

# Refugee Children's Consortium

## Response to Transforming Legal Aid Consultation, June 2013

### Introduction

1. The Refugee Children's Consortium (RCC) is a group of NGOs working collaboratively to ensure that the rights and needs of refugee children are promoted, respected and met in accordance with the relevant domestic, regional and international human rights and welfare standards.
2. Refugee and asylum-seeking children are children first and foremost and must be afforded the same rights and protection as any other children in the UK. Article 2 of the UN Convention on the Rights of the Child clearly states that the rights within the Convention should be respected for all children within the state party's jurisdiction, '*without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status*'.
3. The Convention also states that the best interests of the child must be a primary consideration (Article 3)<sup>1</sup> and that States Parties must afford children the right to express their views in all matters affecting them – including in judicial and administrative proceedings (Article 12).<sup>2</sup>
4. Refugee, asylum-seeking and migrant children may often be particularly vulnerable and in need of specific protection and assistance. This is especially the case when they are separated and without their families. In recognition of this, the UN Committee on the Rights of the Child's *General Comment No. 6 on Treatment of Unaccompanied and Separated Children Outside their Country of Origin* (2005) states that where children are involved in administrative or judicial proceedings they should be provided with legal representation.<sup>3</sup>
5. The need for legal representation for children has also been emphasised by the Council of Europe. The Committee of Ministers of the Council of Europe guidelines on child-friendly justice state that :
  - 3.7 *Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.*
  - 3.8 *Children should have access to free legal aid, under the same or more lenient conditions as adults.*<sup>4</sup>

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<sup>1</sup> This is a binding international obligation and it is translated into domestic law through section 11 of the Children Act 2004 and section 55 of the Borders, Citizenship and Immigration Act 2009 (see the leading Supreme Court judgment *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4). Where Article 8 ECHR rights are engaged, these are to be interpreted in accordance with the UNCRC.

<sup>2</sup>Article 12 of the Convention provides:

1. *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

2. *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

<sup>3</sup>CRC/GC/2005/6 1 September 2005, para 36

<sup>4</sup>Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, (adopted by

6. In the wake of already enormous cuts to civil legal aid brought about by the Legal Aid, Sentencing and Punishment of Offenders Act 2012,<sup>5</sup> which in the experience of RCC members are having a significant detrimental impact on refugee and migrant children and their ability to exercise their rights, the RCC is extremely concerned about the potential impact the current proposals would have, if implemented, on refugee and migrant children, young people and their families. In particular, the Consortium is concerned about the proposed introduction of a 'residence test' for civil legal aid and changes to legal aid for judicial review. The proposals threaten access to justice for thousands of children, young people and families. The RCC is concerned about the effects that the proposed residence test would have in preventing refugee and migrant children and families accessing legal aid in those areas of law where legal aid still exists currently after LASPO, such as public law, community care, special educational needs, homelessness and public, and certain private, law family proceedings.
7. RCC members work with thousands of refugee and migrant children each year, both children who are separated and children in families. Members of the consortium have considerable expertise in supporting this group and offering a range of support, advice, advocacy and other services to them. RCC members try to resolve the issues faced by these children and families, preferring to find means of resolving problems that do not involve litigation wherever possible. However, from our years of experience of working with this group we know that legal representation is crucial if these children are to be able to realise their rights and solve the problems they face. In many situations legal representation is the only possible means of resolving the problem. Members of RCC who are not lawyers cannot lawfully provide advice on a child or family's immigration issues (section 84, Immigration and Asylum Act 1999), nor do RCC members who are not lawyers have the necessary expertise to do so. Similarly in other areas of law such as community care or public law, RCC members who are not lawyers are not able to assist these children and families to resolve their legal problems. The work that RCC members do relies on being able to refer to legal aid solicitors and we are extremely concerned by the threat to legal aid provision, which in turn threatens our work, our ability to assist our clients, and could place a huge burden on scarce voluntary sector resources.

### **Introducing a residence test**

*Question 4: Do you agree with the proposed approach for limiting legal aid to those with a strong connection with UK? Please give reasons.*

8. The Refugee Children's Consortium strongly disagrees with the proposals for limiting legal aid through a requirement that an applicant for legal aid is 'lawfully resident' in the UK at the time of applying for civil legal aid and a requirement that the applicant has resided lawfully in the UK for 12 months. We also disagree with the way in which the question is phrased. Many of the children with whom we work have a very strong connection to the UK. For some it is the only place they have ever lived, or the only one that they can remember. For some it is the only peaceful place they have ever lived, or the only one that they can remember. They may have people they consider family, friends, a home and a school in the UK and not have these things anywhere else in the world.

