properly taken into account. There are also a number of bodies that can practically assist unrepresented children. As a result, the Government does not agree that the residence test would increase the burden on the Courts and Tribunal Service.

JCHR: We also remain unconvinced that the Government’s second justification, that individuals should have a strong connection to the United Kingdom to benefit from the civil legal aid scheme, can be applied fairly to children. Children cannot be argued to have chosen to make the United Kingdom their home, nor can they be expected to make a “contribution” to the UK, whether by paying tax or otherwise. We conclude that this policy justification cannot be applied to children and we believe that all children fall into the category of “potentially vulnerable”. On these grounds, we recommend that all children should be exempt from the residence test. (Paragraph 33)

We continue to believe that in principle, individuals should have a strong connection to the UK in order to benefit from the civil legal aid scheme. The test introduces requirements based on current and past lawful residence. It does not include any requirement that a contribution (through tax or otherwise) should be made. We believe that the residence test we proposed is a fair and appropriate way to demonstrate that an individual has a strong connection to the UK and we consider that this test should apply equally to adults and children. However, the Government has been particularly careful throughout the consultation period and since to listen and take into account concerns that people have about the residence test. We introduced a number of modifications and exceptions that

relate directly to children in response to the consultation and made further changes following the Committee's December report.

In the September 2013 consultation response, *Next Steps*, the Government set out exceptions to the residence test for cases involving protection of children issues. Specifically, this means that the residence test would not apply to applicants for civil legal aid on matters listed in paragraphs 1 (care, supervision and protection of children), 3 (abuse of child or vulnerable adult),³ 9 (inherent jurisdiction of High Court in relation to children and vulnerable adults),⁴ 10 (unlawful removal of children), 15 (children who are parties to family proceedings) and 23 (clinical negligence and severely disabled infants) of Part 1, Schedule 1, of LASPO.

There are also other exceptions from the residence test for specific types of cases, which may also be relevant for children. This includes exceptions for domestic violence cases, for victims of human trafficking in relation to certain damages, compensation and immigration claims as well as detention cases and challenges to the lawfulness of detention by way of judicial review.

Following careful consideration of the Committee's December report, further exceptions to the residence test for certain other types of case involving protection of children issues were made, namely community care cases under the Children Act 1989 including cases under sections 17 and 20 (under paragraph 6 of Part 1 of Schedule 1 to LASPO). Section 17 cases relate to the provision of services for children in need, for example additional care needs of a disabled child and section 20 cases provide for accommodation for children. Following careful consideration we decided not to provide for a further exception for judicial reviews relating to such proceedings (e.g. a judicial review of the failure to provide accommodation under section 20).

Finally, as set out above, individuals excluded from civil legal aid as a result of the residence test would be entitled to apply for exceptional funding. The Lord Chancellor's Guidance to caseworkers on exceptional funding contains some factors that will be specifically relevant to applications from or on behalf of children. These include the role that Children and Family Court Advisory and Support Service (CAFCASS) might have in the case and whether a suitable litigation friend would be available.

³ Exceptions to the residence test for cases under paragraph 3 would only apply for cases where the abuse took place at a time when the individual was a child.

⁴ This exception to the residence test for cases under paragraph 9 would only apply to cases under the inherent jurisdiction of the High Court in relation to children.

Exceptional funding and the JCHR’s concerns relating to its adequacy

JCHR: The recent decision of the High Court that the approach to exceptional funding in immigration cases is too restrictive and therefore unlawful raises concerns as to whether the exceptional funding regime is in practice ensuring that all individual cases are being funded in those instances where failure to do so would be a breach of the European Convention on Human Rights or European Union Law. In the light of these concerns, we reiterate our conclusion from our original report: we do not consider that the exceptional funding scheme is operating in such a way as to guarantee that legal aid funding will always be available whenever Article 6 ECHR requires it, and we therefore conclude that the Government cannot at this stage rely upon the scheme to ensure that the residence test is ECHR compliant. (Paragraph 39)

We are disappointed with the recent judgment and are pursuing an appeal.

The purpose of the exceptional funding scheme is to ensure compliance with ECHR and EU law obligations in the context of a civil legal aid scheme that has refocused limited resources on the highest priority cases. It does not provide a general power to fund cases that fall outside the scope of legal aid.

The Lord Chancellor’s guidance set out the Government’s view of the circumstances in which it would be appropriate to provide exceptional funding, having regard to the case law. That case law on the ECHR and EU obligations in relation to legal aid will inevitably develop over time – such as in the recent judgment – and the availability of exceptional funding under section 10 of LASPO will therefore reflect those developments, including the outcome of the Government’s appeal against that judgment.

Cases will still need to be considered on a case by case basis by the Director of Legal Aid Casework at the LAA to consider whether they meet the requirements of section 10 of LASPO, including merits and means. It is important to note that Collins J in his judgment recognised that the threshold under both Article 6 and Article 8 ECHR is a relatively high one.