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the Committee of Ministers on the 17 November 2010 at the 1098th Meeting of the Ministers' Deputies). Available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1705197&Site=CM>

<sup>5</sup> See previous Refugee Children's Consortium briefings on the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 at [www.refugeechildrensconsortium.org.uk](http://www.refugeechildrensconsortium.org.uk)

9. The RCC considers that excluding from civil legal aid those who are not 'lawfully resident' in the UK and who have not resided lawfully in the UK for 12 months would prevent already marginalised groups from accessing justice, including children and young people. The proposals aim to exclude 'illegal visa overstayers, clandestine entrants and failed asylum seekers from receiving civil legal aid'.<sup>6</sup> RCC members are concerned that the proposals will deny access to justice to many people who are among the most at risk of breaches of their fundamental rights, including vulnerable children and young people. We work every day with refugee children and families and see the frequency with which these children's rights are violated in practice. To deny them legal redress is contrary to the rule of law and the UK's legal obligations.
10. Where unlawful decisions are made there will be children who have meritorious claims and who have a right in law to challenge the decision but who will effectively be without any remedy because they will be unable to access legal advice or representation to challenge these decisions because they cannot pay for it and because legal aid will be denied to them. This will have a significant effect on refugee and migrant children and families, many of whom rely on legal support to ensure that they are able to access the support from local authorities to which they are entitled and to ensure that they are able to challenge unlawful decisions made about their cases – decisions which determine their futures.
11. For example, destitute children who are considered to be in the UK unlawfully (because, for example, their family's asylum claim has been refused, or they are the children of overstayers) are already from 1 April 2013 no longer able to get legal aid for any immigration (non-asylum) application they might be able to make, including one based on the right to respect for private and family life (under Article 8 of the European Convention on Human Rights) and their best interests. The new proposals will take away their access to civil legal aid entirely. So for example, if a local authority acts unlawfully and does not comply with its duties to the children under section 17 of the Children Act 1989, the family will not be able to access legal aid for a community care solicitor. Judicial review proceedings in these cases are a key safeguard in ensuring a local authority does not act in breach of the law by unlawfully refusing support and forcing a family into destitution, but they will have no access to legal aid to bring proceedings and are, in our experience, completely unable to bring such proceedings unaided. As another example, if a mother is a victim of domestic violence, she will not be able to access what remains of private family law legal aid, for example to get a non-molestation order from the family courts. A further, most alarming example is that if a local authority started care proceedings to remove the children, the parent(s) would not get public law family legal aid.
12. Another extremely vulnerable group that would be hit by the proposed residence test is separated migrant children in local authority care. A significant number of children with no regular immigration status may end up in the care of a local authority, for example a child who has long overstayed a visa through no fault of their own and where a private fostering arrangement has broken down or they have been the subject of care proceedings after suffering abuse or neglect. Some of these children will not be claiming asylum so will not fall into the asylum-seeker exception. If the local authority acts unlawfully and does not comply with its duties to the child (for example, placing the child in unsuitable accommodation or undertaking an unlawful age assessment), the child would have no legal aid for a community care solicitor to challenge this treatment which breaches their rights. Also, the recent cuts to legal aid for immigration claims mean that unaccompanied children as well as care leavers rely on the local authority's duties towards them including a duty to pay for immigration legal services privately where this is in their best interests. RCC members are concerned that there has already been a

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<sup>6</sup> Paragraph 3.49

significant cost shift (and overall cost increase to the government) as a result of looked after children being cut off from immigration legal aid under LASPOA 2012. In the view of the Consortium, the government should urgently consider the potential financial burden it risks putting onto local authorities if a residence test were implemented. Local authorities, owing duties to looked after children, would have to pay for private legal services. Furthermore, if a local authority refuses to pay for legal aid in a particular case, legal aid will not be available to enforce this obligation.

13. RCC members are also concerned about the impacts of the proposals on the care leavers we work with. The proposals would also have a significant impact on any young person who came to the UK as an unaccompanied child, who claimed asylum but was refused and became appeal rights exhausted. After turning 18 they would not be able to get legal aid in order to challenge the local authority if they unlawfully withdrew support and made them destitute, an issue faced by many of the young people with whom RCC members work.<sup>7</sup>
14. A further group of cases of concern to RCC members are children whose age is disputed. Many children in the immigration system have their ages disputed and some are treated as adults, which can lead to their being held in immigration detention or being denied support. These children would only be able to get legal aid for a community care solicitor to challenge an unlawful age assessment if they have an ongoing asylum claim at the time the application for legal aid is made. For some, claiming asylum will not be the appropriate course for their immigration case. For others, the age dispute may only arise once they no longer fall within the asylum-seeker exception, either because they have been recognised as a refugee, or granted another form of leave to remain, and then have to wait for 12 months, or because they have been refused and have become a failed asylum-seeker (the process of assessing age within a local authority can take many months). RCC members work with many children whose ages are unlawfully assessed and is extremely concerned that the proposals risk taking away the only effective remedy from those who do not meet the requirements of the residence test (we are also concerned about the effects of the proposals on judicial review more generally – please see below).
15. Yet another group of concern to RCC members in relation to the present proposals are child victims of trafficking. The RCC is extremely concerned that where a child or young person does not fall into the asylum-seeker exception, there would be no legal aid in order to challenge an unlawful decision by the Home Office (as Competent Authority) on whether someone is to be recognised as a victim of trafficking within the National Referral Mechanism process. RCC members and others have elsewhere expressed serious concerns about the National Referral Mechanism.<sup>8</sup> The RCC is also extremely concerned that too many victims of trafficking, including age-disputed child victims and young adults, end up in immigration detention. We are gravely concerned that no legal aid will be available to detained age-disputed children and young people for bail and unlawful detention claims. We believe that this makes disclosure and identification of victims less likely, jeopardising the government's efforts to tackle this crime.

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<sup>7</sup> See, for example, The Children's Society, *I don't feel human: Experiences of destitution among young refugees and migrants*, 2012, at [http://www.childrenssociety.org.uk/sites/default/files/tcs/research\\_docs/thechildrenssociety\\_idontfeelhuman\\_final.pdf](http://www.childrenssociety.org.uk/sites/default/files/tcs/research_docs/thechildrenssociety_idontfeelhuman_final.pdf)

<sup>8</sup> See, for example, Anti-Trafficking Monitoring Group briefing 'Trafficked children' at [http://www.ecpat.org.uk/sites/default/files/atmg\\_briefing\\_trafficked\\_children.pdf](http://www.ecpat.org.uk/sites/default/files/atmg_briefing_trafficked_children.pdf) and , Anti-Trafficking Monitoring Group briefing 'Discrimination in the identification process' at [http://www.ecpat.org.uk/sites/default/files/atmg\\_briefing\\_discrimination\\_in\\_the\\_identification\\_process.pdf](http://www.ecpat.org.uk/sites/default/files/atmg_briefing_discrimination_in_the_identification_process.pdf)

16. The proposed changes would result in a vast inequality of arms between the state and the individual subject to its power, an inequality that is all the more marked for children and young people, whose particular capabilities and vulnerabilities create distinct obstacles to their ability to seek redress and access justice. This is true of all children, due to their inherent vulnerability, lack of experience and enhanced advice needs,<sup>9</sup> but it is particularly true of separated children and young people who are without their families and face complex administrative and legal proceedings alone, often in a language which is not their mother tongue and in a system which is utterly bewildering to them. As is widely recognised, there are significant obstacles to these children being able to recognise legal problems, seek appropriate, quality legal advice and representation, and understand and navigate complex administrative and legal processes.<sup>10</sup> Children need legal representation if their rights are to be realised. Any reforms to the civil legal aid system must take full account of their potential impact on all children, on children's access to justice and an effective remedy, and on a child's opportunity to be heard in administrative and judicial proceedings affecting them (Article 12, UN Convention on the Rights of the Child). The Refugee Children's Consortium is concerned that the proposed residence test risks effectively cutting children off from access to justice. We are concerned that the government appears to have undertaken no child impact assessment whatsoever.
17. The view of the RCC is that the proposed residence test is unlawful, breaching children's rights as outlined above. Children who are not 'lawfully resident' or who have not resided lawfully in the UK for 12 months should not face discrimination and to deny them access to legal remedy is in breach of their rights.
18. RCC members work with thousands of refugee children each year. We note the proposal for an 'exception' for asylum-seekers. However, we consider that the proposed exception for asylum-seekers is inadequate. If an individual has an ongoing asylum claim<sup>11</sup> at the time they apply for civil legal aid, they would be seen as 'lawfully present' and would qualify for legal aid. If they were recognised as a refugee, they would continue to get legal aid for any ongoing civil proceedings but would have to wait 12 months before becoming eligible for legal aid for any new civil proceedings. This 12-month wait is an unfair and arbitrary restriction on the rights of recognised refugees, in contravention of the Refugee Convention.<sup>12</sup>
19. RCC members work with many young care leavers who have exhausted all rights of appeal. In the experience of RCC members, many of these young people are able to make a fresh asylum claim but we are concerned that under the proposals as we understand them they would not get asylum legal aid for a fresh asylum claim, no matter how strong that claim was. Unfortunately, in RCC members' experience a fresh claim is often necessary because of poor decision-making at the time of the initial asylum claim and sometimes poor legal representation. A fresh asylum claim may also be appropriate due to changes in countries of origin, changes in young people's cases or new evidence,