JCHR: If the exceptional funding regime is not working as intended, we are particularly concerned about some groups of children who may be affected by the residence test and we urge the Government to consider four such groups of children: unaccompanied children; undocumented children; children with special educational needs or disabilities; and section 17 and 20 Children Act 1989 cases. We are also concerned about how children will practically be assisted to complete the forms necessary to make an application for exceptional funding. (Paragraph 40)

The Government has carefully considered the impact of the residence test on children, including: unaccompanied children; undocumented children; children with special educational needs or disabilities; and the impact of the test on section 17 and 20 Children Act 1989 cases. The Government considers that potential affect of the residence test on

these groups is accommodated by the proposed exceptions to the residence test, flexibility in evidential requirements and the availability of exceptional funding.

Applications for exceptional case funding can be made either by the applicant directly to the Legal Aid Agency (LAA), or through a legal aid provider. The majority of applications for exceptional case funding are made by legal aid providers, who are in the position to provide the necessary support and practical assistance to children making an application for exceptional funding. A small number of exceptional case funding applications are made directly by the client (approximately 5%),⁵ in practice, a number of bodies can practically assist children with this process, including voluntary sector support and support provided by law centres. Where an application is sent directly from the client and they are likely to be granted exceptional funding, their application is given a Positive Preliminary View, subject to a full application being submitted in conjunction with a legal aid provider.

The Government is therefore confident that children would have the necessary assistance in order to make an application for exceptional funding.

⁵ Legal Aid Statistics in England and Wales, Legal Aid Agency, Ministry of Justice, Statistics bulletin, Published 24 June 2014, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/328901/legal-aid-statistics-2013-14.pdf

Unaccompanied children

JCHR: The Government’s proposal gives little consideration to the problem of access to justice that the proposal creates in relation to children. These include the potential complexity and urgency of the cases for which children would need advice and representation and the need to find a litigation friend to assist the child with their proceedings because they have become separated from their families. Children who have not been granted asylum but have been granted limited leave to remain are not exempt from the residence test. However, if social services unlawfully disputed the child’s age at this point, the child would be unable to access civil legal aid to bring a judicial review. We do not agree that withdrawing funding from a case that could be 90 per cent complete is a valuable use of public money, and we again raise concern that this could have a negative ‘knock-on’ effect on the Court Service. (Paragraph 49)

A person who makes an asylum claim would be exempt from the residence test while that claim is being considered. If they are granted leave to enter, based on rights described in paragraph 30(1) of Part 1 of Schedule 1 to LASPO, then they would be exempt for at least 12 months from the date on which they made their asylum claim.

These exceptions are in recognition of the fact that, by virtue of their circumstances, individuals seeking asylum and recently granted asylum tend to be amongst the most vulnerable in society. However, the Government does not consider that a wider exception to the residence test for other migrants, including those granted Discretionary Leave is justified. Discretionary Leave can be granted in a range of circumstances and we do not consider it appropriate or justified to make an exception to the test for such individuals. Individuals granted Discretionary Leave (however old they are) would be required to satisfy the residence test in full, in common with other migrants.

This, we believe, is consistent with the principle of civil legal aid being available for those individuals with a strong connection to the UK, whilst providing protection for particularly vulnerable groups.

The Government do not share the concerns of the Committee that this proposal will have a “negative ‘knock-on’ effect on the Court Service”. The Government carefully considered arguments regarding potential impacts of the test in the Impact Assessment published alongside *Next Steps*.

An unaccompanied child excluded from legal aid as a result of the residence test would be entitled to apply for exceptional funding.

Undocumented children

JCHR: We are concerned that the Government have not yet produced guidance on flexibility for the production of evidence, and that the guidance may not prevent undocumented children who pass the residence test from being unable to prove they satisfy the test. We are not persuaded by the Government's argument that documentation from other sources may make up for the absence of documentation held by the individual in question. We acknowledge that the Government intend to introduce flexibility however we believe that children who are in very vulnerable situations, such as being street homeless, may have been born in the United Kingdom and never left, yet they will still be unable to satisfy the residence test. We do not believe this is the intention of the Government nor is it consistent with the Government's policy justification for this instrument. (Paragraph 55)

JCHR: We concur with the House of Lords Secondary Legislation Scrutiny Committee: we recommend that the Government introduce the statutory instrument with a list of evidence that will be required, as well as guidance on the flexibility allowed and how it will handle emergency appeal situations before any residence test instrument is debated in either House. (Paragraph 56)

On 25 June 2014 the draft Regulations setting out the anticipated evidentiary requirements were provided to the Secondary Legislation Scrutiny Committee. Copies were placed in the libraries of both Houses and the draft Regulations were made available via <https://www.gov.uk>. These regulations were published in draft form and are subject to further amendment; however they set out the proposed evidential requirements for the residence test as well as provision about the making and withdrawal of determinations that an individual qualifies for civil legal aid under the test.

In line with the recommendations of the Committee's previous report, the Government provided for flexibility for those whose personal circumstances are such that it would be impracticable for the individual to provide the evidence required. This would include children who are in vulnerable situations, such as those who are homeless.

The draft Regulations set out that legal aid providers should seek to establish so far as possible whether the client is lawfully resident (or qualifies for one of the exceptions to the test). As with other requirements for access to civil legal aid, such as financial means, the onus would be on applicants to demonstrate that they meet the residence test. However, where the provider considers that the personal circumstances of the individual are such that it would be impracticable for him or her to provide the evidence required by the Regulations, but the provider is nonetheless satisfied on a reasonable basis that the residence test is met or that the individual falls within an exception, the provider may provide legally aided services. The provider must keep a note of the process on file. The attendance note must give the reason why the provider considered the personal circumstances made it impracticable for full evidence to be supplied and the basis on which the provider nonetheless reached the view that the test or the grounds for an exception were met. This may be subsequently validated by the Legal Aid Agency.

The Government is satisfied that this flexibility would ensure that those who are particularly vulnerable, including children, are assessed fairly under the residence test, taking into account their personal circumstances. It is further noted, as stated above, that a person may apply for exceptional funding if they do not meet the residence test.

We also recognise that there will be some cases where the need for legal advice and/or assistance is urgent and it would not be appropriate to require evidence of residence in advance of application. The existing provisions within the Civil Legal Aid (Procedure) Regulations 2012 (which make detailed provision about the making and withdrawal of determinations that an individual qualifies for civil legal services) would apply to evidence required to satisfy the residence test. Therefore, the Director of Legal Aid Casework at the Legal Aid Agency would be able to determine an application for emergency representation without receiving the evidence specified, where the Director considers it would be in the interests of justice to do so. Where appropriate, the Director would be able to require that evidence proving that the residence test is satisfied is subsequently provided.

Children with special education needs and disabilities

JCHR: The Government argue that the number of SEND cases which will be affected may be very small. We believe that, even if it is only a handful of cases, these are still important. We are also concerned that children in this group may be able to satisfy the residence test but, due to the parent being the applicant, the child is denied civil legal aid. In our view, this is not compatible with Article 2 UNCRC which requires the child's rights to be secured without discrimination irrespective of his or her parent's national or other status. We again do not believe this is what the Government intended. (Paragraph 64)

The Government continues to believe that, in principle, individuals should have a strong connection to the UK in order to benefit from the civil legal aid scheme and that the residence test is a fair and appropriate way to demonstrate that connection. We recognise the importance of Special Educational Needs (SEN) cases, however we think it is right in principle that these should be subject to the residence test. The Government considered these issues carefully as part of the consultation process; the conclusion reached was that a requirement for an individual to have a strong connection to the UK in order to access civil legal aid in such cases is justified.

Section 17 and 20 Children Act 1989 Cases

JCHR: We are confused as to why the Government excluded certain child protection cases from having to satisfy the residence test, but did not exclude from the test all legal remedies including judicial review. Whilst welcoming the funding of legal advice, we do not understand the justification that it is a good use of public money to give funding for advice that cannot be taken through to a judicial review. We are concerned that children could be provided legal advice on Section 17 and 20 Children Act 1989 cases, only to find that their same solicitor will at some point no longer be able to help pursue a meritorious claim. (Paragraph 73)

JCHR: We acknowledge the Government's argument that they would prefer that people do not have to make an application for judicial review. However, we believe that it is inevitable that judicial review will be a necessary remedy in certain cases. We are concerned that, if the residence test applies, there will no longer be the risk of a judicial review when a local authority fails a child in its care. This deterrent effect of a judicial review encourages local authorities to discharge their duties properly. Such cases requiring judicial review are of a serious nature and children should retain legal support. (Paragraph 74)

The Government considered very carefully the exceptions to the residence test before finalising the extent of the exceptions.

We recognise that judicial review is an important mechanism for individuals to challenge public authorities, including in circumstances where a public body is failing to discharge its duties. However, the residence test reflects the Government's view that individuals should have a strong connection to the UK in order to benefit from the civil legal aid scheme. In line with those principles Ministers therefore decided that, in general, applications for legal aid for judicial review proceedings under paragraph 19 of Part 1 of Schedule 1 to LASPO should be subject to the same test.

There are certain limited and focussed exceptions only for judicial review cases which relate to an individual's liberty, and for certain immigration and asylum judicial reviews. The Government has concluded that a wider exception to the test for applicants in other judicial review cases is not justified. We believe the residence test is a fair test which makes sure that legal aid is targeted at those cases where it is justified and achieves the essential policy aim of targeting legal aid at those with a strong connection to the UK. In addition, the provision of legal advice on Section 17 and 20 Children Act cases may resolve the matter in question without leading to judicial review proceedings.

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