<sup>9</sup> See, for example, Youth Access, *Young People's Access to Advice – The Evidence: Key Research Evidence on Young People's Needs for Advice on Social Welfare Issues*, 2009

<sup>10</sup> See, for example, Coram Children's Legal Centre, *Navigating the System: Advice provision for young refugees and migrants*, 2012, at [http://www.seekingsupport.co.uk/images/navigating\\_the\\_system\\_final.pdf](http://www.seekingsupport.co.uk/images/navigating_the_system_final.pdf)

<sup>11</sup> As defined at para 30(1) of Part 1, Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

<sup>12</sup> Article 16 of the Refugee Convention provides:

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*.
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

developments in case law, or other reasons. We are concerned that the proposals will deny them their right to do so. Under the proposals as we read them, if an individual's asylum claim fails, as a failed asylum-seeker they would not be eligible for legal aid, and would only re-enter the asylum-seeker exception once they had made a fresh asylum claim, with legal aid being unavailable to make that claim. This restriction on legal aid would amount to a breach of the UK's obligations to refugees and domestic law duties, including to separated children making fresh asylum claims in their own right. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (the Procedures Directive) lays down minimum standards that EU states must comply to including the opportunity to consult a legal adviser (Article 15) and states that 'Member States shall ensure that legal assistance and/or representation ... is not arbitrarily restricted'.

20. The Ministry of Justice's Impact Assessment assumes that *'individuals who no longer receive legal aid will now adopt a range of approaches to resolve issues. They may choose to 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.'*<sup>13</sup>The RCC believes that the children, young people and families it works with are unable to adopt alternative approaches that will resolve the issues they face. In the RCC's view, the clients we work with will simply be unable to bring their cases without legal aid, especially children. Nor should they be expected to do so. It is completely unreasonable to expect children to navigate complex legal issues without professional advice and representation and leaving children without legal representation is incompatible with the government's obligations under the UN Convention on the Rights of the Child. For children in care, the changes will simply result in significant costs to local authorities (forced to pay for private legal services for looked after children, and potentially also care leavers and families supported under the Children Act 1989) and significant costs to the court system, as judges are forced to deal with thousands of ill-prepared litigants in person.
21. It is also clear that most children and families who have previously been able to apply for legal aid, many of whom will be dealing with legal issues around support and accommodation, will be unable to pay for private representation, and may be left at risk of abuse and exploitation, including sexual abuse and exploitation, as they seek alternative means of funding legal services.
22. It cannot be assumed that alternative sources of advice exist or will continue to exist, as the legal services landscape is changing so dramatically due to government decisions. Many law centres and other not-for-profit organisations have already suffered significant cuts under LASPO, and it is not realistic to expect voluntary sector advice agencies or pro bono solicitors to offer alternative source of advice on many issues. The government's changes threaten the very existence of legal providers, and undermine any sense of clarity about the future operating environment, so it is not at all clear who would be left to do any pro bono work. In any case, pro bono work is by its nature limited in terms of the amount of advice that can be offered and advice providers will not have capacity to meet clients' needs, either in terms of the potential volume of people seeking help, or the specialist knowledge required for more complex cases.
23. As stated at paragraph 7 above, many RCC members provide advocacy services to young refugees and migrants, and while they can liaise with local authorities and others to try to ensure that appropriate support and protection is provided, without recourse to legal action it is often impossible to force the relevant individual or agency to take action. A clear example of this is the high numbers of judicial reviews of unlawful local authority

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<sup>13</sup> MoJ194 (paragraph 9)

age assessments, where it is not until a letter before action has been sent that the local authority will agree to treat the child as the age they claim to be. A significant number of these cases have to go to full hearing, and in many situations interim support will only be provided as a result of a court order.<sup>14</sup>

24. While the cost savings of restricting legal aid via a residence test are wholly unknown to the government, as stated in Impact Assessment MoJ194, the impact on children and those voluntary and statutory sector organisations supporting them (including local authorities) will be hugely significant.

### **Paying for permission work in judicial review cases**

Question 5: Do you agree with the proposal 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 (but that reasonable disbursements should be payable in any event)? Please give reasons.

25. The Refugee Children's Consortium disagrees with this proposal. Someone who has suffered an unlawful act or omission by a public authority can bring a challenge by judicial review where there is no other remedy. Judicial review represents the practical application of the rule of law. JR is, for example, the only way to challenge an unlawful age assessment or an adverse decision on whether someone is a victim of trafficking. The Government's proposal that legal aid providers do not get paid for work on judicial review cases unless permission is ultimately granted by the High Court would transfer all the financial risk of an application for judicial review to the legal aid provider, so that all the work they do on a JR is at risk. This will make providers far less willing to bring JRs. RCC members who are not lawyers are concerned that we will simply find no lawyers willing to take on the cases that we wish to refer to them because they cannot bear the financial risk. This will leave children with no way to challenge unlawful treatment and undermine our efforts as voluntary sector organisations to support them.
26. The RCC believes that the current system already allows for weak cases to be refused permission to proceed, which serves to ensure that unmeritorious cases are not pursued and also serves to protect the public purse. The proposed means of addressing the purported problem serves to put the provision of legal representation for those with meritorious cases at risk and prevent access to an important legal remedy.
27. The RCC is extremely concerned that the legal representatives who specialise in judicial review and to whom we refer children's cases will be unable to bear the financial risks which these proposals would introduce or unable to bear them across a very high volume of cases. It is highly unlikely that solicitors or counsel will be able to carry out so much work at risk, and as a result it will become impossible for children and young people to access legal representation.

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<sup>14</sup> For more information, see Coram Children's Legal Centre, *Happy Birthday? Disputing the age of children in the immigration system*, 2013, at [http://www.childrenslegalcentre.com/userfiles/file/HappyBirthday\\_Final.pdf](http://www.childrenslegalcentre.com/userfiles/file/HappyBirthday_Final.pdf)

## Civil merits test – removing legal aid for borderline cases

Question 6: Do you agree with the proposal that legal aid should be removed for all cases assessed as having “borderline” prospects of success? Please give reasons.

28. The RCC does not agree with this proposal. The RCC wishes to highlight that children’s cases often involve a significant wider public interest. It is important that cases involving significant novel points of law in relation to children receive legal aid funding to test and develop the law in relation to children. It is vital for the upholding of children’s rights and the UK’s obligations to children and providers are able to take on difficult and complex challenges involving novel points of law. It is only in this way that the law can adapt and change according to changing social norms and values and only in this way that it can be ensured that the law takes full account of children’s rights.

### FOR FURTHER DETAILS PLEASE CONTACT:

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Members of the Refugee Children's Consortium are:

*Action for Children, Asphaleia Action, Asylum Aid, AVID (Association of Visitors to Immigration Detainees), Bail for Immigration Detainees, BASW – The British Association of Social Workers, Brighter Futures, British Association for Adoption and Fostering (BAAF), Catch 22, Children and Families Across Borders, Coram Children's Legal Centre, Child Poverty Action Group, Children's Rights Alliance for England, The Children's Society, DOST, ECPAT, Family Rights Group, The Fostering Network, FSU (Family Service Units), The Immigration Law Practitioners' Association (ILPA), Islington Law Centre, JCORE, Law Centres Network, Medical Justice, Freedom from Torture, NCB, NSPCC, The Prince’s Trust, RAMFEL, Refugee Action, Refugee Council, Refugee Support Network, Royal College of Paediatrics and Child Health, Scottish Refugee Council, Student Action for Refugees (STAR), Voice, The Who Cares?Trust, and Welsh Refugee Council.*

*Barnardo’s, The British Red Cross, Office of the Children’s Commissioner (England), UNICEF UK and UNHCR all have observer status*

For more information on the Consortium, see [www.refugeechildrenconsortium.org.uk](http://www.refugeechildrenconsortium.org.uk)